

APPEAL NO. 991465

Following a contested case hearing held on June 2, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) failed to make a good faith attempt to obtain employment commensurate with her ability to work during the filing periods for the fifth and sixth compensable quarters and thus is not entitled to supplemental income benefits (SIBS) for those quarters. Claimant has appealed, contending that the evidence did indeed establish her good faith attempts. In response, the respondent (carrier) urges that the evidence is sufficient to support the challenged determinations and warrants our affirmance.

DECISION

Affirmed.

Claimant testified that she has a master's degree in speech pathology and has been a speech language pathologist for approximately 20 years. In her answers to interrogatories, claimant stated that her neck and back were injured when she repositioned a heavy stroke patient who was choking in the dining room when she arrived to evaluate the patient's chewing and swallowing abilities. She further stated that she experienced severe depression from the injury; that her work restrictions include not lifting more than 20 pounds and not bending; and that she receives Social Security disability payments because of severe back pain. She testified that she takes daily medications for pain and depression which make her sleepy and that she cannot drive very much because of drowsiness from medication. Claimant's treating doctor, Dr. R, wrote on September 14, 1998, that claimant takes daily medications for muscle spasm and chronic pain syndrome. Claimant stated that in October 1998 she underwent a facet steroid injection for her back pain. Dr. C, claimant's psychiatrist, wrote on September 17, 1998, that he is treating claimant's depression with a medication.

Claimant's Statement of Employment Status (TWCC-52) for the fifth quarter filing period, which the parties indicated was from August 18 to November 17, 1998, reflects that for the weeks ending September 2, September 16, and September 30, 1998, claimant earned a total of \$669.55 doing contract speech therapy jobs for the (VNA) and that she listed 28 job search contacts. Two entities were listed twice on different dates and two entities were listed three times on different dates. Claimant indicated these multiple contacts were follow-ups. She said that she made personal visits to eight of these potential employers and that she contacted the others by mailing or faxing resumes after first calling them. She indicated that she read the daily newspaper employment ads every day and called on jobs she thought she could do. Twelve of her contacts were for speech language pathologist positions. Claimant said she first looked for those positions and then other positions she thought she could do such as sales, computer software training, account executive, and education coordinator. She indicated she was certified in special education. Claimant further testified that she had previously written two children's story books which

were published and that during the fifth quarter filing period she wrote two children's story books which she hoped to either publish herself or get published. She acknowledged that three of the entries on her fifth quarter filing period TWCC-52 were contacts made with entities in an effort to get a book published and that another contact was with an entity in an effort "to get a book copyright back," apparently for a previously published book.

Claimant's TWCC-52 for the sixth quarter filing period (November 18, 1998, to February 17, 1999) reflects that she earned \$90.00 for the week ending January 15, 1999, and \$120.00 for the week ending February 12, 1999, from the (school) where she said she worked as a substitute teacher. This TWCC-52 reflected 28 contacts. Two entities were listed twice on two different dates and claimant listed a fellow speech pathologist twice. Fourteen of the contacts were for speech language positions and five for teacher or education-related positions while nine were attempts to obtain an agent or publisher for her books and two were attempts to "get copyright back for a book."

Claimant further testified that she made a number of telephone calls about jobs but that she had no documentation of those calls. She said she had previously had contact with the Texas Workforce Commission but not during the fifth and sixth compensable quarter filing periods. She also indicated that for some time, apparently in the summer of 1998, she had contact with a job counselor hired by the carrier but that no job was found for her. Claimant indicated that she no longer sought contract speech therapy jobs from the VNA because of the problems she has with driving while taking daily medications. She acknowledged that some of the jobs listed on her TWCC-52 forms were "all the way across town," referring to (city). She testified that she regarded her book writing in the fifth quarter filing period and her efforts to obtain a publisher or agent in the sixth quarter filing period as efforts at self-employment. However, she acknowledged that the contacts made to "get a book copyright back" were not efforts to obtain employment.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be determined by his protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The hearing officer found that although claimant's inability to earn 80% of her AWW for either the fifth or sixth quarter filing periods was a direct result of her impairment from

the compensable injury, he further found that during these filing periods, claimant did not make a good faith effort to obtain employment commensurate with her ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). In his discussion of the evidence, the hearing officer mentions certain factors which persuaded him that claimant failed to prove she made the required good faith effort to obtain employment, including her concentration on finding a speech therapy position despite having testified that government funding for speech therapy for patients was reduced.

We cannot say that the challenged finding is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge