

## APPEAL NO. 991172

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 3, 1999. With regard to the issues before him, the hearing officer determined that, because appellant (claimant) had not made a good faith effort to seek employment during the filing periods for the second through fifth compensable quarters, she was not entitled to supplemental income benefits (SIBS) for those quarters and, because claimant was not entitled to SIBS for 12 consecutive months comprising the second through fifth compensable quarters, claimant "has lost entitlement to SIBS" ("ceases to be entitled to any additional income benefits for the compensable injury." Section 408.146(c)). The hearing officer also found, therefore, that claimant has lost entitlement to SIBS for the sixth through ninth quarters, although claimant testified that she had received SIBS for the seventh compensable quarter. The hearing officer made findings that claimant's unemployment or underemployment was a direct result of her impairment and those findings have not been appealed.

Claimant appeals, contending that her doctors had given her a restricted release to work; that her 10 contacts (together with follow-ups) constituted a good faith job search; that she had "the right to pick and choose who [she] wants to work for"; that the hearing officer did not consider that she continues to suffer from pain, memory loss and confusion; that a functional capacity evaluation (FCE) did not include a mental evaluation; and that she has good days and bad days. Portions of claimant's appeal touch on matters not in evidence before the hearing officer. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The Attorney General's Office, Risk Management Division, referred to here as carrier, responds urging affirmance.

### 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.

The parties stipulated that the carrier accepted liability for an \_\_\_\_\_, injury; that claimant had an impairment rating of 15% or greater; and that impairment income benefits were not commuted. The circumstances of claimant's injury were not developed. Claimant had apparently been employed by the Texas Workers' Compensation Commission (employer) as an assistant disability determination officer and customer service representative. A medical report recites that claimant injured her back, shoulder, neck, and elbow lifting a heavy box at work. Claimant testified that she had had four surgeries but there was no testimony as to the parts of the body or when these surgeries were performed. The hearing officer makes a finding that claimant had neck surgery in August 1996 and that claimant's depression was part of the compensable injury. The hearing officer made findings on the dates of the filing periods with the filing period for the second compensable quarter beginning April 1, 1997, and the filing period for the ninth compensable quarter ending March 29, 1999. An FCE performed on August 15, 1997 (during the filing period for the second quarter), found that claimant was "able to perform at a light physical demand level for an 8 hour day." Claimant challenges that finding, saying that she had received an injection and that was on one of her good days.

Dr. R is claimant's orthopedic treating doctor and Dr. N is claimant's treating psychiatrist. Dr. R's office progress notes indicate that claimant has some limited ability to work. The hearing officer made separate findings for each of the quarters and variously found that claimant was capable of "at least part time [work] at a light duty capacity" or capable of "a light duty to sedentary capacity on a part or full time basis." Claimant testified that she made about 10 or 15 job contacts during the fourth compensable quarter (claimant's Statement of Employment Status (TWCC-52) shows 10 contacts which is what the hearing officer found). On appeal and at the CCH, claimant contended that she made follow-up contacts with these potential employers which were not included on the TWCC-52. On claimant's TWCC-52 for the fourth quarter, claimant states "Started Home Business." There was considerable testimony and evidence about the home business, which consisted of a vitamin and herb supplement distributorship. Although claimant admits that she had earnings from the business, she did not recall how much the earnings were and asserts that the expenses far outweighed any income. Although claimant's exhibits include promotional literature, mailing lists, and a business plan, there are no tax records, profit and loss records, etc. to document the financial aspects of claimant's home business.

The hearing officer found that claimant did not make good faith efforts to seek employment commensurate with her ability for the second through fifth and the ninth compensable quarters, and that for the sixth and eighth quarters when claimant did make a good faith effort, she had "lost entitlement to SIBS" (actually Section 408.146(c) says "ceases to be entitled to any additional income benefits"). Each quarter was discussed separately, both on direct and cross-examination, in argument, and in the hearing officer's findings. Apparently, the hearing officer found that, after claimant got her home business started, efforts in that regard met the good faith requirement.

Regarding claimant's appeal on the manner in which she sought work and whether that amounted to good faith, we have noted that whether a claimant has 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. The hearing officer obviously believes that the 10 contacts on six different days made in the fourth quarter did not amount to good faith. Although claimant protests that she did follow-ups, that was not evident in the testimony and evidence.

Regarding claimant's contention on appeal that the hearing officer did not consider her depression, memory loss, confusion, and other psychological problems, the hearing officer clearly considered those factors, reciting in his Statement of the Evidence that "[claimant] said she had problems including depression, confusion and memory loss, and she was not testing well when she applied for jobs." Based on that recitation and the record as a whole, we cannot say that the hearing officer did not consider her testimony. 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.

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.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Tommy W. Lueders  
Appeals Judge