

APPEAL NO. 992015

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 20, 1999. He (the hearing officer) determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the third quarter. Claimant appeals, contending that the hearing officer erred in determining that his underemployment is not a direct result of his impairment. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not act in good faith, that his underemployment is not a direct result of his impairment, and that he is not entitled to third quarter SIBS. Claimant contends that he was actually employed full time during the filing period and that he felt he could no longer do his former job as a bulldozer operator. Claimant asserts that he is not required to seek a higher-paying position.

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 of at least 15%; (2) not returned to work or has earned less than 80% of the 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.

If there are job restrictions due to impairment from a compensable injury, then a hearing officer should consider whether any unemployment could be at least a direct result of the impairment from the compensable injury. A claimant need only prove that the unemployment or underemployment is a direct result of the impairment, not that it is the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996. A direct result determination in favor of a claimant may be sufficiently supported by evidence that claimant sustained a serious injury with lasting effects and that, during the filing period, the claimant could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

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.

Claimant testified that he sustained a compensable injury on _____, when a rock flew up and hit his eye while he was operating a bulldozer. Claimant said he cannot see out of his left eye. Claimant said he was making \$10.00 per hour operating a bulldozer, that the job now pays about \$14.00 per hour, and that he is currently working as a roller operator. Claimant said roller operators make minimum wage, but that he has received a small raise. Claimant said he began working about one month into the filing period in question. Claimant said that his injury affects his ability to operate a bulldozer because he cannot go in reverse to the left. Claimant said that a roller compacts soil and that it is easier to operate. In answers to interrogatories, claimant stated that he did not have any "present medical restrictions from driving or operating machinery because of" his impairment. In a March 26, 1997, letter, Dr. B stated that claimant's injury affected his ability to do his job "the way he was doing it," that his depth perception has been affected, and that depth perception must be relearned and this will "take a little time." In a June 3, 1999, report, Dr. J stated that claimant should be able to drive a bulldozer.

The hearing officer determined that the medical records showed that the claimant's loss of sight in his left eye does not prevent him from working as a bulldozer operator and that claimant did not meet his burden to prove the direct result criterion. The hearing officer noted in his decision that claimant has no restrictions that would prevent him from returning to bulldozer operations and that he had not applied for work as a bulldozer operator.

In this case, the hearing officer could consider that claimant did not have restrictions that prevented him from returning to his former work. The hearing officer could find from the evidence that the reason for claimant's underemployment was not his impairment, but his conscious decision to do different, lesser-paying work. If the claimant had continuing restrictions and could do only limited work, then this would likely indicate that the underemployment is at least a direct result of the impairment. However, the hearing officer was entitled to consider claimant's work ability and lack of restrictions in making his determinations in this case. We conclude that the hearing officer's direct result determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We also affirm the hearing officer's good faith determination. The hearing officer could consider claimant's work ability, his job search, and employment in determining that claimant did not make a good faith effort to find work commensurate with his ability to work.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR IN PART, DISSENT IN PART:

I agree with the majority opinion and the hearing officer on application of the "direct result" criterion to the facts. However, the hearing officer's determination that claimant did not make a good faith search for employment is wrong, because it implies that one must search for the same wage, which we have held is not required when one has a full-time job. So I would reverse the hearing officer's finding on good faith, even though it does not change the result--the claimant would still not be entitled to supplemental income benefits (SIBS).

Susan M. Kelley
Appeals Judge