APPEAL NO. 991114

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 May 3, 1999. He determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the 16th compensable quarter but was entitled to SIBS for the 17th compensable quarter. In its appeal, the appellant (carrier) asserts that the hearing officer's determination that the claimant made a good faith effort to find employment during the filing period for the 17th quarter, that the claimant's decreased earnings during the filing period for the 17th quarter are a direct result of the claimant's impairment, and that the claimant did not refuse services or refuse to cooperate with services provided after a Texas Workers' Compensation Commission (Commission) referral to the Texas Rehabilitation Commission (TRC), are not supported by the evidence, or are against the great weight and preponderance of the evidence and should be reversed. The appeals file does not contain a reply from the claimant.

DECISION

Affirmed.

The claimant testified that on _____, she fell at work and injured her lower back and neck. The claimant testified that at the time of the injury she was working as a laborer, cleaning buildings, at a nuclear power plant. According to the claimant, her job required her to mop, sweep, go up and down stairs, bend, stoop and crawl in confined spaces that were hard to reach. The claimant's treating doctor is Dr. B. As a result of the injury, the claimant had a cervical and a lumbar fusion in September 1992, and a repeat lumbar fusion in May 1995. The claimant testified that she is never out of pain, and on a bad day, she cannot do anything. The claimant testified that she can do very little housework and has to lay down approximately three to four times per day.

The parties stipulated that the claimant reached maximum medical improvement on January 17, 1994, with a 19% impairment rating; that the claimant did not commute the impairment income benefits; that the filing period for the 17th quarter was from November 17, 1998, through February 15, 1999; and that the 17th quarter was from February 16, 1999, through May 17, 1999.

The claimant testified that Dr. B had not released her to return to work during the filing period for the 17th quarter. On November 10, 1998, and November 17, 1998, a functional capacity evaluation (FCE) was performed. The FCE recommended the claimant was at a sedentary to light physical demand level: walking, standing, and sitting restricted to 30 minutes each; stooping and bending limited to rare occasions; kneeling occasionally; no climbing; and a maximum lifting capacity of 15 pounds. The FCE examiner did not recommend that the claimant return to work and recommended that the claimant be enrolled in a chronic pain management or outpatient physical therapy program. Dr. L examined the claimant and in a report dated March 29, 1999, states "based on the results

of her [FCE] which was obtained last November, I agree that she would not be able to perform any type of work without further therapeutic intervention." The carrier's doctor, Dr. K, examined the claimant and in a report dated September 21, 1998, indicates that the claimant could perform work activities with lifting restrictions of 10 pounds, restriction of work with the upper extremities, and no prolonged sitting greater than 30 minutes.

The claimant testified that during the filing period for the 17th quarter she sought employment with 19 potential employers. The claimant testified that the jobs that she applied for were jobs within her restrictions. According to the claimant, she is 55 years old and has an 11th grade education. The claimant stated that she contacted the TRC in December 1998, and another organization that does retraining for senior citizens. The TRC advised the claimant to get a GED. The claimant testified that she started working on her GED, but was unable to attend the classes during the filing period. The claimant testified that she had a severe flu twice, in January and again in February 1999. According to the claimant, if she had been working, she would have had to take off work for two weeks in January and two weeks in February 1999. The claimant testified that the flu prevented her from seeking employment after January 5, 1999, and attending GED classes.

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. 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The carrier points out in its appeal that the claimant made no job contacts during the first 17 days of the filing period and only made a job search for approximately one month out of the three-month period, asserting this does not constitute a good faith effort under Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997. That case did reverse an award of SIBS after stating that good faith continued to be an intangible quality and a question of fact for the hearing officer. It noted, though, that the claimant in that case listed no job contacts but merely testified to having approached "maybe five" homes about domestic work, one or more restaurants, and another unnamed business about sewing, on six days during the last 12 days of the filing period. The hearing

officer's finding of good faith from the above facts was determined to be against the great weight and preponderance of the evidence.

In this case, the hearing officer determined that the claimant sought employment on 19 occasions. The claimant's Statement of Employment Status (TWCC-52) indicates that 19 contacts were made on eight different days, with seven contacts not identifying the date the contact was made. Whether the claimant made a good faith effort to seek employment commensurate with her ability to work was a question of fact for the hearing officer to resolve. Although the claimant's search for employment did not span the entire filing period, the number of days that searches are made is but one factor that may be considered by the hearing officer in determining whether a claimant made a good faith effort. The hearing officer was free to consider the claimant's testimony that she was unable to search for employment from January 5, through the end of the filing period, February 15, 1999, due to illness. We find sufficient evidence to support the hearing officer's finding that the claimant attempted in good faith to obtain employment commensurate with her ability to work.

The hearing officer found that the claimant's decrease in earnings during the filing period for the 17th quarter was a direct result of the claimant's impairment and that the claimant was unable to perform the duties of her job with employer. The claimant testified that she could no longer perform her previous job as a laborer, which required her to mop and sweep, go up and down stairs, bend, stoop and crawl in confined spaces. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, she could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

The carrier appeals the hearing officer's finding that the claimant did not refuse services or refuse to cooperate with services provided after a Commission referral to the TRC. The carrier argues that the claimant did not attend GED classes during the 17th quarter filing period and used illness as an excuse. Although the claimant testified that she went to the TRC and they advised her to get a GED, there was no evidence indicating that the Commission determined the claimant should be referred to the TRC and then referred her there. *See* Section 408.150(a); Texas Workers' Compensation Commission Appeal No. 961344, decided August 26, 1996. There is sufficient evidence to support the hearing officer's finding that the claimant did not refuse services or refuse to cooperate with services provided after a Commission referral to the TRC.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge