

APPEAL NO. 991486

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 9, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fifth, sixth, and seventh compensable quarters, and whether the claimant has permanently lost entitlement to SIBS because he was not entitled to them for 12 consecutive months. The hearing officer determined that the claimant is entitled to SIBS for the fifth compensable quarter, is not entitled to SIBS for the sixth and seventh compensable quarters, and has not permanently lost entitlement to SIBS. The claimant appeals, urging that the hearing officer's determination that he did not make a good faith effort to obtain employment commensurate with his ability to work during the filing periods for the sixth and seventh quarters is against the great weight and preponderance of the evidence and should be reversed. The respondent/cross-appellant (carrier) replies that there is sufficient evidence to support the determinations of the hearing officer regarding the sixth and seventh quarters. In its cross-appeal, the carrier asserts that the claimant is not entitled to SIBS for the fifth quarter because he failed to affirmatively demonstrate with medical evidence that he was totally unable to perform any work and that the hearing officer abused his discretion in refusing to admit the carrier's medical reports. The claimant responds that the hearing officer's decision in regard to the fifth SIBS quarter is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was entitled to SIBS for the second quarter; that he was not entitled to SIBS for the third and fourth quarters; that the fifth SIBS quarter was from September 19, 1998, through December 18, 1998; that the sixth SIBS quarter was from December 19, 1998, through March 19, 1999; and that the seventh SIBS quarter was from March 20, 1999, through June 19, 1999. The claimant testified that his compensable injury consists of bilateral carpal tunnel syndrome which resulted in surgery to his right hand, and severe depression. He testified that at times he cannot hold things with his right hand, his left hand has worsened, and his mental state is such that he sometimes hears voices. According to the claimant, he was taking Prozac, Motrin, and sleep medication during the filing periods for the fifth, sixth, and seventh quarters.

The claimant testified that he is 46 years old, has a ninth grade education, can write, but can only read numbers. According to the claimant, he had to have assistance with applications and the Statement of Employment Status (TWCC-52) forms. The claimant asserted that he had no ability to work during the fifth quarter filing period and his doctor, Dr. S, had him off work. The claimant testified that during the fifth quarter filing period, his

hands would swell after activity, he could not sleep because of pain, he had problems grasping things, and he had splints on both wrists which prevented him from driving.

The claimant asserted that during the sixth and seventh quarters, he made a good faith effort to seek employment commensurate with his ability to work. The claimant testified that during the sixth quarter filing period he sought employment at 12 places, although he had not been released to return to work by Dr. S. According to the claimant, he asked people that he knew for jobs and looked in the newspaper. His search for employment was dependent on his state of mind, because sometimes he was afraid to leave the house. The claimant testified that during the seventh quarter filing period he was released to return to work by Dr. S on December 30, 1998, and sought employment at 25 places of employment. He looked in the newspaper for jobs, asked people he knew for jobs, and looked for jobs in the computer at the Social Security office. The claimant had difficulty remembering what transpired during the sixth and seventh quarter filing periods and, on cross-examination, stated that he thought he had contacted more prospective employers than were indicated on the TWCC-52 forms.

The carrier asserts on appeal that evidence was excluded. The documents of carrier excluded by the hearing officer were medical reports, Carrier's Exhibits A, B, C, D, G, and I. The hearing officer excluded the documents on the basis that the documents were not timely exchanged and no good cause was shown for failure to timely exchange. The carrier asserted that the documents were exchanged at the benefit review conference (BRC) on April 9, 1999, but the carrier did not have confirmation of this, and the carrier representative was not present at the BRC. The carrier was required to provide the documents to the claimant no later than 15 days after the BRC and to exchange additional documentary evidence as it became available. Sections 410.160 and 410.161 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). The carrier exchanged the documents by mail on May 21, 1999. Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there was an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. To obtain reversal of a judgment based upon error of the hearing officer's admission or exclusion of evidence, the appellant must first show that the determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992. The hearing officer did not abuse his discretion in not admitting the documents and did not commit error in not admitting the documents.

Dr. S, on May 11, 1998, prior to the fifth quarter filing period, states that the claimant continues to be unable to perform any type of work as a direct result of the on-the-job injury of _____, as well as the impairment resulting from the injury. In Dr. S's opinion, the claimant has range of motion deficits which impair his ability to perform sedentary levels of work; he is unable to manage his pain and concentrate on job requirements; he has pain,

drowsiness, lethargic behavior, and emotional nurturing of the pain; his medication causes stomach irritation and bowel irregularity; he has difficulty driving and operating a vehicle; he has educational and cognitive deficits; and his psychological depression and anxiety interfere with job performance. On December 30, 1998, Dr. S released the claimant to return to work with restrictions, lifting not to exceed five pounds and no repetitive use of his hand.

The carrier asserts that Dr. S's statements are "unbelievable" because it was so stated in a previous Decision and Order affirmed by the Appeals Panel. As stated on the record, these previous decisions were admitted into evidence by the hearing officer for the sole purpose of determining the issue of permanent loss of entitlement to SIBS. No argument was made by the carrier at the CCH as to the hearing officer's prior comment on the credibility of Dr. S's reports. The hearing officer's statement in the previous Decision and Order was made in the context of the evidence and issues presented, and his prior assessment of the evidence is not binding at a subsequent CCH.

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 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, the parties stipulated that the claimant met the first requirement. 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, sixth and seventh quarter filing periods.

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 had no ability to work during the fifth quarter filing period based upon the medical reports of Dr. S as well as the claimant's testimony. Although the hearing officer did not make a specific finding of fact that the claimant made a good faith effort to seek employment commensurate with his ability to work during the fifth quarter filing period, such a finding is inferred from his Statement of the Evidence and other findings of fact. While the claimant asserted that he had an ability to work and made a good faith effort to seek employment commensurate with his ability to work during the filing periods for the sixth and seventh compensable quarters, the hearing officer did not find the claimant's testimony persuasive. We note that the first employment contact during the sixth quarter filing period was made on November 18, 1998, approximately 60 days after the beginning of the filing period. Although the claimant testified that he sought employment at 25 places of employment during the filing period for the seventh quarter, the hearing officer determined that the claimant's efforts did not establish good faith.

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 no ability to work during the fifth quarter filing period and made a good faith effort to obtain employment commensurate with his ability to work, that the claimant had some ability to work during the sixth and seventh quarter filing periods and did not make a good faith effort to obtain employment commensurate with his ability to work, that the claimant is entitled to SIBS for the fifth quarter, that the claimant is not entitled to SIBS for the sixth and seventh quarters, and that the claimant has not permanently lost entitlement to SIBS.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge