APPEAL NO. 990922

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 26, 1999. The hearing officer resolved the disputed issue by determining the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first compensable quarter. The claimant appeals, urging that the determinations of the hearing officer are against the great weight and preponderance of the evidence and should be reversed. The respondent (carrier) responds that sufficient evidence supports the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his cervical and lumbar spine, knees, and elbows on _____; that he has an impairment rating (IR) of 30%; that he has not elected to commute any portion of the impairment income benefits (IIBS); that the filing period for the first compensable quarter of SIBS was from August 13, 1998, through November 11, 1998; that the first compensable quarter of SIBS was from November 12, 1998, through February 10, 1999; and that the claimant neither returned to work nor earned wages beginning on November 2, 1998, through November 11, 1998.

The claimant testified that he is 46 years old and had worked for 13 years as a carpet installer when he tripped and fell off a loading dock and was injured. The claimant testified that as a result of the injury he had right knee surgery in 1995 and left knee surgery in 1996. The claimant testified that his job as a carpet installer required him to do heavy lifting and work on his knees. The claimant testified that he cannot return to work as a carpet installer because of his injury. According to the claimant, his treating doctor, Dr. W, released him to work with the following restrictions: no prolonged sitting or standing, no lifting over 30 pounds, and no overhead work.

The claimant testified that he obtained a temporary job in April 1998 servicing and washing trucks, working 32-46 hours per week at $8.00 per hour, but he suffered a heart attack and had to quit employment on July 5, 1998. The claimant testified he obtained a job at a newspaper, (news paper company), on July 29, 1998, with a guaranteed minimum work week of 32 hours at $5.75 per hour. The job required the claimant to insert advertisements and flyers in the newspaper and work machines. The claimant testified Dr. W said the job was not within his restrictions, as he was required to do some heavy lifting and stand all day. According to the claimant, he left employment at the newspaper on October 3, 1998, because he was unhappy with the work environment due to a coworker, who used foul language and who had the claimant performing her job, in addition to his. The claimant testified that shortly after obtaining the newspaper job, he had personal problems with his son, which required him to take time off work, and he had to stay home

for approximately a two-week period. The claimant stated that he did not look for work during the time period he was working for the newspaper. The claimant testified that after he left employment with the newspaper, through the end of the filing period, he sought employment by looking in the newspaper and other job leads given to him by his wife and the carrier. Through his wife's employer, the claimant testified, he obtained a job with a construction company in late October 1998 or early November 1998 at $10.00 per hour, working 40-50 hours per week, but due to a project setback he was not able to start work until December 1998. The claimant testified that he worked at the construction company until March 12, 1999, and started a new job with an air conditioning company on March 19, 1999, working 42 hours per week.

No medical records from Dr. W were in evidence. Dr. R a carrier-selected doctor, sent the claimant for a functional capacity evaluation (FCE) on September 14, 1998. The FCE indicated the claimant was capable of performing in the medium to heavy work level with a maximum lifting capacity of 45-70 pounds and repetitive lifting of 31.5 to 49 pounds. After reviewing the FCE, Dr. R stated in a report dated September 23, 1998, "Because of his right knee and heart, I would question his ability to work at this level, and would probably put him more in the category of light work."

The claimant appealed the following factual determinations:

FINDINGS OF FACT

4. Claimant had the ability to perform a full time job including a minimum work week of thirty-two (32) hours per week or more during the filing period for the first compensable quarter of [SIBS].

10. Claimant voluntarily restricted and limited the number of hours he would work for (news paper company) during the time period beginning on July 29, 1998, through October 3, 1998, to less than twenty-five (25) hours per week due to personal family problems that was unrelated to Claimant's work with (news paper company) and was not a direct result of Claimant's impairment.

11. Claimant did not conduct a job search during the filing period for the first compensable quarter of [SIBS].

12. Claimant's job search was self-restricted, selective, and lacked timing, forethought, and diligence during the filing period for the first compensable quarter of [SIBS].

* * * *

14. Claimant has not in good faith attempted to obtain employment commensurate with Claimant's ability to work during the filing period for the first compensable quarter of [SIBS].

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Whether the claimant made a good faith effort to seek employment commensurate with his ability to work was a question of fact for the hearing officer to resolve. The claimant testified that he was able to work during the filing period, with restrictions. There was no medical evidence in the record that limited the amount of hours of work the claimant was able to perform, and the claimant's testimony did not indicate that he had been restricted to a limited number of work hours. The claimant testified that he worked less hours at the newspaper because of personal family problems, and would have continued to work there had it not been for the coworker. In Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996, we said that a claimant, who was restricted medically to a certain number of hours of work per week and who worked fewer than the number of hours medically allowed, still had a duty to attempt to find work commensurate with her ability to work more hours. In this case, the claimant worked for nine weeks and three days of the filing period, from July 29, 1998, through October 3, 1998. Although the claimant testified he sought employment during the remainder of the filing period, October 4, 1998, through November 11, 1998, and obtained a job that was delayed until December 1998, the hearing officer did not find this testimony credible. With no restrictions on the number of hours the claimant could work, and with the hearing officer's finding that there was no job search made during the filing period, the hearing officer could determine that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. We find the evidence to be sufficient to support the factual determinations of the hearing officer. This is so, even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Gary L. Kilgore
Appeals Judge