

APPEAL NO. 991686

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 21, 1999. With respect to the sole issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 14th quarter. The claimant appeals, urging that he did make a good faith effort to seek employment commensurate with his ability to work. The respondent (carrier) replies that the evidence supports the hearing officer's decision and it should be affirmed.

DECISION

Affirmed, as reformed.

The parties stipulated that the claimant sustained a compensable lower back injury on \_\_\_\_\_; that the claimant has an impairment rating of 24%; that the claimant did not commute any portion of his impairment income benefits; that the 14th quarter started May 16, 1999, and ended August 14, 1999; and that the qualifying period for the 14th quarter started on February 1, 1999, and ended on May 2, 1999. The claimant testified that he sustained a back injury as a result of excessive lifting on a production line. The claimant's treating doctor is Dr. W, who referred the claimant to Dr. P. During the qualifying period, the claimant had a lumbar discogram and a lumbar epidural injection, was prescribed Oxycontin for pain, and his dosage of Effexor was increased. The claimant testified that his back injury causes pain from the waist down to his feet and that his pain has increased after the lumbar discogram. Dr. P's medical records indicate that the claimant's pain is caused by three discs and that the claimant is not a surgical candidate. Dr. P has indicated that the claimant is able to work at a sedentary job with occasional lifting up to 10 pounds, alternating sitting and standing, and that he should avoid repetitive lumbar flexion.

The claimant testified that during the qualifying period he looked for work every week within his restrictions and followed up on approximately six of the contacts provided by the carrier's vocational case manager, Ms. U. The Statement of Employment Status (TWCC-52) completed by the claimant indicates he sought employment at 21 places. The claimant testified that 12 contacts were follow up telephone calls to potential employers where he had previously submitted applications, and nine contacts were made in person where applications were completed. The claimant emphasized throughout the CCH that his search efforts were hampered by the drug Oxycontin, which Dr. P prescribed and increased in dosage during the qualifying period. According to the claimant, Oxycontin caused him to be "high," dizzy, and unable to function. Dr. P's report dated March 1, 1999, states that Oxycontin does not prevent the claimant from being able to work.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her

ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that “[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e), effective January 31, 1999, provides in pertinent part that “[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.” Since the qualifying period for the 14th quarter began on February 1, 1999, when the new SIBS rules were in effect, entitlement to SIBS for the 14th quarter is determined in accordance with the new SIBS rules.

The hearing officer made findings that during the qualifying period, the claimant contacted approximately 21 potential employers; that of the 21 contacts, approximately 12 were by telephone and were very brief; and that the claimant did not spend sufficient time or energy seeking employment. Although the hearing officer did not make a finding that the claimant sought employment every week of the qualifying period, we can infer such a finding because the claimant's documentation for the 21 contacts indicates the date each contact occurred. In determining whether the claimant made a good faith effort, the hearing officer could consider the amount of time spent in attempting to find employment. See Section 130.102(e)(6). The hearing officer notes that the claimant made approximately one contact every three days.

The hearing officer, in the Statement of the Evidence, states that the claimant did not make a good faith effort commensurate with his ability and Conclusion of Law No. 1 states that the claimant is not entitled to SIBS for the 14th quarter. Finding of Fact No. 9 states that the claimant did make a good faith effort to obtain employment commensurate with his ability. We consider Finding of Fact No. 9 to be in the nature of a typographical error. For this reason, we reform Finding of Fact No. 9 to reflect that the claimant did not make a good faith effort to obtain employment commensurate with his ability.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant has not attempted in good faith to obtain employment commensurate with his ability to work and is not entitled to SIBS for the 14th quarter.

The decision and order of the hearing officer are affirmed, as reformed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge