

APPEAL NO. 991450

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 9, 1999. With respect to the sole issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. In his appeal, the claimant challenges the hearing officer's determinations that he had an ability to work, that he did not attempt in good faith to obtain employment commensurate with his ability to work, and that he is not entitled to SIBS for the fifth quarter. The appeals file contains no response from the respondent (self-insured).

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury resulting in an impairment rating of 15% or greater; that the claimant did not commute any portion of impairment income benefits; that the filing period for the fifth compensable quarter began on December 29, 1998, and ended on March 29, 1999; that the fifth SIBS quarter began on March 30, 1999, and ended on June 28, 1999; and that during the filing period, the claimant was unemployed and earned no wages. The claimant testified that on _____, he was attempting to pull shelving out of a box and injured his neck, shoulder and right arm. He testified that he has no feeling in the mid finger of his right hand, that he has weakness in his right arm and hand, and that he has constant headaches. According to the claimant, his treatment has consisted of physical therapy, work hardening, acupuncture, medication, and epidural injections. He has received differing opinions as to whether he is a candidate for neck surgery.

The claimant testified that he was released to return to work with restrictions during the first through fourth SIBS quarters, and that he sought employment within his sedentary/light-duty restrictions: lifting under 10 pounds, no use of his arms, working no more than two to four hours per day, and ability to change positions as necessary. According to the claimant, these work restrictions were also in effect at the beginning of the fifth quarter filing period. The claimant testified that at the beginning of the fifth quarter filing period he made two job searches, was registered with the Texas Workforce Commission and the Texas Rehabilitation Commission, and had his resume posted on the Internet. The claimant testified that during the first or second week of January 1999, his condition worsened and he was taken off work by Dr. ME. The claimant did not seek employment from January 1999, through the end of the filing period. The claimant asserted that he made a good faith effort to seek employment until January 1999, and that thereafter, he had no ability to work and was not required to search for employment.

The claimant testified that he was unable to work beginning January 1999, because he had no endurance in his right hand, had problems writing and typing, suffered from headaches, and had constant pain in his neck and shoulder. However, there was no

medical evidence presented which indicates that Dr. ME changed the claimant's work status in January 1999. Dr. ME, on February 2, 1999, states that the claimant "is not employable" and needs surgery. On May 6, 1999, in response to an inquiry from the Texas Workers' Compensation Commission (Commission), Dr. ME states that during the fifth quarter filing period the claimant was not employable, that without surgery he may have a total disuse of his right arm in time, and that he is totally disabled from doing any gainful employment and from doing any of his previous work. He also states "[i]n regards to whether the claimant has made a good faith effort to seek employment within his ability to work during that time, I have no idea although I doubt that there would be anyone who would hire him in the first place." The claimant also presented a response from Dr. MO to an April 23, 1999, letter from the Commission. Dr. MO was asked whether the claimant was able to work in any capacity during the fifth quarter filing period and he responded that the claimant was partially disabled because of total loss of use of his right arm. When asked why the claimant's work status changed after February 2, 1999, Dr. MO responded that he did not change the claimant's work status, nor did Dr. ME, and that the claimant should still be off work due to severe radiculopathy.

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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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. In this case, what is at issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the fifth quarter filing period.

Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. 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. The Appeals Panel has held that, if an employee established that he has no ability to work at all, then he may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden is on the claimant to prove no ability to work and there must be medical evidence showing no ability to work. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. 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 hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer determined that the claimant did not establish that during the majority of the fifth quarter filing period he had no ability to work. The hearing officer found the medical evidence insufficient to establish by a preponderance of the evidence that the claimant had no ability to perform any type of work during the filing period. The hearing officer noted that the claimant's testimony revealed that the claimant was able to perform some types of work-related activities, albeit minimally, during the filing period. The hearing officer found the evidence insufficient to establish that the claimant attempted in good faith to obtain employment commensurate with his ability to work during the filing period.

When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the hearing officer's determinations that the claimant had an ability to work during the fifth quarter filing period, that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work, and that the claimant is not entitled to SIBS for the fifth quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge