

APPEAL NO. 000020

Following a contested case hearing held on December 8, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant) failed to make a good faith attempt to obtain employment commensurate with his ability to work and that he is not entitled to supplemental income benefits (SIBS) for the 10th quarter, June 16 through September 14, 1999. Claimant has requested our review asserting, in effect, that he did make a good faith effort despite the appearances of the evidence. The respondent (carrier) urges that the evidence is sufficient to support an affirmance.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that he did not commute any portion of his impairment income benefits (IIBS); that the 10th quarter was from June 16 through September 14, 1999; and that the qualifying period was from March 17 through June 15, 1999.

We observe at the outset that this is a "new SIBS rules" case. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 *et seq.* (Rule 130.101 *et seq.*).

Claimant testified, through a Spanish-language translator, that on _____, he injured his back at work with a tire weighing approximately 200 pounds; that on May 28, 1996, he had spinal surgery with insertion of hardware; that his occupation was that of a carpenter; that his doctor has restricted him to light-duty work; that he did not work during the qualifying period; and that on October 7, 1999, he commenced employment performing light labor for a contractor, a job he found through a friend.

Claimant introduced an Application for Supplemental Income Benefits (TWCC-52), signed on May 28, 1999, upon which was listed information, including checkmarks, reflecting that between March 11 and May 14, 1999, he made 20 contacts about employment "in person" and that the results were "not hiring." Notably, claimant's TWCC-52 did not reflect that he contacted a prospective employer each week of the qualifying period. With 12 of the businesses listed on the TWCC-52, claimant stated the name of the person contacted and, with the exception of one job described as "stock food" and another as "packer," he described all the jobs applied for as either "labor" or "production." Claimant, who stated that the Texas Rehabilitation Commission could not assist him because of his lack of English-language skills, said that he called the first company listed on the TWCC-52; that he called some of the others but could not identify them; that he would turn the phone over to his wife if English was to be spoken; and that none of the businesses listed on the TWCC-52 asked him to come in. Claimant said he used the telephone because his car was broken and that after it was repaired, he did go in person to

two of the businesses, which he did not identify. He further stated that he received lists of employers to contact from the carrier and that he also inquired about jobs with friends.

Claimant introduced the March 31 and April 21, 1999, reports of Dr. G both of which stated the impression as lumbar radiculopathy. The earlier report stated that claimant would be referred for injections and the latter report stated that claimant has been scheduled for electrodiagnostic testing of the lower extremities. Both reports stated identical physical examination results and both stated the work status as "[claimant] should [sic] is unable to work." The May 4, 1999, report of the electrodiagnostic testing indicated that the results were normal.

The carrier introduced a "TWCC 52 Work Search Verification Report" which stated that 25 employer verifications were conducted; three contacts were confirmed; 19 contacts were denied; three contacts were unconfirmed as the prospective employers could not be located or the contacts verified; and 14 had jobs available at the time of application.

The September 2, 1998, report of a functional capacity evaluation, signed by Dr. G, stated that claimant's job description is classified as "heavy" and that he is currently functioning at the "medium physical demand level." The report recommended that claimant undergo a chronic pain management program including work hardening. The carrier introduced records showing that claimant was in a work hardening program from December 30, 1998, through January 14, 1999.

The carrier introduced correspondence from (employment company) to claimant dated May 3, May 11, and May 24, 1999, enclosing lists of job opportunities for claimant to pursue. The carrier also introduced 25 forms which it represented were attached to claimant's TWCC-52 when filed with the Texas Workers' Compensation Commission (Commission) and which bear the Commission's date stamp showing they were received on May 28, 1999. The first 20 of these forms, which are apparently "fill-in-the-blank" forms prepared by the Commission's (city) field office, bear the names of the businesses listed in the TWCC-52 and they purport to have been signed by the persons, and on the dates, reflected on the TWCC-52 as the persons contacted by claimant in person. The remaining five forms were not explained but could relate to another page of the TWCC-52 which did not become part of claimant's TWCC-52 exhibit.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's 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. Rule 130.102, relating to the requirement for a good faith effort, provides in subsection (d)(4) that an employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment." Subsection (e) provides, in part, that an injured employee

who has not returned to work and who is able to return to work in any capacity shall look for employment commensurate with the employee's ability to work every week of the qualifying period and shall document the job search efforts. The subsection goes on to specify certain information that may be considered in this regard including any other relevant factor.

The hearing officer found that with regard to the 20 job searches made during the qualifying period, the TWCC-52 was submitted to appear that claimant made these searches in person and received appropriate signatures from these employers to verify each contact; that the evidence clearly established that claimant's search efforts "were rigged in an effort to qualify for [SIBS] and were not performed in an effort to find work commensurate with Claimant's ability to work"; and that claimant did not make a good faith effort to find employment commensurate with his ability to work, during the 10th quarter qualifying period.

Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. 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, an appellate reviewing tribunal, 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 is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge