APPEAL NO. 991174

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 30, 1999, a hearing was held. She (hearing officer) determined that, since the appellant (claimant) did not provide supporting documentation to show underemployment and did not show a good faith attempt to find work, she was not entitled to supplemental income benefits (SIBS) for the sixth compensable quarter. Claimant asserts that certain findings of fact are inconsistent with the Statement of Evidence and disagrees with the finding of fact that said claimant did not seek employment in good faith during the filing period. Claimant also takes issue with the finding of fact that said she did not provide supporting documentation to show that she was underemployed, but does not argue that documentation provided was sufficient. Claimant asserts error in the finding of fact that said she had not shown that her underemployment was a direct result of the impairment. The appeals file contains no reply from the respondent (carrier).

DECISION

We affirm.

Claimant worked for (employer) on _____, when she injured her neck in a motor vehicle accident. The parties stipulated that claimant sustained a compensable cervical injury on _____; that she has not commuted any benefits; that her impairment rating is 15% or greater; and that the filing period for the sixth quarter began on October 17, 1998, and ended on January 15, 1999.

There was some medical documentation indicating that claimant has had surgery to fuse her spine at C5-7 and now has radiculopathy and headaches. Dr. C pointed out in October 1998 that claimant had been hospitalized for an exacerbation of her injury "while attempting to work." While Dr. C does not indicate that claimant was thereafter released to seek work, claimant testified that she worked by babysitting throughout the filing period.

While her babysitting involved only one child for two to five days per week, claimant testified that she sought work with 17 other employers. She listed these employers and provided a name of the contact, the phone number, and the month contacted, but no specific date. She listed her wages earned as varying from $0.00 to $20.00 to $30.00, and up to $50.00 per week. She testified that she charged $10.00 per day, but that she did not babysit during Christmas holidays and other dates in which the mother of the child did not attend college classes. No documentation was provided as to claimant's income per week.

The parties litigated the case at the hearing as one in which the claimant had some ability to work and therefore needed to attempt in good faith to obtain employment commensurate with her ability. There was some evidence that claimant could do sedentary work with a 10-pound lifting limit.

The hearing officer, in her Statement of Evidence, said that claimant could not recall specific dates but was credible, which tends to negate any question raised by claimant's failure to list specific dates she contacted employers. The hearing officer also said that claimant's babysitting of one child "which she lifts occasionally" is "close" to her restrictions. After making these comments, the hearing officer then made a finding of fact that claimant did not document when the 17 contacts or follow-up calls were made. She also found that claimant did not try to expand her babysitting business in any way. These findings may or may not be inconsistent with the Statement of Evidence. A babysitting business could be expanded, perhaps, by employing others or by restricting the children to those of an age that were not picked up. With the claimant working, although not a total of 40 hours a week on average, but with 17 contacts made to other employers, about which the hearing officer found claimant to be credible, the finding that claimant did not attempt in good faith to find employment commensurate with her ability is, at most, marginally supported by the evidence.

As stated by the hearing officer, the "real problem" is that claimant did not provide any documentation for her earnings, as required by the definition of "Statement of Employment Status" in Tex. W.C. Comm'n, 28 Tex Admin. Code § 130.101, which would show that she is underemployed. In addition to the rule set forth, Texas Workers' Compensation Commission Appeal No. 970428, decided April 17, 1997, reversed a determination of entitlement to SIBS, stating that the claimant was not even eligible for SIBS because she was employed but failed to prove that she was underemployed, citing that definition in Rule 130.101.

The determination that claimant is not entitled to SIBS for the sixth quarter is sufficiently supported by the finding of fact that claimant did not provide any supporting documentation for the wages she earned during the filing period. While claimant also takes issue with a finding of fact that said claimant did not show that her underemployment was a direct result of the impairment, we point out that claimant has not shown that she was underemployed. The question of underemployment is one of fact for the hearing officer to determine (*see* Texas Workers' Compensation Commission Appeal No. 982146, decided October 26, 1998), but testimony must be confirmed by documentation to determine that underemployment exists. *See* the previously cited definition in Rule 130.101.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the result. Whether claimant made a good faith effort to obtain employment commensurate with the ability to work and whether her unemployment or underemployment was a direct result of her impairment from her compensable injury were fact questions for the hearing officer to determine from the evidence presented. However, I point out that the cited definition in Rule 130.101 pertains to what is supposed to be contained in the Statement of Employment Status (TWCC-52) and, in part, requires a statement, with supporting documentation, that the employee has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury. I do not believe that the rule precludes a hearing officer from considering a claimant's testimony concerning wages earned during the filing period in conjunction with whatever supporting documentation is provided, nor do I believe that, in a case where it is undisputed that a claimant earned less than 80% of the employee's preinjury AWW, the rule regarding supporting documentation for earnings should be used to deny a claimant supplemental income benefits. Apparently, in this case, there was some dispute as to whether claimant earned less than 80% of her preinjury AWW, as well as whether any underemployment was a direct result of the impairment.

_____
Robert W. Potts
Appeals Judge