

APPEAL NO. 000026

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 December 13, 1999. The hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 19th, 20th, and 21st quarters. Claimant appeals these determinations on sufficiency grounds. 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 she is not entitled to SIBS for the 19th quarter. Claimant contends that she made 13 job contacts and that she met her burden to prove she acted in good faith.

The "old" SIBS rules apply regarding the 19th quarter, which was from April 10, 1999, through July 9, 1999. See Texas Workers' Compensation Commission Appeal No. 992272, decided November 29, 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.

Under the old SIBS rules, there is no requirement that a claimant look for work for any set number of days or period of time during the filing period. Texas Workers' Compensation Commission Appeal No. 960818, decided June 3, 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 she injured her neck and right arm when she slipped on water at work in 1992. She said she underwent cervical surgery in 1993 and, after the surgery,

she awoke with numbness and pain in her right side and also in her left upper extremity. Medical records indicate that a cause for claimant's symptoms was not discovered. Claimant said she cannot sit or stand for very long, that she cannot walk very far, and that she has intermittent severe pain. A 1998 functional capacity evaluation (FCE) stated that claimant cannot return to her previous work as a residential aide, and that sedentary work was the most appropriate level for claimant. In a May 20, 1999, report, Dr. S stated that he had reviewed an FCE performed in 1997 and that he thought claimant could work part-time doing sedentary work. Dr. S did not state that claimant was unable to work. Claimant indicated that Dr. S had not seen her 1998 FCE report. There was evidence that claimant was in a motor vehicle accident (MVA) in 1996 and that she experienced an increase in low back and left leg symptoms. Claimant stated that she underwent surgery after the MVA.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's IR is 17%; and (3) claimant did not elect to commute her IIBS. It was undisputed that claimant was unemployed during the filing period. The filing period for the 19th quarter was from approximately January 9, 1999, to April 9, 1999.

Claimant did not assert at the CCH that she had no ability to work at all during the filing period for the 19th quarter. Instead, it was contended that she had an extremely limited ability to work. The hearing officer noted in his decision that there was little evidence of claimant's restrictions and that the medical evidence did not link claimant's continuing symptoms to her 1992 compensable injury. Our review of the record does not indicate that the hearing officer's good faith determination regarding the 19th quarter is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain, supra*. Therefore, there is no basis for disturbing his decision on appeal. The hearing officer heard claimant's testimony about her health problems and her job search. The fact that the evidence could have allowed different inferences under the state of the evidence does not provide a sufficient basis for reversing the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS for the 20th quarter. The filing period for this quarter was from March 28, 1999, to June 26, 1999. Claimant's contentions regarding the 20th quarter are essentially the same as for the 19th quarter. We note that the "new" SIBS rules apply regarding the 20th quarter.

The hearing officer again noted that claimant's restrictions during the filing period were not clear. Claimant testified that she made 14 job contacts during the filing period for this quarter.

Rule 130.102(d) provides in part:

Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

* * *

- (4) 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 pertinent part:

Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. . . .

Claimant testified that during the filing period in question, she searched for work with 14 employers. The hearing officer apparently found that claimant had some ability to work and that claimant's evidence regarding her job search did not establish good faith. The record indicates that claimant did not search for work every week of the filing period and sometimes waited 11 to 13 days between job searches. We conclude that the evidence is sufficient to support the hearing officer's determination that during the 20th quarter filing period claimant did not make a good faith effort to obtain employment commensurate with her ability to work and that she is not entitled to SIBS for the 20th quarter.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS for the 21st quarter. Claimant contends that she had no ability to work during the filing period for this quarter.

Rule 130.102(d) provides in part:

Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

* * *

- (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer made findings that during the filing period for the 21st quarter, the claimant did not meet the good faith SIBS requirement. The hearing officer noted that claimant said her condition had not changed from prior filing periods. The hearing officer could have weighed the evidence and determined that claimant had some ability to work and was required to search for work every week of the filing period. We conclude that the evidence is sufficient to support the hearing officer's determination that claimant did not meet her burden of proof regarding good faith and that she is not entitled to SIBS for the 21st quarter.

Claimant contends that the hearing officer erred in making his direct result determination. She contends that the records of Dr. C and Dr. W show that her unemployment is a direct result of her impairment from the compensable injury. In this case, the hearing officer reviewed the evidence, decided what weight to assign to this evidence, and determined whether claimant's unemployment is a direct result of her impairment from her compensable injury. He determined that claimant did not meet her burden of proof to establish that her unemployment during the three filing periods was a direct result of her impairment. We conclude that the hearing officer's direct result determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge