

APPEAL NO. 991690

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 12, 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 sixth compensable quarter. The claimant appeals the hearing officer's findings that he had the ability to perform some work; that he voluntarily decided to become self-employed by pursuing a private business that was unsuccessful and sporadic; that he failed to provide good business and tax records and failed to document efforts made to develop his business; and that he did not make a good faith effort to obtain employment commensurate with his ability to work. The respondent (carrier) responds that the findings appealed by the claimant are sufficiently supported by the evidence and the decision should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable right shoulder, left knee, neck and psychological injury on _____, with an impairment rating of 24%; that the claimant did not commute any impairment income benefits; that the filing period for the sixth quarter of SIBS was January 7, 1999, through April 7, 1999; and that the sixth SIBS quarter was April 8, 1999, through July 7, 1999. The claimant testified that as a result of the injury, he had rotator cuff surgery to his right shoulder in February 1998. The claimant's treating doctor is Dr. W, who referred him to Dr. C. The claimant testified that he also receives treatment from Dr. S, a psychologist.

The claimant testified that during the filing period he was unable to work, and did not search for employment because of physical and mental problems: a catch in his right shoulder; pain in his neck, back, knee and shoulder; headaches; major depression; and anxiety and panic attacks. The claimant testified that during the filing period he spent 18-24 hours per week gathering an inventory at scrap yards, flea markets, auctions and garage sales, to start a resale shop of collectibles. The claimant did not sell any items during the filing period, establish a telephone number for the business, advertise, or keep a ledger of income and expenses. The claimant testified that if he had sought employment, he would not be hired, and there was no use in looking for work. During the filing period the claimant took care of his three grandchildren, mowed his yard with a riding lawnmower, and took care of a vegetable garden.

Prior to and after the filing period, Dr. W opined that the claimant was unable to work; however, on January 22, 1999, Dr. W opined that the claimant was able to work within the light/medium category. On April 2, 1999, the carrier had the claimant examined by Dr. B. Dr. B reviewed the results of a functional capacity evaluation performed on December 7, 1998, and opined that the claimant could perform light to medium duty work. Dr. B opined that there is no medical reason which would preclude the claimant from

traveling to and from work, being at work, and performing appropriate tasks and duties. Outside the filing period, on July 2, 1999, Dr. C reported that the claimant had complaints of weakness in his right arm and left leg, and numbness and tingling in the arms and hands bilaterally. Dr. C recommended further diagnostic testing, and indicated that the claimant should remain off work until the diagnostic tests are performed.

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. 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." The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994.

On the claimant's Statement of Employment Status (TWCC-52), he checked the block which states "I have not returned to work," and indicated that no job contacts were made. The claimant complains on appeal that the TWCC-52 sent to him did not contain anything about proof of self-employment; that the carrier may have deliberately sent him a misleading or incorrect form; and that the carrier deliberately sent the TWCC-52 late. The TWCC-52 is the Texas Workers' Compensation Commission's required form for applying for SIBS. Rule 130.104(b); Rule 130.101. The TWCC-52 states "[w]ere you self-employed during the 90 days before the start date of this quarter? If yes, show your gross weekly wages as the total amount of income received from self-employment. You may also attach additional information regarding the normal and fixed expenses of the business." The claimant completed the correct form, a TWCC-52, which did contain information concerning self-employment. Whether the carrier sent the TWCC-52 late to the claimant was not an issue at the hearing, was not litigated, and will not be addressed on appeal.

The claimant asserted two inconsistent theories of entitlement--that he had no ability to work and that he was self-employed during the filing period. The hearing officer determined that the claimant had the ability to perform some work during the filing period. We have previously recognized that self-employment may satisfy the SIBS good faith requirement. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. In doing so, we noted that in self-employment cases, the claimant must establish that he made efforts to solicit business or customers in the filing period in order to sustain his burden of proof. Texas Workers' Compensation Commission Appeal No.

94918, decided August 26, 1994; Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995. The claimant did not provide any documentation regarding his resale shop business, and the hearing officer found that the claimant did not make a good faith attempt to obtain employment commensurate with his ability to work.

Whether the claimant had no ability to work at all during the filing period for the sixth quarter, or whether the claimant had some ability to work and made a good faith effort to seek employment commensurate with his ability to work 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).

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the document the claimant has attached to his appeal, but is not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the document attached to the appeal which was not offered at the hearing does not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to the claimant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge