

APPEAL NO. 991066

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 April 14, 1999. There were seven issues before the hearing officer at the CCH: entitlement to supplemental income benefits (SIBS) for quarters four through eight, whether the appellant (claimant) has permanently lost entitlement to SIBS because he was not entitled to SIBS for 12 consecutive months, and whether the claimant timely filed a Statement of Employment Status (TWCC-52) for quarters four through eight. The hearing officer determined that the claimant is not entitled to SIBS for the fourth through eighth compensable quarters, the claimant has permanently lost entitlement to SIBS because he was not entitled to SIBS for 12 consecutive months, the claimant timely filed a TWCC-52 for the fifth through eighth SIBS quarters, and the claimant did not timely file a TWCC-52 for the fourth SIBS quarter relieving the respondent (carrier) of any liability to pay SIBS for that quarter. The claimant appeals, urging that the hearing officer's determination that the claimant had some ability to work during the filing periods for the fourth through eighth SIBS quarters was erroneous; that he did not attempt in good faith to obtain employment commensurate with his ability to work; that he is not entitled to SIBS for the fourth through eighth quarters; and that he has permanently lost entitlement to SIBS, is contrary to the overwhelming weight of the evidence and should be reversed. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. Not appealed is the determination of the hearing officer that the claimant timely filed a TWCC-52 for the fifth through eighth SIBS quarters and did not timely file a TWCC-52 for the fourth SIBS quarter, and it has become final.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that the fourth compensable quarter of SIBS was from August 29 through November 27, 1997; that the fifth compensable quarter of SIBS was from November 28, 1997, through February 26, 1998; that the sixth compensable quarter of SIBS was from February 27 through May 28, 1998; that the seventh compensable quarter of SIBS was from May 29 through August 27, 1998; that the eighth compensable quarter of SIBS was from August 28 through November 26, 1998; that during the qualifying periods for the fourth through eighth compensable SIBS quarters the claimant earned no wages and his unemployment was a direct result of his impairment; and that the claimant did not attempt to obtain employment during the qualifying period for the seventh and eighth SIBS quarters.

Pursuant to a prior CCH decision, the claimant was determined not entitled to SIBS for the first and second compensable SIBS quarters, and entitled to SIBS for the third compensable quarter.

The claimant testified that as a result of his compensable back injury he can only sit for approximately 45 minutes and stand for 20 minutes due to pain. According to the

claimant, he has suffered incontinence of his bowel and bladder since the date of injury. The claimant testified that he sought sedentary employment during the filing period for the fourth, fifth and sixth SIBS quarters. According to the claimant, during the filing period for the fourth SIBS quarter, he contacted temporary employment agencies, read advertisements in newspapers, searched the Internet, and sent letters to potential employers. The claimant testified that his efforts at seeking employment took approximately two to three hours per day, two to three days per week, and he could have done more to search for employment. The claimant testified that during the filing periods for the fifth and sixth quarters, he did not put in as much effort to seek employment as he did in the fourth quarter filing period. The claimant testified that in December 1998 his back condition worsened, he was required to use a walker, and his treating doctor indicated he was totally unable to work.

A letter from the Texas Rehabilitation Commission dated March 25, 1997, states that the claimant had observable difficulty with walking, standing and sitting, and that they considered him suitable for sedentary occupations, such as envelope addresser or envelope folder. On August 21, 1997, the claimant's treating doctor, Dr. E, states "I believe the patient had a work related injury and his inability to work at this time is related to his work-related injury." In a December 2, 1998, letter, Dr. E indicates that the claimant was last seen on November 17, 1997, after an episode of severe pain radiating to his left lower extremity, and the claimant's clinical status had worsened. Dr. E states "I do not think at this time with the recurrence of lower back pain radiating to the left lower extremity, the patient is able to work."

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. In this case, the parties stipulated that the claimant met the first requirement. What is at issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the filing periods.

Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider "the manner in which the job search is undertaken with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. The Appeals Panel has held that if an employee established that he has no ability to work at all, then he may be able to show that seeking

employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden is on the claimant to prove no ability to work and there must be medical evidence showing no ability to work. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer determined that the claimant had some ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work during the filing periods for the fourth through eighth quarters. The hearing officer indicated in his Statement of the Evidence that given the little amount of time spent in looking for work during the filing period for the fourth quarter, the claimant's efforts did not establish good faith, and for subsequent quarters, the claimant's efforts to seek employment were substantially less and did not indicate good faith. While the claimant asserted an inability to work during the seventh and eighth quarter filing periods, the hearing officer did not find the medical evidence persuasive. The hearing officer indicated that Dr. E's statement on August 21, 1997, was not sufficiently supported to be persuasive that the claimant had no ability to work on that day and there was insufficient information to establish for what days or periods of time Dr. E believed the claimant had no ability to work.

When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the hearing officer's determinations that the claimant had some ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work, that the claimant is not entitled to SIBS for the fourth through eighth quarters, and that the claimant has permanently lost entitlement to SIBS because he was not entitled to SIBS for 12 consecutive months.

The decision and order of the hearing officer are affirmed.

---

Dorian E. Ramirez  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Susan M. Kelley  
Appeals Judge