APPEAL NO. 000058

On December 13, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the seventh and eighth quarters. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. Attached to claimant's appeal are documents, some of which were not made a part of the CCH record. We do not consider on appeal those documents that were not made a part of the CCH record. Section 410.203(a)(1). Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has an impairment rating (IR) of 15% or more, has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, has not elected to commute IIBS, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Eligibility for SIBS is determined based on whether claimant has met SIBS criteria during the relevant qualifying period for the SIBS quarter in issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). The "new" SIBS rules effective January 31, 1999, apply to the quarters in issue. Rule 130.102(d) provides in pertinent part that "[a]n 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 preform 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; . . . ." Rule 130.102(e) provides in pertinent part that "[e]xcept 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."

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on August 20, 1996, with a 24% IR; that he did not commute IIBS; that the seventh quarter was from July 8, 1999, to October 6, 1999; with a qualifying period of March 26, 1999, to June 24, 1999; and that the eighth quarter was from October 7, 1999, to January 5, 2000, with a qualifying period of June 25, 1999, to September 23, 1999. There is no appeal of the hearing officer's finding that claimant did not return to work as a direct result of his impairment during the seventh and eighth quarter qualifying periods. Claimant testified that he was injured on _____, while working as a truck mechanic. He indicated that he injured his neck, back, right shoulder, and left knee; that he is being treated for depression; and that he had right shoulder surgery.

There is conflicting evidence regarding claimant's ability to work. Dr. W, who was claimant's treating doctor, wrote in January 1999 that a work status assessment done at HealthSouth reported that claimant could work within the category of light to light/medium. Dr. W reported in March, April, and May 1999 that claimant cannot work, and Dr. C, an orthopedic surgeon, noted in July 1999 that he would keep claimant off work until a cervical MRI and an EMG are done. Claimant said that he was hospitalized for one week during the qualifying period for the eighth quarter because of a heart attack. The hospital discharge instructions of July 30, 1999, note that claimant has restrictions of no exertional activity and no lifting items greater than 20 pounds.

In his Application for SIBS (TWCC-52) for the seventh quarter, claimant listed four job contacts during the qualifying period. In his TWCC-52 for the eighth quarter, claimant listed approximately 32 job contacts during the qualifying period. Claimant's notations on his TWCC-52 for the eighth quarter reflect that he used the computers at the Texas Workforce Commission (TWC) to look for jobs on several occasions but was unable to find any jobs within his light-duty category. Claimant also presented copies of applications and printouts from the TWC computers and a letter from TWC stating that claimant looks for work on TWC's automated system on a regular basis. Claimant also presented a letter from a Texas Rehabilitation Commission (TRC) counselor that states that claimant made an application for services with TRC in July 1999, that claimant's doctor has not given him a release to return to work, that claimant may need knee surgery, and that gainful employment seems unlikely. On one job application made during the filing period for the eighth quarter, claimant wrote that the reason he was applying for the job was because the attorney for the carrier had said that that job was a light-duty job that he could do according to carrier's doctor. On another application, claimant noted that he would be unable to work on days he has doctor's appointments or workers' compensation hearings. Claimant also copied several job advertisements from a newspaper and wrote next to them reasons he cannot perform the advertised jobs.

The hearing officer found that claimant had some ability to work during the qualifying periods for the seventh and eighth quarters; that claimant did not seek employment within his ability to work every week; and that claimant did not attempt in good faith to obtain employment commensurate with his ability to work during the qualifying periods for the seventh and eighth quarters. The hearing officer concluded that claimant is not entitled to SIBS for the seventh and eighth quarters. Whether claimant had no ability to work at all during the qualifying periods or whether claimant had some ability to work and made a good faith effort to obtain employment commensurate with his ability to work presented the hearing officer with questions of fact to resolve. In Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, the Appeals Panel stated that medical evidence from the filing period is clearly relevant but that other medical evidence from outside the qualifying period, especially that which is relatively close to the qualifying period, may be relevant. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications automatically constitutes a good faith effort to obtain employment and noted that, in common usage, good faith is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intent to defraud, and, generally

speaking, means being faithful to one's duty or obligation. While the hearing officer could certainly consider claimant's hospitalization, he could also consider whether reported job contacts were made in an effort to obtain employment commensurate with claimant's ability to work. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that in determining whether claimant has attempted in good faith to obtain employment commensurate with claimant's ability to work, the hearing officer must sometimes assess whether job contacts constitute a true search for employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge