

APPEAL NO. 992017

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 16, 1999. He (the hearing officer) determined that the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 4th, 5th, and 6th compensable quarters; that he is not entitled to SIBS for the 7th and 8th quarters; that he did not permanently lose entitlement to SIBS; and that respondent (carrier) has not waived its right to contest claimant's entitlement to SIBS for quarters four through eight. Claimant appeals only the determination that he is not entitled to 8th quarter SIBS. Carrier responds that claimant's appeal was not timely and also that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and remand.

Carrier contends that claimant did not file a timely appeal. Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was mailed to the claimant on August 24, 1999, with a cover letter dated that same date. Claimant's request for review does not indicate when he received the hearing officer's decision and order. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the decision and order five days after the date it was mailed. Because the fifth day fell on a Sunday, claimant is deemed to have received the decision on Monday, August 30, 1999. A request for review is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and if it is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule 143.3(c). In this instance, the 15th day after the deemed date of receipt was Monday, September 13, 1999. Claimant's request for review was mailed to the Appeals Panel on September 13, 1999, which was within the 15-day period. The appeal was received on September 15, 1999. Therefore, claimant's appeal was filed on time.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBS for the 8th quarter. Carrier contends that the hearing officer improperly considered whether he "ignored several facially-appropriate job leads sent to him by the carrier's vocational-services contractor" even though, he asserts, he did not receive such job leads until after the filing period ended.

The "old" SIBS rules apply to this case. See Texas Workers' Compensation Commission Appeal No. 991762, decided September 30, 1999. 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 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. Although the claimant's good faith effort must, generally, span the filing period, the Appeals Panel has stated that a claimant's job search does not have to encompass a certain length of time. Texas Workers' Compensation Commission Appeal No. 961454, decided September 11, 1996; Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. 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.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's IR was 15% or greater; and (3) claimant did not elect to commute his IIBS. The qualifying period for the eighth quarter was from approximately December 29, 1998, to March 29, 1999.

Claimant testified that he sustained a compensable injury to his neck and low back at work on _____. Claimant said he underwent cervical spinal surgery in the summer of 1997, that he has undergone a "nerve burning" procedure, that he has used a dorsal stimulator, and that he takes medications for pain and for depression that is injury-related. Claimant testified that during the filing period, he had trouble having energy due to his depression, that he had continuing pain, that he developed difficulty swallowing, and that he had symptoms in his arms and legs.

The hearing officer determined that claimant is not entitled to 8th quarter SIBS because he did not make a good faith effort to obtain employment commensurate with his ability to work during the filing period in question. The hearing officer made a direct result determination in claimant's favor, which was not appealed. In the discussion portion of the decision and order, the hearing officer stated:

[I]t appears that for the 8th quarter, the claimant ignored several facially-appropriate job leads sent to him by the carrier's vocational-services contractor - an action which does not bespeak a good faith job search.

Our review of the record indicates that the hearing officer's good faith and SIBS determinations regarding the eighth quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. The record reflects that job leads were sent to claimant in April 1999, which was during the 8th quarter itself, but after the filing period for the 8th quarter had already ended. Therefore, claimant could not have applied for

those jobs. We must remand this case for findings regarding the job leads referenced by the hearing officer and regarding whether claimant “ignored several facially-appropriate job leads sent to him” during the filing period. Carrier contends that the “totality” of the evidence shows that claimant did not make a good faith job search. However, a comparison of the facts regarding some prior quarters, in which SIBS were awarded, with the facts regarding the 8th quarter does not establish that claimant lacked good faith “as a matter of law.” Good faith is a fact issue for the hearing officer to determine. We reverse the hearing officer’s decision and remand this case to the hearing officer to reconsider the good faith and SIBS entitlement issues with regard to the 8th quarter.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission’s Division of Hearings, pursuant to Section 410.202. See Texas Workers’ Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy Stephens
Appeals Judge

CONCUR:

Philip F. O’Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge