APPEAL NO. 991170

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 12, 1999, a contested case hearing (CCH) was held. With respect to the issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth and fifth quarters. The hearing officer's direct result findings were not appealed.

Appellant (carrier) appeals a number of the hearing officer's findings, contending that claimant believed that she could not work and, therefore, all her job contacts were not in good faith. Carrier also contends that many of the job contacts claimant said she made were for positions for which she was not qualified or for which she did not have the requisite experience. Carrier also points out that its vocational rehabilitation consultant could only verify a very few of claimant's job contacts and that claimant did not follow up on the leads sent her. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance. Claimant, for the first time on appeal, submits a medical report dated a week before the CCH, which we decline to consider, as it was not admitted at the CCH.

DECISION

Affirmed.

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. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). 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.

It is undisputed that claimant sustained a compensable low back injury on _____ while being employed as a stocking supervisor for a large retail chain (employer). Claimant testified that she sustained a lifting injury and has undergone a discectomy/ laminectomy, a double fusion and a triple fusion at the L3 through L5 levels, with the last surgery being in December 1996. The parties stipulated that claimant had a 15% or greater impairment rating, that impairment income benefits were not commuted and that the fourth quarter filing period began on August 8, 1998, with the fifth quarter filing period ending on February 5, 1999.

Claimant testified that she continued working for the employer for about a year after her injury, until her treating doctor took her off work pending her first surgery. Carrier's required medical examination doctor, Dr. L, in a report dated July 15, 1998, noted some symptom magnification but was of the opinion that claimant "should be able to perform less than sedentary duties at this point in time." Although claimant was of the opinion that she was totally unable to work, attached to her Statement of Employment Status (TWCC-52) for the fourth quarter are some 27 pages of want ads with around 100 job contacts and claimant's notations regarding those contacts. Carrier's vocational consultant, Ms. K, testified that 32 of the contacts said there was no application on file, 86 were unable to confirm either way and only two confirmed an application was on file.

Similarly, during the fifth quarter filing period, the claimant was examined by Dr. B, a Texas Workers' Compensation Commission independent medical examination doctor, who, in a report and functional capacity evaluation (FCE) dated December 15, 1998, noted some results were invalid because of claimant's failure to perform all testing and was of the opinion claimant had an ability to perform sedentary-type work. Claimant, in her TWCC-52 for the fifth quarter, listed some 38 job contacts with dates, person contacted and type of position. Ms. K testified that she could verify only one of those contacts. Claimant testified that many of the contacts were made by telephone. Ms. K had also sent claimant some potential job leads, but claimant had noted they were too far away for her to drive. There was a good deal of testimony whether one place in (City No. 1) was closer than another in (City No. 2) or (City No. 3). Much of that testimony is relatively lost on the Appeals Panel, which is not familiar with the relative locations in large metroplexes and we can only rely on the hearing officer's judgment.

Claimant testified that she had gone back to her employer and sought work in keeping with her restrictions, but the employer was unable to accommodate her. Claimant testified that at some time after the filing period for the fifth quarter she was able to obtain part-time employment within her restrictions and at the time of the CCH was employed.

The hearing officer noted claimant's efforts during the filing periods at issue and the fact that claimant is currently employed and determined that there was evidence that claimant had attempted in good faith to obtain employment commensurate with her ability to work. Carrier argues that since claimant believed she was unable to work, her efforts in making job contacts were not in good faith, that the medical reports indicated that she had refused certain tests and had claimant fully performed during the FCE, "she would have received a release to return to work that would have allowed her to perform more work than sedentary type work." Carrier cites some of claimant's testimony as indicative of not rising to the level of a good faith effort.

The Appeals Panel has many times noted that good faith is an intangible and abstract quality and that the hearing officer could consider any number of factors, including the timing, diligence and forethought given to the job search. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. The Appeals Panel has also rejected the contention that a certain number of job applications were necessary to show good faith. Texas Workers' Compensation Commission Appeal No.

950364, decided April 26, 1995. We would further note that the hearing officer is not bound by the testimony or opinion of carrier's vocational rehabilitation consultant and that testimony is but one of the factors the hearing officer could consider. In short, whether a claimant's efforts in seeking employment were in good faith is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94741, decided February 9, 1995. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge