

APPEAL NO. 991360

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 24, 1999. With regard to the issues before him, the hearing officer determined that, while claimant's unemployment was a direct result of her impairment, claimant had not made a good faith effort to seek employment commensurate with her ability and was not entitled to supplemental income benefits (SIBS) for the first and second compensable quarters. The hearing officer also found that claimant's average weekly wage (AWW) was \$576.00 per week. The hearing officer's findings on direct result and AWW have not been appealed and, therefore, have become final and will not be addressed further.

Claimant appealed, citing her severe injuries, reports of the treating doctor, Dr. K, what another doctor had told her, and the Texas Rehabilitation Commission (TRC) position as proving that claimant had a total inability to work. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds urging affirmance.

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's AWW as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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]."

Claimant was employed as a truck driver when she was injured in a roll over accident on _____. The parties stipulated that claimant sustained a compensable injury on that date; that claimant reached maximum medical improvement on April 22, 1997, with a 21% IR; that IIBS were not commuted; that the filing period for the first compensable quarter began on April 8, 1998, with the filing period for the second quarter ending October 6, 1998; and that claimant had no earnings during either filing period. Claimant suffered closed head and cervical injuries, along with other lesser injuries. Claimant testified that she has seizures, blackouts, loss of memory, cognitive difficulties, fainting spells, and migraine headaches. Claimant testified that she had to use a "quad cane" to support herself. Claimant proceeded on a total inability to work theory.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. See also Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. 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 absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

Medical records in evidence show extensive treatment for both the work-related injuries and other nonrelated medical matters (such as high blood pressure, hepatitis, appendectomy, etc.). Most of those reports only indicate treatment for the particular condition the report was addressing. A neuropsychological evaluation dated February 7, 1996, by Dr. F, documents claimant's cognitive problems, recommends that claimant not drive and, at that time, indicates her "many physical symptoms" preclude "aggressive rehabilitation treatment." Dr. K's voluminous medical records appear to begin in November 1995. In several of his reports and records, Dr. K complains that carrier "is arbitrarily obstructing sound medical care," has denied Dr. K payment, and otherwise complains that carrier or the adjuster are practicing medicine. Claimant points to a report dated May 28, 1997, as showing a total inability to work. Carrier had apparently denied a rehabilitation nurse consultant and Dr. K wrote:

There is a clear-cut history of denial of services, which is an obstruction of sound medical care, and this has occurred repeatedly in this patient's case. She is unable to work at her former occupation, or for that matter at any occupation at this time. We will try to support her in terms of her pain and headaches in any way we can. I do not believe she is a surgical candidate at this point, although we can certainly get myelograms and neurosurgical opinions regarding her neck and lower back.

In another "To Whom It May Concern" letter dated November 17, 1998, cited by claimant as supporting her position, Dr. K states:

I am the treating physician for [claimant]. She is under my care for multiple symptoms related to her injury. She is currently still disabled from her usual occupation and has not been released to return to work. Her medications have been continually denied and her condition has worsened.

The hearing officer cites other examples of Dr. K's comments including how he is owed "a tremendous amount of money" for care he has rendered and that he is reluctant to treat claimant due to carrier's nonpayment of bills. The hearing officer, in his Statement of the Evidence, summarizes claimant's testimony regarding what she cannot do and that she has been advised not to attempt to reenter the work force. The hearing officer commented:

It is, however, noted that throughout her testimony, Claimant was able to communicate effectively, appeared to have strong recall of dates, times, and events, and appeared to be able to move her head without difficulty or pain.

The hearing officer concluded that he was "not persuaded that claimant had no ability to work during the filing periods" at issue.

Claimant also testified that she was being treated for some of her nonwork-related ailments by Dr. S. Claimant testified that Dr. S told her that she should not work unless or until she can bring her seizure activity under control. There are no reports or records from Dr. S in evidence to support claimant's testimony. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Claimant also testified that she made a job contact during the second quarter filing period where she asked a friend who had a collection business about work. Claimant said that her friend turned her down because of potential liability due to her seizures. The hearing officer commented:

By making no job search during the filing period for the first compensable quarter and a single contact during the filing period for the second compensable quarter, Claimant failed to discharge her obligation to make a good faith effort to seek employment commensurate with her ability to work.

Claimant also contended that she had exhibited a good faith effort by contacting the TRC. In evidence is a memo dated July 15, 1998, by a TRC counselor, which states:

[Claimant] has contacted this office regarding possibility of services. I questioned her about her realistic prospects for returning to work. She believes strongly that the limitations created by the combination of her problems will preclude her ever returning to work. Per standard procedure, a TRC counselor does not typically take an application when the enquirer says he or she feels they will not be capable of employment. I discussed this and other policies with her, and she agreed.

Carrier argues that, since claimant clearly did not believe she had any ability to work going through the motions in contacting the TRC and telling them she did not believe she could ever return to work constituted a lack of good faith. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1994. Whether the required good faith job search exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that 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.

Our standard of review is that 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 for that of the hearing officer even though another fact finder might have reached a different conclusion on the same facts. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

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:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge