

APPEAL NO. 000106

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 29, 1999. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the third and eighth quarters, that claimant did not timely file a Statement of Employment Status (TWCC-52, revised 4/93) for the third quarter, and that respondent (carrier) did not need to "timely contest" claimant's entitlement to SIBS for the third quarter. Claimant appeals these determinations on sufficiency grounds. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order. The direct result determinations in claimant's favor were not appealed.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that he did not act in good faith and that he is not entitled to SIBS for the third quarter, which was from May 15, 1998, to August 13, 1998. He asserts that he acted in good faith, as shown by his testimony about his job search and his TWCC-52. The SIBS rules that were in effect prior to January 31, 1999, applied regarding the third quarter. 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 he cannot do the maintenance work he did at the time of his injury because of his back problems. He testified that his last surgery was in 1996 and that

his current doctor has discussed further surgery. Claimant said that during the filing period in question, he looked for work with at least four employers, and that he listed four on what he said was his TWCC-52 for the third quarter. In a 1996 report, Dr. S stated that claimant's impairment was minimal and that claimant is physically capable of returning to work. In a December 1997 report, Dr. P stated that claimant was "pretty much disabled" because of heart problems. In a January 1998 report, Dr. P said he reviewed claimant's 1997 functional capacity evaluation and that he thought claimant might be able to return to sedentary employment, but that he could not perform a "medium" level job.

The parties stipulated that: (1) claimant sustained a compensable injury on August 1, 1995; (2) claimant's IR was 15%; and (3) claimant did not elect to commute his IIBS. It was undisputed that claimant was unemployed during the filing period. The filing period for the third quarter was from February 13, 1998, to May 14, 1998.

Our review of the record does not indicate that the hearing officer's good faith determination regarding the third quarter is so against the great weight and preponderance of the evidence. Cain, supra. Therefore, there is no basis for disturbing her decision on appeal. The hearing officer reviewed the record and heard claimant's testimony about his job search. We conclude that the hearing officer's determination regarding good faith is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBS for the eighth quarter, which was from August 14, 1999, to November 11, 1999. The filing period for this quarter was from May 11, 1999, to July 30, 1999. We note that the "new" SIBS rules in effect on January 31, 1999, applied regarding this quarter.

The hearing officer made findings that during the filing period for the eighth quarter, the claimant had some ability to work and that he did not attempt in good faith to obtain employment commensurate with his ability to work. The hearing officer stated that claimant listed "15 - 20" job contacts on his TWCC-52 for this quarter, but that some of the contacts were "duplicate listings," that the same employers had been contacted in the prior quarter, and that claimant did not search outside the small town of his residence. In a July 29, 1999, letter, Dr. N stated that claimant presented with a lumbar disc extrusion with periodic nerve root involvement and that he underwent a decompression and discectomy in 1996. Dr. N noted that further stabilization surgery has been recommended. He stated that claimant's current work restrictions included no repetitive bending, no lifting over 10 pounds, and no driving "while on medication for this condition." In a July 1999 letter, Dr. P stated that claimant is unable to work because of significant degeneration and pain in his back.

Claimant testified that during the filing period in question, he searched for work with several employers and with the Texas Workforce Commission, and listed them on his TWCC-52. Claimant said he wanted to work but that he was not offered a job. A review of claimant's TWCC-52 indicates that claimant did not document a weekly job search between

May 12, 1999, and May 24, 1999. Considering this fact and the factors discussed by the hearing officer, we conclude that the hearing officer's good faith determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Claimant contends the hearing officer erred in determining that he did not file a TWCC-52 for the third quarter. He asserts that the TWCC-52 he filed on July 30, 1998, that stated it was for the fourth quarter was actually for the third quarter. We note that the hearing officer stated in the decision and order that four job searches reflected on the TWCC-52 filed on July 30, 1998, were made during the third quarter filing period. The hearing officer stated that "even if" the TWCC-52 was filed for the third quarter, it listed only four job contacts for that quarter. Therefore, the hearing officer did consider the job searches listed in considering the good faith issue. The hearing officer determined that claimant did not establish his good faith and entitlement to third quarter SIBS at the CCH. We have affirmed the determination that claimant was not entitled to SIBS for the third quarter. In any case, whether a claimant "timely filed" a TWCC-52 is of no consequence where there is no entitlement and there is no issue regarding when SIBS benefits would accrue.

Claimant contends that the hearing officer erred in determining that carrier had no duty to contest claimant's entitlement to third quarter SIBS. Appeals Panel decisions interpreting the rules in effect prior to January 31, 1999, distinguished between those situations involving continuing entitlement to SIBS and those quarters where there had been no previous entitlement to SIBS for the preceding quarter.¹ In summary, the Appeals Panel concluded that waiver does not apply against a carrier where there has been no SIBS entitlement in the preceding quarter. See Texas Workers' Compensation Commission Appeal No. 980756, decided May 27, 1998.

¹This is now set forth in Rule130.108.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge