

APPEAL NO. 991559

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 seventh compensable quarter. In his appeal, the claimant challenges the hearing officer's determinations that he did not make a good faith effort to find employment commensurate with his ability to work, that his unemployment is not a direct result of his impairment, and that he is not entitled to SIBS for the seventh quarter. The respondent (carrier) replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The records of the Texas Workers' Compensation Commission (Commission) reflect that the hearing officer's decision and order was distributed to the parties on July 8, 1999. The claimant's appeal indicates that she received the decision on July 13, 1999. The claimant's deadline to file her appeal was 15 days later, July 28, 1999. Section 410.202(a). The claimant's appeal was mailed on July 19, 1999, and received by the Commission on July 22, 1999, and, thus, was timely filed. On August 6, 1999, claimant mailed another letter which was not timely as an appeal and will not be considered.

The parties stipulated that on _____, the claimant sustained an injury in the course and scope of employment resulting in an impairment rating of 15% or greater; that the claimant did not commute any portion of impairment income benefits; and that the filing period for the seventh compensable quarter began on January 27, 1999, and ended on April 27, 1999. The claimant testified that he injured his neck, right shoulder, hand and wrist while taking out trash for his employer. According to the claimant, he continues to suffer from the effects of the injury and has problems with the right side of his body. The claimant testified that his treating doctor is Dr. K.

The claimant testified that he obtained a job working part time at a fast food restaurant on June 8, 1999, after the filing period. The claimant testified that during the filing period he was released to return to work and sought employment at over 30 locations; that he cooperated with the Texas Rehabilitation Commission and had a vocational assessment performed which indicated he could work with light-duty restrictions; that he received job leads from the Texas Workforce Commission (TWC) and the newspaper; and that he is attending classes to get his GED. The carrier asserts that the claimant has been released to return to full-duty work by Dr. K, that the claimant did not make any contacts after April 14, 1999, and that there are inconsistencies between the claimant's testimony and the evidence concerning the contacts made.

The carrier presented the report of Dr. W dated September 26, 1998, prior to the filing period. Although the hearing officer's decision reflects that Dr. W is the claimant's treating doctor, the record does not reflect the role of Dr. W. Dr. W indicates that the claimant's condition is compatible with a release to work at full-duty level with no repetitive lifting greater than 20 to 30 pounds. Dr. K's records do not reflect the claimant's work status during the filing period and the claimant testified that he did not discuss his ability to work with Dr. K during this time frame. On May 3, 1999, Dr. K states:

[The claimant] was told that I really do not know what to do for him or how to try to help him. I further told him that I felt he was capable of engaging in some type of gainful employment.

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. 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 hearing officer considered all of the evidence and determined that the claimant did not make a good faith effort to find employment commensurate with his ability to work and his unemployment was not a direct result of his impairment during the seventh quarter filing period. The hearing officer's decision states that the claimant could not explain how he made job contacts from the TWC leads; that his Statement of Employment Status (TWCC-52) indicates that he made contact with some potential employers before he printed out the information from the TWC; that the adjuster's notes reflect that many of the alleged job contacts could not be confirmed; and that the evidence indicates that the claimant has not attended any GED classes since enrolling on December 8, 1998. The record reflects the claimant did not testify as to his work restrictions, if any, and there was no evidence presented to indicate that the claimant could not reasonably perform the type of work that he was doing at the time of the injury.

Whether the claimant's unemployment was a direct result of his impairment and whether the claimant made a good faith effort to seek employment commensurate with his ability to work during the filing period for the seventh quarter presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the weight and

credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge