

APPEAL NO. 991018

On April 13, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (claimant) requests that the hearing officer's decision that she is not entitled to supplemental income benefits (SIBS) for the 12th quarter be reversed and that a decision be rendered in her favor. No response was received from carrier.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more, has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, has not elected to commute a portion of the IIBS, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Claimant had the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement on July 12, 1994, with an IR of 29%; that claimant did not commute IIBS; and that the 12th quarter for SIBS was from December 10, 1998, to March 10, 1999, with a filing period of September 10 to December 9, 1998 (the filing period). There is no appeal of the hearing officer's finding that claimant's unemployment during the filing period was a direct result of her impairment. Although the hearing officer ruled in claimant's favor on the direct result criterion for SIBS for the 12th quarter, in order to be entitled to SIBS for the 12th quarter claimant also had to establish that during the filing period she attempted in good faith to obtain employment commensurate with her ability to work. Section 408.143.

Claimant testified that on _____, she injured her neck, low back, and knees while working as a traveling photographer. Claimant had previously worked as a nurse for 18 years. Claimant said that her photographer job required her to lift heavy equipment and that her injury prevents her from working as a photographer or nurse. According to a medical report, claimant has had three arthroscopic surgeries on each knee and lumbar spine surgery in 1972, 1973, and October 1997, the last surgery consisting of an interbody fusion with a cage system. A medical report states that claimant has not worked since her 1992 injury. Dr. S examined claimant at carrier's request and he reported on August 25, 1998, that claimant wears a back brace at all times, that claimant can answer telephone

calls, and that he recommends that claimant begin with part-time sedentary work. Dr. G, who has treated claimant, wrote in September 1998 that he agrees with Dr. S's recommendations and on October 28, 1998, wrote that claimant has a solid fusion confirmed by x-rays and that claimant is available for sedentary work on a part-time basis. Dr. G also noted that claimant would participate in a pain management program and that she would see Dr. M for narcotic medication management.

Claimant provided a list of contacts with 25 employers during the filing period. She indicated that many of the employers were contacted several times. Claimant noted that she contacted the five employers the carrier's vocational consultant had sent her as job leads and that the sources for the other employer contacts were the Internet and newspaper want ads. Claimant said that she personally went to three of the listed employers. Her list of job contacts reflects that about 11 different employer contacts were made by telephone calls, that repeat calls were made, and that she sent her resume or an application by e-mail or other method to the other employers. Jobs listed include telephone sales, answering telephones, claims processor, administrative assistant, medical billing, collector, and others. Claimant said she also called the Texas Rehabilitation Commission about retraining and was told she would have to be off her medication and have a doctor's release for retraining. Claimant said that she wants to go back to work and looked for work within the limitations set by her doctor but does not believe that there is a part-time sedentary job within her geographic location that is within her physical abilities and experience. Claimant said that she has limited skills and needs retraining.

PS, carrier's vocational consultant, testified that she wrote a letter to claimant regarding having a vocational interview and claimant told PS that her attorney did not want PS to contact claimant.

The claimant appeals the hearing officer's finding that claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the filing period and the hearing officer's conclusion that claimant is not entitled to SIBS for the 12th quarter. The hearing officer states that she found that claimant's efforts were directed more at creating a job search than actually finding work. The hearing officer's finding that claimant had the ability to work part-time sedentary work during the filing period is not disputed.

Whether claimant made a good faith attempt to obtain employment commensurate with her ability to work was a fact question for the hearing officer to determine from the evidence presented. In determining good faith the hearing officer can consider the manner in which a job search is undertaken with respect to timing, forethought, and diligence. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995.

In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, an Appeals Panel rejected the contention that a certain number of job applications automatically constitutes a good faith effort to obtain employment and noted that, in common usage, good faith is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means

being faithful to one's duty or obligation. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, an Appeals Panel stated that in determining whether claimant has attempted in good faith to obtain employment commensurate with claimant's ability to work, the hearing officer must sometimes assess whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Regarding other matters mentioned by claimant in her appeal, claimant's allegations that the hearing officer did not act professionally and that she was discriminated against find no support in the record. As the finder of fact, the hearing officer could compare claimant's claimed limitations with observed physical capabilities at the CCH and in order to ensure the full development of the facts, the hearing officer could question claimant regarding her job search. If, as claimant asserts, carrier paid her SIBS for the 13th quarter, carrier's decision on the 13th quarter would have been based on SIBS criteria met by claimant during the filing period for the 13th quarter. The hearing officer based her decision on 12th quarter SIBS on efforts made by claimant during the filing period for the 12th quarter.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge