

APPEAL NO. 991573

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 6, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 14th compensable quarter but that he is not entitled to SIBS for the 15th compensable quarter. Appellant self-insured ("carrier" herein) appeals the award of SIBS for the 14th quarter on sufficiency grounds. The file does not contain a response from claimant. There was no appeal regarding the 15th quarter.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant met the good faith and direct result SIBS requirements for the 14th quarter. Carrier asserts that claimant was capable of doing some work during the filing period, that claimant must have known that he had been released to do some work during the filing period, that claimant applied for only four jobs at places that did not have openings, that the job applications could not be verified, and that claimant self-limited his job search by looking for work only with employers close to his home.

The parties stipulated that: (1) claimant sustained a compensable injury on \_\_\_\_\_; (2) claimant had an impairment rating (IR) of 22%; and (3) he did not commute any of his impairment income benefits (IIBS). The filing period for the 14th quarter was from approximately August 29, 1998, to November 28, 1998.

Claimant testified that in \_\_\_\_\_, he was working as a concrete finisher when he sustained a compensable neck, chest and arm injury when he was hit by a release of concrete. An October 13, 1994, report from the designated doctor states that: (1) claimant underwent arthroscopic excision of the distal clavicle and debridement of the glenohumeral joint on February 8, 1994; (2) claimant underwent an acromioplasty with subacromial bursectomy; (3) claimant had some impairment for his lumbar and cervical spine injury and an MRI showed probable disc bulging at multiple levels in his lumbar and cervical spine; (4) claimant underwent a surgical procedure of the right upper extremity to correct ulnar neuritis; and (5) claimant had reduced fine movements and motor control of the left hand, and some median nerve involvement above the left mid-forearm. Under diagnoses, the designated doctor included: (1) neuropathy, left upper extremity, status post-surgical procedure times two; (2) right ulnar nerve neuritis, status post-surgical procedure; (3) degenerative changes of the lumbar and cervical spine with probable disc bulging; and (4) chronic pain syndrome. The designated doctor noted that claimant had "interosseal wasting of the left hand" with evidence of decreased sensory and motor function. In a June 29, 1998, report, Dr. R, who treated claimant after 1997, indicated that he is not sure whether claimant is employable; that claimant may need a vocational rehabilitation

consultation, training, or work hardening; that if there is a position that claimant can physically do, training should be provided; and that “otherwise, I can’t see how [claimant] would ever be employed again.” In an August 27, 1998, report, Dr. L stated that claimant’s upper extremities appear “appropriate,” that there is no evidence of extrinsic weakness of claimant’s hands; that claimant displayed a substantial amount of functional overlay; that claimant is capable of returning to light or medium-duty work; and claimant’s neck and back problems are due to the normal ageing process. In an October 7, 1998, report, Dr. R stated that: (1) he reviewed Dr. L’s conclusions; (2) he disagreed that claimant had no atrophy and that his own examination in 1997 revealed atrophy of the first dorsal interosseous muscle of the left hand; (3) sensation to pinprick was diminished in the left ulnar nerve distribution; (4) he disagreed with Dr. L, and he believes claimant cannot return to work as a cement finisher; (5) light-duty work in a sedentary position would be appropriate for claimant; (6) a short course of reconditioning physical therapy is recommended; (7) claimant is “ill-suited” to find employment on his own; and (8) as a minimum, claimant would require a vocational rehabilitation consultation and “possibly training.” A December 9, 1998, disability certificate states that claimant is “released for light duty while sitting only.” A January 1999 emergency room report states that claimant presented complaining of back pain and lower extremity swelling, and that he was given Vicodin. A May 1999 letter from Dr. C states that claimant is “totally incapacitated.”

Claimant’s Statement of Employment Status (TWCC-52) for the 14th quarter states that he earned no wages. Claimant listed nine job contacts, some of which were with the same employer. It appears from the TWCC-52 and claimant’s testimony that the work sought was sweeping, cleaning, counseling at a homeless center, and any other available work. Claimant testified that he still suffers the effects of his compensable injury in that his legs swell, his fingers are in a “claw,” and that his hand swells. Claimant said he cannot drive because of his hand condition. Claimant said he began seeking work on his own in September 1998 because he felt like he could do something and he did not wish to be idle while in pain.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage 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. Whether good faith exists is a fact question for the hearing officer. Texas Workers’ Compensation Commission Appeal No. 94150, decided March 22, 1994. The absence of a doctor’s release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Texas Workers’ Compensation Commission Appeal No. 941382, decided November 28, 1994.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the

evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer heard claimant's testimony about the continuing effects of his condition and his search for work, and also had before him the medical evidence regarding claimant's injury and impairment. The hearing officer noted that: (1) the credible evidence from claimant's treating doctor indicated that claimant had some ability to perform light work; (2) claimant did not find out that he had been released to work until the last month of the filing period in question; (3) claimant "believed that he could do some work and made an unsuccessful effort to locate a job"; and (4) after claimant found out he had been released to return to work, he increased his efforts to find a job. Our review of the record does not indicate that the hearing officer's good faith determinations regarding the 14th compensable quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. Therefore, there is no basis for disturbing his decision on appeal. The hearing officer could consider the medical evidence regarding claimant's actual ability to work in assessing whether the job search effort claimant made was in good faith and "commensurate with" his ability to work. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. The hearing officer's direct result determination is also sufficiently supported by evidence that claimant sustained a serious injury with lasting effects and that, during the filing period, claimant could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

Carrier complains that the hearing officer found that claimant acted in good faith during the 14th quarter, but found that essentially the same job search effort during the 15th quarter did not constitute good faith. The hearing officer noted that claimant believed he could do some work during the filing period for the 14th quarter, and that he looked for work. The hearing officer obviously considered as a factor the fact that claimant did not know he had been released to return to work until the last month of the filing period for the 14th quarter. The Appeals Panel has indicated that an employee's receipt of a report bearing his doctor's release to return to work is not required to trigger the duty to attempt to obtain employment. Texas Workers' Compensation Commission Appeal No. 971209, decided August 11, 1997. However, the hearing officer in this case did not state that claimant's lack of knowledge about the work release during part of the filing period in question excused claimant from making a job search. In fact, the hearing officer noted that claimant himself thought he could do some work, so the issue of whether claimant knew of the work release is less consequential. We believe that the hearing officer could appropriately consider, as a factor regarding the 15th quarter, whether claimant's job search efforts did sufficiently increase once he knew that he had been released to work. Although the lack of knowledge about a work release would not excuse a claimant from looking for work, a claimant's actual knowledge of a work release may be considered regarding whether claimant made a good faith effort in his search for employment. We

perceive no error in the hearing officer's determinations regarding the 14th quarter, as compared to his determinations regarding the next quarter.

We affirm the hearing officer's decision and order.

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Judy Stephens  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge