

APPEAL NO. 990939

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 31, 1999, a hearing was held. He (hearing officer) determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. Claimant asserts that he had significant medical activity during both relevant filing periods and then had spinal surgery about 11 days after the end of the filing period for the third quarter; claimant referred also to his cessation of a job search at the behest of Texas Rehabilitation Commission (TRC); he adds that he was "unemployable" because he needed spinal surgery, but stated that all his acts in the two filing periods were made in good faith. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) when he hurt his back moving a drum (barrel) on \_\_\_\_\_. The parties stipulated that he had at least 15% impairment and did not commute any benefits. Claimant stated that he either made an application for work, or left a resume when there was no application form, with 14 employers during the filing period of the second quarter, which began approximately July 11, 1998, and ended on October 9, 1998. The filing period for the third quarter began on October 10, 1998, and ended on January 8, 1999. According to the hearing officer, the jobs claimant sought were primarily shuttle driver jobs; in addition to such positions, claimant also sought jobs delivering parts, as a utilities inspector, and as a pipeline inspector. As stated by the hearing officer, all job contacts were made in a two-week period from July 21 to August 4, 1998.

A significant point raised during the hearing was that claimant was working with TRC; an employee there, Ms. T, was said to have told claimant to stop his job search until he had made "sufficient visits" to Dr. Di, a psychiatrist. (Carrier pointed out at the hearing that it had not accepted any psychological problem as part of the compensable injury.) Claimant complied with that direction. Claimant's notes also show that he then asked Ms. T, apparently on September 4, 1998 (the Texas Workers' Compensation Commission stamp showing receipt was placed directly upon the written note on this page, making the legibility of the written date questionable), for a letter explaining the August 4, 1998, change in his job search. Ms. T was said to have replied, "you do not need to explain anything for not job searching 8-4-98 to approximately October 1, 1998." Claimant's job search during the filing period for the second quarter (July 11th to October 9th) ended on August 4, 1998.

Claimant also testified that he was told he should inform his job contacts of his limitations. (Claimant's testimony, as reflected on the audiotape, indicates that he is an older gentleman who takes people at their word and does his best to follow the rules.) The evidence shows that claimant and his doctor, Dr. D, sought a functional capacity evaluation (FCE) for an extended period of time. One was finally done in September, but it was

terminated before completed for problems associated with claimant's heart condition, not part of the compensable injury. Dr. D's medical records primarily relate to claimant being in distress and needing surgery. Dr. D does not say claimant cannot work, and Dr. S, who examined claimant for carrier, said that he could do light work. Claimant also testified that he had to go to many medical appointments during the filing period of the third quarter in relation to the spinal surgery which occurred on January 19, 1999.

While there are no medical records that say claimant cannot do any work at all, claimant appears to be saying that he could not undertake a job search in the filing period of the third quarter because he did not have valid restrictions to inform potential employers of (although Dr. D finally gave claimant an estimate of restrictions, including a 10-pound lifting limit), because he was attending many medical appointments, and because he was about to have surgery which would keep any employer from hiring him just before that event.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The hearing officer's Statement of Evidence and Discussion appears to have a typographical error; it was during the filing period of the second quarter that claimant contacted 14 employers, not during the filing period for the third quarter. The hearing officer indicates that "13" contacts during two weeks of a 13-week period does not show good faith; that determination is one of fact which we will not disturb, even though claimant had a plausible reason for ending his search based on what he heard Ms. T, of the TRC, tell him. In addition, the 1989 Act does not provide for SIBS based on whether a claimant is "unemployable." However, a doctor's advice to a claimant not to work while surgery is pending, given for a medical reason such as an unstable back, could be sufficient evidence that a claimant had no ability to work. In addition, in certain instances a treating doctor may advise a claimant that he is unable to do any work at all until an FCE shows what can be done; in that case, depending on the evidence, a claimant may have no ability to do any work until the FCE shows the ability, but a claimant does not have to wait to search for work, absent his doctor telling him that he has no ability to work, because "he must" inform his potential employers of the restrictions found by the FCE. We note that FCEs are widely used; however, doctors have placed restrictions on what a patient can do without the use of an FCE.

The evidence presented at the hearing provided sufficient support for the hearing officer to determine that claimant did not show an attempt in good faith to find work in either period. While the hearing officer found claimant credible and that he acted in good faith, the 1989 Act requires that good faith be applied to the attempt to find work. See Section 408.142. We cannot say that the hearing officer could not find both credibility and good faith while finding that claimant did not attempt in good faith to find work because this case involved misconceptions by claimant. We will not overturn the hearing officer on questions of fact in this instance.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

---

Joe Sebesta  
Appeals Judge

CONCUR:

---

Gary L. Kilgore  
Appeals Judge

---

Dorian E. Ramirez  
Appeals Judge