

APPEAL NO. 991063

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 29, 1999. With respect to the issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 10th compensable quarter. In its appeal, the appellant (carrier) argues that the determinations that the claimant made a good faith job search in the filing period for the 10th compensable quarter and that he is entitled to SIBS in that quarter are against the great weight of the evidence. The carrier did not appeal the determination that the claimant's unemployment in the filing period was a direct result of his impairment. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on December 11, 1995, with an impairment rating of 16%; that the 10th quarter ran from February 12 to May 13, 1999, with a corresponding filing period of November 13, 1998, to February 11, 1999; and that the claimant's average weekly wage is \$255.38. The claimant testified that he is 76 years old and that he has a ninth grade education. He stated that he injured his low back on _____, in the course and scope of his employment delivering telephone books and that his injury necessitated interbody fusion surgery at L4-5 in February 1995. The claimant stated that prior to the job where he was injured, he worked for 30 years as a mechanic and before that he worked as a telephone lineman.

The claimant's treating doctor is Dr. R, who performed the spinal surgery. In a "To Whom it May Concern" letter of August 3, 1998, Dr. R stated:

[Claimant] is under my care for an on-the-job injury he sustained on _____. He currently has work restrictions of limited bending at the waist, no lifting greater than 20 lbs. frequently and 19 lbs. infrequently [sic].

On November 19, 1998, the claimant underwent coronary bypass surgery. He testified that he was in the hospital for one week for surgery and that he recovered from the surgery in about two weeks. In a letter of March 8, 1999, Dr. W, the claimant's cardiologist, stated that the claimant is "doing quite well" following his surgery and that "his heart situation probably will not keep him from becoming active and continu[ing] to work." In a "To Whom it May Concern" letter of March 8, 1999, Dr. R stated that the claimant is "totally disabled secondary to lumbar radiculopathy."

On March 9, 1998, the claimant underwent functional capacity evaluation (FCE) testing. The FCE report states that the claimant is "functioning in the light work level as he

is able to dynamically lift 17 lb. infrequently from floor to knuckle and lift 8.5 lb. frequently from floor to knuckle." The FCE report also notes that the claimant's plan is to retire. The claimant denied that he told the FCE evaluators that he planned to retire, insisting that he wants to return to work.

The claimant testified that he looked for work in the filing period for the 10th compensable quarter. Specifically, he stated that he contacted 25 employers, largely by telephone, and inquired about employment. He testified that he identified the potential employers by looking in the newspaper every day in an attempt to identify jobs within his restrictions. On cross-examination, the claimant acknowledged that his 25 job contacts were made over 19 days of the filing period and that he did not make any job contacts on the other days of the filing period. He stated that on the days that he did not make job contacts he spent his time sleeping and watching television. He explained that his contacts were limited because he had to confine his search to the area where he lived because, while he could drive to the larger cities near him, driving causes severe back pain and would preclude his performing job duties after a commute.

Ms. M, a vocational consultant retained by the carrier, testified at the hearing. Ms. M stated that she had previously supplied job leads to the claimant but that she did not do so in the filing period for the 10th compensable quarter because her file had been closed. She testified that most of the jobs the claimant applied for in the filing period were not within his restrictions. In addition, Ms. M took issue with the claimant's having contacted the potential employers by telephone rather than completing a written application. She explained that a written application provides a better record of the contact and that he would also be more likely to be hired if he completed a written application instead of making a telephone contact.

The carrier asserts that the hearing officer's determination that the claimant made a good faith effort to look for work commensurate with his ability to work in the 10th quarter filing period is against the great weight of the evidence. Good faith is a question of fact for the hearing officer, as the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. In arguing that the hearing officer's good faith determination is against the great weight of the evidence, the carrier notes that the claimant applied for positions outside his restrictions, that he limited his job search to 19 days of the filing period, and that the claimant acknowledged that on the balance of the days in the filing period he spent his time watching television and sleeping. The carrier emphasized the same factors at the hearing and it was solely within the hearing officer's discretion as the fact finder to determine the significance, or lack thereof, of those factors. In this instance, the hearing officer considered the evidence presented by the claimant about his job search efforts in the filing period and was persuaded that the claimant sustained his burden of proving that those efforts rose to the level of a good faith job search. The hearing officer was acting within her province as the fact finder in so finding. Our review of the record does not reveal that the hearing officer's good faith determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust and find no merit in the carrier's assertion that the claimant's job search efforts in this instance were insufficient as a matter of law. Accordingly, no sound basis exists for us to reverse the

good faith determination, or the determination that the claimant is entitled to SIBS for the 10th quarter, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge