APPEAL NO. 991414

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 4, 1999, a contested case hearing was held. With respect to the only issue before him, the hearing officer determined that appellant's (claimant) underemployment during the filing period was not a direct result of claimant's impairment, that claimant had not in good faith attempted to obtain employment commensurate with his ability to work and that claimant was not entitled to supplemental income benefits (SIBS) for the third compensable quarter.

Claimant appeals a number of the hearing officer's findings and takes issue with some of the hearing officer's statements in the Statement of the Evidence. Basically, claimant argues that he was unable to return to his preinjury job, that respondent (carrier) and the employer are "contradicting" the truth, that he did not have an attorney and that information and facts he had used for other purposes were wrongfully used against him. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, urging affirmance and giving reasons therefore.

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 (AWW) 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 claimant sustained a compensable cervical and lumbar injury on _____, that claimant has a 16% impairment rating, that impairment income benefits have not been commuted and that the filing period for the third quarter was from November 11, 1998, through February 9, 1999. At the time of his injury, claimant was employed by Interstate Forging Industries (employer) as a forge helper, working 50 to 60 hours a week, lifting and working with heavy metal parts, when he sustained his compensable injury on _____. Claimant's treating doctor is Dr. C. At some point claimant was referred to Dr. S, who, in a report dated June 20, 1997, recited the medical history, including an MRI which showed "a moderately large herniated disk at C6-7 on the right, a smaller central herniated disk at C5-6 and some degenerative changes and disk

bulges in the lumbar spine." Dr. S noted no radicular pain, "no evidence of myelopathic features and has very little pain." Dr. S released claimant back to work with restrictions of no reaching and a maximum 30-pound lifting restriction, on June 20, 1997.

It is undisputed that prior to going to work for the employer in November 1995, claimant had been employed for a number of years by the (Employer T). After Dr. S released claimant to restricted duty, claimant returned to his job with the employer. The testimony is in dispute whether claimant returned to exactly his preinjury duties (claimant says he did) or a similar, slightly lighter job using a smaller "hammer" (as the employer's safety coordinator testified). Subsequently, on a form dated July 8, 1997, Dr. S released claimant to return to full duty without restrictions. Claimant testified that Dr. S did so at his request in order that claimant could work extra hours. It is undisputed that after July 8, 1997, claimant could work as many hours as he wanted. Claimant testified that although he returned to his regular duties, he continued to have neck and back pain and took medication. Claimant was assessed as reaching maximum medical improvement on September 9, 1997.

Claimant continued to work his regular duties at his preinjury pay through May 1998, when he gave notice that he was quitting. Claimant testified that during the July 1997 to May 1998 time frame he had asked the employer for a lighter, less strenuous job, but that there were no openings available. It is undisputed that after quitting work with the employer, claimant obtained employment with his old employer, Employer T, at a high security risk facility. Although claimant said he left employer because of pain and inability to do his job, there is some evidence that he changed employers to obtain better health insurance coverage for a minor son. Claimant said that when he applied to Employer T, he thought that he was applying for his old low security risk position but there was a mix-up and claimant was assigned to a high security unit. Claimant said that he could not simply transfer from the high security unit to a low security unit but would have to resign, lay out for 30 days and then reapply. Claimant worked the high security unit from May 1998 through September 1998, when he resigned and went to work for (Employer V) as a welder. Claimant testified that he considered this as only a temporary job until he could be rehired by Employer T. Claimant worked for Employer V from October 1, 1998, through January 9, 1999, when he again resigned and secured employment with Employer T at a low security risk unit (which had mostly older inmates). Claimant went to work for Employer T on January 11, 1999. In an undated letter, apparently to Employer V, claimant states that he is returning to Employer T "due to my son's health conditions," that his son "will need the best health insurance" and that Employer V "made a lot of false promises to me[,] the work slowed down and the health insur [sic] plan didn't cover my son's condition." Claimant contends that letter was not written to the employer and, therefore, carrier should not use it to "contradict the truth." It is undisputed that at some point claimant contacted the employer to get a job. How many contacts claimant made and whether it was to get his old job back or some other lighter duty job is in dispute. Employer's safety manager testified claimant contacted human resources twice and the shop foreman once and told the shop foreman he had made a mistake in leaving.

Dr. C, in a note dated October 1, 1998, commented that claimant had "recently changed jobs" and this was due to "the hazardous conditions [the high security risk unit] that existed at the prison system." In another letter, dated March 23, 1999, Dr. C stated:

> [Claimant] was initially put on light duty by [Dr. S] and instructed to under go [sic] physical rehabilitation. This was performed by my office. Being on light duty is only an eight hour day for [claimant]. [Claimant] made reference to the fact that he was unable to pay his bills with the light duty. As his condition improved he requested that he go back to full duty because of his financial position. This was discussed with him and his employer. He was returned to fully duty by [Dr. S] with the understanding that he use prudent judgment in the performance of his assigned job.

Claimant's preinjury AWW was $913.67. When claimant returned to work for the employer after July 8, 1997, he was earning essentially his preinjury wage. The evidence of how much claimant earned working for Employer V was somewhat sketchy but the hearing officer commented that based on documentation in the record, claimant earned either $10.09 or $10.71 an hour. Claimant testified that he worked eight-hour swing shifts (four to five days on, two days off), earning $11.50 an hour, or $1,782.00 a month. In either event, claimant's earnings would be less than 80% of his preinjury AWW.

At issue is the reason claimant left the employer's employment in May 1998, whether it was because of his impairment or whether to obtain better benefits at a lighter duty job. Resolution of that matter is a factual determination for the hearing officer to resolve. 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). It is relatively undisputed that claimant had, in fact, been working essentially full time since his release to full duty in July 1997 and that no doctor had changed that full-duty release.

Claimant contends that the letter to Employer V about his son was not sent to the employer or carrier and, therefore, its use contradicts the truth. We note that claimant does not deny that he wrote the letter or the truth of the matters stated, only that it was written to another employer. While it is true that claimant was not represented by an attorney, the hearing officer explained the ombudsman program, that the ombudsman was not an attorney, and the claimant elected to proceed with the assistance of an ombudsman. We perceive no error in considering claimant's letter and proceeding with the assistance of the ombudsman.

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:

_____
Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision based on claimant's failure to meet the direct result criterion for supplemental income benefits (SIBS). Although I disagree that the evidence does not show a good faith effort to obtain employment commensurate with the claimant's ability to work, even if a good faith effort has been shown, claimant would not be entitled to SIBS for the quarter in issue based on the hearing officer's finding against the claimant on the direct result criterion, which finding I agree is supported by the evidence.

_____
Robert W. Potts
Appeals Judge