

APPEAL NO. 991959

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 4, 1999. (Hearing Officer) She determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first, third, fifth, sixth, eighth, ninth, 10th, 11th, 12th, 13th, and 14th quarters. Claimant appeals the determinations that: (1) claimant was not unemployed or underemployed as a direct result of his impairment for the first, third, fifth, sixth, and eighth quarters; and (2) that claimant is not entitled to SIBS for the first, third, fifth, sixth, eighth, ninth, 10th, 11th, 12th, 13th, and 14th quarters. Respondent self-insured ("carrier" herein) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

This case concerns the SIBS direct result criterion and whether the claimant documented that he was underemployed during certain filing periods. There was evidence that claimant applied for the first six quarters all at once in March 1999 because he did not find out that he was eligible for SIBS until that time. Claimant contends that the hearing officer "erred in finding of fact number four when she found that claimant was not . . . underemployed as a direct result of his impairment during the first, third, fifth, sixth, and eighth quarter SIBS filing periods." The "old" SIBS rules apply to these quarters. The "old" SIBS rules apply to this case. See Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999. Claimant contends that he proved that he was underemployed during the filing periods in question because he testified that he was unable to work at times due to back pain from his injury.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage (AWW) 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.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's IR was 22%; (3) claimant did not elect to commute his IIBS; (4) the filing period

for the first quarter was from December 20, 1995, to March 20, 1996; (5) the filing period for the third quarter was from June 20, 1996, to September 18, 1996; (6) the filing period for the fifth quarter was from December 19, 1996, to March 19, 1997; (7) the filing period for the sixth quarter was from March 20, 1997, to June 18, 1997; and (8) the filing period for the eighth quarter was from September 18, 1997, to December 17, 1997. Claimant was working as a painter when he was injured in 1993. Claimant said he injured his back, shoulders, and ankle when he fell backwards off a ladder and landed on a cement floor. Claimant underwent ankle surgery in 1994 and underwent lumbar surgery on November 6, 1998, during the filing period for the 12th SIBS quarter.

The hearing officer summarized the evidence in her decision and order. Briefly, the parties stipulated that claimant was not entitled to SIBS for the second, 4th, and 7th quarters because "he was fully employed." The hearing officer determined that claimant "made a good faith effort to obtain employment during the first, third, fifth, sixth, and eighth quarter SIBS filing periods" The hearing officer found against the claimant on the direct result criterion for these five quarters because claimant did not provide adequate documentation that he was underemployed during these filing periods.

Claimant testified regarding his employment during the filing periods for the first, third, fifth, sixth, and eighth quarter filing periods. Claimant was unable to remember the periods that he worked and the periods when he said he was unable to work due to back pain. Claimant testified that he obtained his check stubs from his employer so that he could document his earnings during these five filing periods in question. However, as stated by the hearing officer, claimant did not provide all of his check stubs and did not clearly explain why he had no earnings during certain weeks of these five filing periods. It was clear that claimant was unable to remember the exact circumstances regarding his employment during these filing periods in question. The check stubs in the record show that claimant was not underemployed during the filing period for the eighth quarter in that he earned more than 80% of AWW wage. The record supports the hearing officer's determination that claimant did not provide sufficient documentation for his earnings for the first, third, fifth, sixth, and eighth quarter filing periods, as required by the definition of "Statement of Employment Status" in Tex. W.C. Comm'n, 28 Tex. Admin. Code § 130.101. Therefore, the hearing officer determined that he did not show that he was underemployed. See Texas Workers' Compensation Commission Appeal No. 970428, decided April 17, 1997.

The determination that claimant is not entitled to SIBS for the first, third, fifth, sixth, and eighth quarters is sufficiently supported by the direct result findings and the fact that claimant did not provide sufficient supporting documentation to show the wages he earned during the applicable filing periods. Claimant did not show that his underemployment was a direct result of his impairment because he did not show that he was underemployed. The question of underemployment is one of fact for the hearing officer to determine. See Texas Workers' Compensation Commission Appeal No. 982146, decided October 26, 1998. After reviewing the record, we conclude that the hearing officer's direct result determinations regarding the first, third, fifth, sixth, and eighth quarters are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Claimant contends the hearing officer “erred in conclusion of law number four when she ruled that claimant is not entitled to [SIBS] for the third, fifth, sixth, eighth, ninth, 10th, 11th, 12th, 13th, and 14th quarters.” We have affirmed the direct result determinations regarding the first, third, fifth, sixth, and eighth quarters; therefore, claimant is not entitled to SIBS for those quarters. He is also not entitled to SIBS for the second, fourth, and seventh quarters. As noted by the hearing officer, claimant was not entitled to four consecutive prior SIBS quarters. Pursuant to Section 408.146(c), an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. Texas Workers’ Compensation Commission Appeal No. 990897, decided June 9, 1999. Therefore, he is also not entitled to SIBS for the ninth, 10th, 11th, 12th, 13th, and 14th quarters and we affirm the hearing officer’s determinations in that regard.

We affirm the hearing officer’s decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge