

APPEAL NO. 991588

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 July 1, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second, third, fourth, and fifth compensable quarters, and whether the respondent (self-insured) was relieved of liability for the fifth compensable quarter because of claimant's failure to timely file the application for SIBS. The hearing officer determined that the claimant did not attempt in good faith to obtain employment commensurate with her ability to work and thus was not entitled to SIBS for the quarters in issue. The hearing officer also determined that the claimant did not timely file an application for fifth quarter SIBS until April 1, 1999, and that she would not be entitled to fifth quarter SIBS until that date even if she were otherwise entitled to SIBS for the fifth quarter. The claimant has appealed, attaching additional documents and evidence to her appeal, and urging that if all her evidence had been admitted at the CCH, she believes there would have been a different result. She reurges that she was not released to work for the second quarter, that she was employed during the third quarter, and that during the fourth and fifth quarters she was enrolled in college courses. The self-insured responds, objecting to the consideration of new evidence and urging that there is sufficient evidence to support the decision of the hearing officer.

DECISION

Affirmed.

Not in dispute was the fact that the claimant sustained a bilateral carpal tunnel syndrome injury on _____, and was ultimately assigned a 22% impairment rating (IR) which included a rating for depression from her _____ injury. The claimant is seeking SIBS for the second through fifth compensable quarters, the filing periods for which were stipulated as, respectively: February 25 through May 26, 1998; May 27 through August 25, 1998; August 26 through November 24, 1998; and November 25, 1998, through February 23, 1999.

Succinctly, the claimant testified that prior to August 5, 1998, when she was released to work by her doctor, Dr. M, that she was totally unable to work. However, she acknowledged that a letter from Dr. M dated January 9, 1997, stated that it would benefit the claimant to work in a light-duty environment and that it was suggested she return to a four to six-hour workday at that time. Dr. M later indicated that claimant had requested the release and that he did not believe she could return to her previous position. In any event, after August 5, 1998, the claimant stated that she applied for a short-term position at the state fair and worked for three weeks starting in late September 1998. During the filing period for the fourth quarter, the claimant worked part time for a couple of days and applied for some eight jobs with the self-insured on the same day. During the filing period for the fifth quarter, the claimant sought employment, according to a Statement of Employment Status (TWCC-52), at four prospective employers, and attended classes at a college. She

testified that during the filing periods involved she attended some classes at various times and that she is now enrolled in a full-time retraining program under the auspices of the Texas Rehabilitation Commission.

The claimant testified that she is and has been in pain from her injury and that she also suffers depression that has limited her ability to work. She testified, and medical records show, that she has been diagnosed with and treated for depression and was assessed an IR of 10% for the depression. Several medical reports concerning the claimant's depression were in evidence. A psychiatric evaluation by Dr. L dated January 8, 1998, states that "it does not appear that it is her mental health condition that is preventing her from being gainfully employed at this time, rather her overall physical condition." A psychiatric report from Dr. C dated April 24, 1998, contains comments by the claimant as to not going back to work until the "system does the right thing" (claimant testified that this was not true and that she did not so state), and concludes that while the claimant does fit the diagnostic criteria for Major Depressive Disorder, recurrent, with moderate features, and would benefit from ongoing treatment with an anti-depressant medication, claimant has unrealistic expectations concerning her disability, as well as her previous employer, the Texas Workers' Compensation Commission (Commission), and individual psychotherapy.

Initially, the additional documents and evidence attached to the claimant's appeal are not considered in our review of this case. The Appeals Panel generally reviews only the record and evidence developed at the CCH. Texas Workers' Compensation Commission Appeal No. 93682, decided September 20, 1993; Section 410.203. We do not find that the matters submitted warrant a remand or that they would otherwise likely produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. With regard to the five pages of Claimant's Exhibit No. 8 that were not admitted, the hearing officer stated that they involved training programs the claimant entered after any filing period involved in this case. The hearing officer stated in his decision that the claimant was currently enrolled in a full-time retraining program but that she was not during any of the filing periods. Although there was a reasonable basis for the hearing officer to exclude these particular items, even if they had been erroneously excluded, there is no showing, and nothing is otherwise apparent, that there is any likelihood of a different result being reached if they had been considered. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer also found from the evidence before him that claimant had not attempted in good faith to obtain employment commensurate with her ability to work. This is a requirement for establishing an entitlement to SIBS. Section 408.142. In his discussion, the hearing officer also stated that he found from the evidence that the claimant had some ability to work. There is medical evidence that supports this determination, although there is also other evidence, including the claimant's testimony, to the contrary. This was a conflict for the hearing officer to resolve based on all the evidence before him. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer also states that during the filing periods in issue, the claimant worked for a few weeks, looked for a few jobs, and took a

couple of one-day classes. He concluded that these, taken separately or together, did not constitute a good faith effort to find work during any of the filing periods. Whether good faith is shown is generally a factual issue for the hearing officer's resolution. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have repeatedly held that the pattern of a search with regard to timing, diligence, and forethought is pertinent and a matter to be considered in addressing this issue. Texas Workers' Compensation Commission Appeal No. 982987, decided February 4, 1999; Texas Workers' Compensation Commission Appeal No. 982210, decided November 4, 1998. From our review of the record, we cannot conclude that the findings and conclusions of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, our standard of review on evidence sufficiency issues. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Accordingly, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge