APPEAL NO. 991736

A contested case hearing (CCH) was held on July 2, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with (hearing officer) presiding as hearing officer, to resolve the sole disputed issue, namely, whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 10th compensable quarter beginning February 27 and ending May 28, 1999. The hearing officer determined the issue adversely to claimant who has requested our review, indicating not only her disagreement with the hearing officer's determination but also her dissatisfaction with the representation she received from her attorney. The respondent (self-insured) first asserts in response that claimant's request for review is untimely, and, alternatively, that the hearing officer's determination is sufficiently supported by the evidence.

DECISION

Affirmed.

Claimant testified that during the filing period for the 10th compensable quarter, she drove a school bus for the (employer); that in addition to her regular runs, she sometimes made other short trips but did not drive the bus on out-of-town trips; that she worked from 25 to 30 hours per week at this employment and was considered a full-time employee by the employer; and that her treating doctor, Dr. RM, recommended that she not work more than 30 hours per week. Dr. RM wrote on March 17, 1999, that he is treating claimant's fibromyalgia; that she has been able to engage in jobs such as that of school bus driver; that she is quite capable of working any sedentary job, as in a secretarial position; and that she should have permanent restrictions including working only 30 hours a week with no lifting, pushing or pulling above 10 pounds, no standing for more than 30 minutes at a time, and no bending, stooping or kneeling or use of stairs. Claimant also stated that the number of school days per month varied. She said she had previously worked as a nurse's aide and a home health care aide; that she has taken two computer skills courses; and that she will be taking an office procedures skills course in the fall.

According to the August 27, 1998, report of a functional capacity evaluation (FCE), claimant is able to work at a sedentary physical demand level "for an 8 hour day . . ." and while claimant exhibited symptoms exaggeration and inappropriate illness behavior, which is observable and measurable out of proportion to the impairment, her FCE was nonetheless valid.

Dr. P, who conducted an independent medical examination of claimant on August 29, 1998, noted that claimant manifested four out of five Waddell signs, showed some pain behavior during the examination, and clearly manifested symptom magnification, chronic pain behavior, and functional overlay. He said he agreed with the FCE report that claimant has the ability to work an eight-hour day in a sedentary to light capacity.

The copy of a Statement of Employment Status (TWCC-52) for the 10th quarter which claimant introduced (Claimant's Exhibit No. 4) reflects the start date as "2/16/99" and the end date as "5/17/94," the discrepancy between these dates and those in the issue as set out in the benefit review conference report was not mentioned at the CCH. This exhibit further reflected that claimant returned to work on "8-17-97"; that she earned $6.25 per hour; and that for the month ending "10-31-1998" she earned $593.75; for the month ending "11-30-99 [sic]" she earned $919.06; and that for the month ending "12-31-99 [sic]" she earned $59.93. On the second page of her TWCC-52 exhibit, which pertains to applications for employment during the 90-day filing period, claimant's entries reflect that on "8-11-97" she contacted Mr. M with the employer for a bus driver job. On the third page, also pertaining to applications for employment, claimant listed Ms. B as the person contacted at Peterson Home Health (home health care agency) and the job applied for as "sitter." This was the only job contact listed on that page. Claimant said, however, that she had applied for a teacher's aide job, possibly in January 1999 but she was unsure of the date. During her cross-examination, the carrier showed claimant a page from a TWCC-52 represented to be claimant's TWCC-52 filed for the 11th quarter (Carrier's Exhibit No. 12). This page reflects four job contacts made on March 21, April 5, April 7, and April 12, 1999, respectively, including the teacher's aide job contact. It also reflects the home health care agency and the date by that entry as "1998-1999." Page three of the carrier's exhibit reflected one contact on "2-99" with Friends of Hospice (a hospice) for a sitter job. Claimant denied that these entries were in her writing. On redirect, however, claimant stated that page two of Carrier's Exhibit No. 12 is page two of Claimant's Exhibit No. 5 and should be so considered.

Claimant also introduced a hospital list of persons including herself who were not employees but who could be contacted for patient sitting. She said the list was updated in January 1999.

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." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to [SIBS] for any quarter claimed." Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The hearing officer found that claimant is able to work 30 hours a week in a sedentary to light duty capacity according to the medical restrictions resulting from her compensable injury; that during the filing period, she worked for the employer as a bus driver and her hours averaged less than 15 hours a week; that she made no effort to seek additional employment with other potential employers during the filing period; that she did

not make a good faith effort to seek employment during the filing period; and that her "unemployment [sic] during the filing period was not a direct result of the impairment from her compensable injury." Since claimant did have some employment during the filing period, this is a case of underemployment.

In her discussion of the evidence, the hearing officer states that claimant had a duty to seek employment in addition to the part-time work she was performing for the employer. She also commented that she did not find claimant to be a credible witness and that the content of claimant's TWCC-52 "belied any assertions she made in her testimony that she sought work during the filing period." "In short," said the hearing officer, "she did not make a good faith effort to seek employment during the filing period and the hours she worked were far less than the number of hours she could have worked and still be in compliance with her medical restrictions."

Claimant makes a number of complaints about the conduct of her hearing by her representative at the hearing, attaches various documents which she feels should have been offered below, and asserts that she received his letter resigning from her representation before the CCH. The quality of claimant's representation at the hearing is not, in this case, a matter of which we take cognizance. The reliance on an attorney to preserve a client's rights must be determined on an agency relationship. Texas Employers Insurance Ass'n v. Wermske, 162 Tex. 540, 349 S.W.2d 90 (1961). In Wermske, the Supreme Court of Texas stated "an attorney employed to prosecute a claim for workmen's compensation is the agent of the client, and his action or nonaction within the scope of his employment or agency is attributable to the client." Id. At 95. There is no evidence that the attorney acted deliberately to injure the client or was guilty of bad faith or fraud on the client. *See* Wermske. Under these circumstances, this is a matter to be resolved between the claimant and her attorney. Texas Workers' Compensation Commission Appeal No. 94030, decided February 15, 1994.

Claimant takes specific issue with Finding of Fact No. 1d, a purported stipulation of fact that the parties stipulated "on the record," stating that if claimant is entitled to SIBS for the 10th compensable quarter, the monthly amount would be $401.90. Claimant attaches to her appeal a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated "5/27/97" stating the amount of payment as $876.15, ostensibly for third quarter SIBS, and asserts that this figure should be the monthly amount. Neither this document nor the other documents attached to claimant's request for review will be considered by the Appeals Panel for the first time on appeal as they do not meet the criteria for newly discovered evidence. *See* Section 410.202(a)(1) and Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. The tape-recorded record of the CCH does not contain any stipulations of fact let alone the four set out by the hearing officer in Finding of Fact No. 1a - d. We are not constrained to reverse and remand this case as we otherwise might, however, because we affirm the ultimate determination of the hearing officer in this case and because one of claimant's exhibits (the last page of Claimant's Exhibit No. 1), is a SIBS worksheet stating the monthly payment as $401.90.

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 (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). 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

Alan C. Ernst
Appeals Judge