

APPEAL NO. 991627

Following a contested case hearing held on June 30, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 12th compensable quarter. The appellant (carrier) has requested our review, asserting that the hearing officer's findings that during the 12th quarter filing period claimant's unemployment was a direct result of her impairment from the compensable injury and that she made a good faith attempt to obtain employment commensurate with her ability to work are against the great weight of the evidence. The carrier maintains that claimant has simply developed a continuing habit of "perpetuating a sick role." Claimant has filed a response, urging the sufficiency of the evidence to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for the _____, injury to claimant; that claimant had an impairment rating (IR) of 15% or greater from the _____, injury; that claimant did not elect to commute any portion of her impairment income benefits (IIBS); and that the 12th compensable quarter is from March 15 to June 13, 1999. The parties represented that the filing period for the 12th compensable quarter ran from December 15, 1998, through March 14, 1999.

Claimant testified that she is 46 years of age, has a 10th grade education, was a manager of a (employer) at the time of her compensable injury, and that most of her work experience has been in sales. According to the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), claimant slipped on a metal (drain) lid and fell forward to the floor on _____, injuring her head, jaw, and knee and sustaining a hernia. A Texas Workers' Compensation Commission (Commission) record reflects that this was claimant's fourth workers' compensation claim. Emergency room records of _____, reflect that claimant was diagnosed with inguinal hernia, forehead contusion and mild concussion, and left knee strain, and was treated and released on _____. Claimant said that Dr. SM, whom she sees monthly, is her "main" treating doctor, that she sees Dr. RM monthly for her depression, and that she sees Dr. L for her knee. The latest report of Dr. L in evidence is dated July 21, 1998. She also said she attends a pain control group on an as-needed basis.

Claimant further testified that although no doctor has released her to return to work, she did begin to look for work, apparently sometime in the 12th quarter filing period, after being advised, for the first time since she began drawing SIBS in 1996, that she was required to look for work. She said she looked for jobs in newspapers and on bulletin boards; that she prepared a resume and distributed it; and that she made more than 30 job contacts but was not successful in obtaining employment. She said she was offered one

interview by a department store but could not keep the appointment because she had a seizure and the interview was not rescheduled. She also stated that she had not been referred by the Commission to the Texas Rehabilitation Commission nor is she registered with the Texas Workforce Commission.

Though claimant indicated she was not aware of having been given any restrictions by her doctors, she stated that she cannot perform heavy lifting or pushing nor can she squat because of her knee injury or drive for more than 20 to 30 minutes. She also indicated that she has not undergone a functional capacity evaluation.

Claimant's Statement of Employment Status (TWCC-52) reflects that between February 7 and 24, 1999, she contacted 33 businesses, seeking mostly, but not exclusively, sales positions. Attached to her TWCC-52 were copies of applications she completed for six businesses, a list of the names of the persons she contacted at the businesses, copies of the newspaper advertisements to which she responded, and a note concerning the time of her interview at the department store.

Dr. SM wrote on January 28, 1999, that claimant's pain levels are increased with sitting, standing, walking, twisting, turning, and riding in a car and that, because of her ongoing pain symptoms, she cannot sit, stand, walk, push or pull for long periods of time and that she is unable to work not only because of physical limitations but also because of high levels of anxiety and depression. Dr. SM wrote on March 23, 1999, that claimant sustained multiple work-related injuries, has not worked since the initial injury, and "remains unable to work at this time, secondary to back pain, neck pain, knee pain and cognitive impairments." This letter is similar in content to Dr. SM's October 3, 1996, letter. Dr. SM enclosed the report of his March 2, 1998, examination which stated the diagnoses as musculoskeletal spasm, cervical and lumbosacral spine; headaches, muscle contraction and possibly vascular in type; status post left knee arthroscopic surgery-1993, 1995; Grade IV chondromalacia left patella femoral joint; status post inguinal hernia repair-1994; depression secondary to neck pain and low back pain; and obsessive compulsive personality disorder with panic attacks.

Dr. RM wrote to Dr. SM on November 4, 1997, stating that claimant identifies herself as a "cripple," that her case complexity has been multiplied by her use of opiate and synthetic opiate pain killers which have prevented any meaningful psychotherapy; that his goal is to return claimant to the workplace and that to do so, claimant must be maintained in a drug-free status; that claimant does not display the usual symptoms and signs of chronic pain; and that Dr. RM is requested to avoid treating her with addictive or mind-altering drugs. Dr. RM wrote a "To Whom It May Concern" letter on March 11, 1999, stating that claimant's diagnoses include obsessive compulsive disorder with panic and phobias, major depressive disorder with psychotic features, CP seizures, chronic pain, acid stomach, and frontal lobe injury. He further stated that she has seizures frequently, sometimes daily; that she experiences slow mentation, psychomotor retardation, and short-term memory loss; and that in his opinion, she "is unable to work and will continue to be unemployable indefinitely."

On her resume, claimant stated the following: "Health: Excellent."

Dr. P, who is board certified in neurology and psychiatry and whom the parties represented as having been assigned by the Commission to perform an independent medical examination, reported to the Commission on September 24, 1998. Dr. P stated that he reviewed claimant's records and examined her; that her affect was distinctly histrionic; that she could not complete the spelling of "cat" but recalled her phone number; that the multiplicity of mental and pseudo-neurological findings point to Factitious¹ Disorder with both psychological and physical symptoms; and that over a period of years, claimant "has become entrenched in the habit of perpetuating the sick role" and "her symptoms and seeming disability have become a solution to her problems rather than a consequence of her injury." Dr. P concluded that further treatment, physical and psychological, will further entrench claimant's factitious behavior, that "any symptoms directly due to her compensable injury have . . . long past dissipated," and that he sees "no relationship between the nature of her injury and the extensiveness of her variegated current symptoms." He further concluded that with discontinuation of medical treatment and only supportive psychotherapy, claimant is capable of returning to the workforce, and that "if she continues to profess an inability to do so, her attitude, in his opinion, is related to her own volition and not to any illness factors." Responding to a request to review additional records, Dr. P wrote on April 27, 1999, that there is not the slightest clinical evidence that claimant sustained a closed brain injury and that it is his opinion that "over-diagnosis and over-treatment has [sic] enhanced the diagnosis of Factitious Disorder."

In addition to the dispositive legal conclusion, the carrier challenges the following factual findings:

FINDINGS OF FACT

5. During the filing period for the twelfth compensable quarter Claimant did not earn any wages. Claimant was physically capable of working at least part time in a sedentary capacity. Claimant was not capable of returning to work at her pre-injury job earning her pre-injury wages from the _____ injury and its impairment in accordance with the reports of [Dr. SM] limiting her sitting, standing, walking, pushing and pulling, that are related to Claimant's injury and its impairment. Even though Claimant may have had other conditions that limit her ability to work, the specific physical limitations in part prevent Claimant from returning to full time work earning pre-injury wages, and therefore Claimant's unemployment was a direct result of impairment.
6. During the filing period for the twelfth compensable quarter Claimant made 33 job contacts. Claimant made good faith efforts to seek

¹Factitious is defined as "artificial; not natural" in DORLAND'S ILLUSTRATED MEDICAL DICTIONARY. 604 (28th ed. 1994).

employment commensurate with her ability to work during the filing period for the twelfth compensable quarter.

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 employee's 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. 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. We have also observed with regard to satisfying the "direct result" criterion that a claimant need not establish that his or her impairment is the only cause of the unemployment or underemployment but that it is a cause (Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996), and that a finding that the unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury (Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996).

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 including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing body, the Appeals Panel will not disturb the challenged factual 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge