APPEAL NO. 000113

Following a contested case hearing held on November 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by finding that during the qualifying periods for the 15th and 16th quarters, the appellant (claimant) failed to make a good faith attempt to obtain employment commensurate with her ability to work and by concluding that she is not entitled to supplemental income benefits (SIBS) for those quarters. The hearing officer further concluded that because the Texas Workers' Compensation Commission (Commission) had previously determined that claimant was not entitled to SIBS for the 12th, 13th, and 14th quarters, she has permanently lost entitlement to SIBS. Claimant has requested our review of these determinations on evidentiary grounds, asserting that her evidence established that she had no ability to work during the qualifying periods for the 15th and 16th quarters. The respondent (carrier) urges in its response that the evidence is sufficient to support the challenged determinations of the hearing officer.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that she reached maximum medical improvement on May 12, 1994, with an impairment rating (IR) of 23%; that she commuted no portion of her impairment income benefits (IIBS); that the 15th quarter began on June 2, 1999, and the 16th quarter ended on November 30, 1999; and that the qualifying period for the 15th quarter began on February 18, 1999, and the qualifying period for the 16th quarter ended on August 18, 1999.

Claimant testified that while lifting heavy boxes into a cart for the employer on _____, she felt pain in her neck that went all the way down to her lower back; that she subsequently underwent two cervical spine fusion operations by Dr. V; that she has pain in her neck, left shoulder, left arm, and down her back; that she cannot work or do the things she used to do because of the pain; that she takes medication for pain and to sleep; and that she cannot drive because the medications make her dizzy. As claimant put it, "[a]ll I do lately is just take medications and that's all I do."

Claimant further testified that during the 15th quarter qualifying period, she made telephone calls from her house to the businesses listed on her Application for Supplemental Income Benefits (TWCC-52); that she obtained the names of the businesses from her nephew and the newspaper; that she did not go to any of these businesses or complete any employment applications; and that she would call the businesses, "ask if they would give [her] a job," and would also tell them she "couldn't do much." Claimant, who testified through a Spanish-language translator and said she was educated to the 11th grade in Mexico, also stated that she was registered with the Texas Rehabilitation Commission (TRC) and plans to go to school but is not now attending any classes. She did not testify to

such matters as whether she, personally, made all the calls and completed the TWCC-52, and as to the amount of time she spent in these efforts over the 13-week qualifying period for the 15th quarter.

As previously stated, the parties stipulated that the 15th quarter qualifying period began on February 18 and ended on May 19, 1999. Claimant's TWCC-52 lists 41 businesses contacted. The date of the first contact is March 2, 1999, which is in the second week of the qualifying period. The date of the last contact is May 27, 1999, which is outside the qualifying period. The TWCC-52 further reflects that the type of job applied for with each employer was "sedentary." Claimant took the position at the hearing that she had no ability to work during the 15th quarter qualifying period but that if the hearing officer should determine she did, then, in the alternative, her telephone calls constituted a good faith attempt to obtain employment commensurate with her ability to work. As for the 16th quarter, claimant contended only that she had no ability to work during the qualifying period and her TWCC-52 for that period reflects no contacts with prospective employers.

In his July 1, 1998, report of a functional capacity evaluation (FCE), Dr. O noted that despite claimant's complaints of severe pain during the testing, her heart rate did not increase at all, which shows she is in good condition; that claimant can occasionally bend, stoop, squat, and kneel, but not frequently; and that she can sit or stand for at least two hours without a short break before repeating. Dr. O concluded that, generally, claimant fits into the category of "sedentary light or medium" work.

Dr. V wrote on January 7, 1999, that claimant continues to complain of neck and low back pain; that an x-ray shows the cervical fusion with a plate and screws to be healed; and that a lumbar spine MRI was normal except for some mild wedging at L1. Dr. V further reported that the Commission has asked if claimant could return to light work; that he will refer her for an FCE to see how much she can safely lift; and that once that information is available, he could release her for light duty. The January 19, 1999, FCE report of Dr. G states on one record that claimant is "unable to return to previous job at this time, sedentary work only," and on another that claimant is not able to return to work at this time "except for possible sedentary position," and that she should follow up with her doctor for continued care and possible return to employment. Dr. V reported on February 5, 1999, that claimant continues to complain of pain in the neck as well as in the thoracolumbar and lumbosacral areas; that an MRI scan showed some disc dessication at T12/L1; and that he is going to refer her to Dr. H for further evaluation. Dr. V further stated the following: "I do feel that she could get back to sedentary work duties since she had a [FCE] which showed she could not do any type of lifting, but she could do sedentary work with no lifting if it was available."

Dr. V wrote on April 8, 1999, that claimant may benefit from a fusion at "C12 L1 [sic]" and that he would refer her to Dr. H to see if he would consider a fusion at that level based on her MRI scan. Dr. V wrote on June 10, 1999, that he thinks claimant has some loose plate screws and some flexion deformity at the C4-5 level above with marked osteophyte formation and that she may be having problems from this level.

In her June 4, 1999, evaluation for work capacity and return to work status, Dr. C referred to the report of an FCE performed on that date but separately reported on June 14, 1999, by an occupational therapist. This report states that claimant failed three of six validity criteria indicating submaximal effort and that the results of the evaluation represent her minimal functional ability and that her actual functional ability must be left to conjecture. The report further stated that due to claimant's being off work since 1992, she is not a good candidate to return to work at this time, and that she is noted to have poor endurance, body mechanics, and habits, all of which increase her risk for injury.

A TRC counselor wrote on June 22, 1999, that claimant is making plans to attend school and take classes in computer operations so she can have skills to obtain sedentary employment.

Dr. H wrote a letter on August 18, 1999, stating that claimant has not had a definitive diagnosis because the carrier refused to authorize a discogram; that the FCE of January 19, 1999, resulted in an "equivocal" recommendation; that an FCE on June 4, 1999, resulted in an interpretation that claimant is not able to work; and that he concurs that claimant "most likely is not a return-to-work candidate."

In evidence is an August 18, 1999, letter from claimant's attorney to Dr. V which takes the position that claimant had no ability to work from February 1999 to the present based on the June 4, 1999, FCE and Dr. C's evaluation, as well as the testing showing loose plate screws, an MRI showing changes in claimant's thoracolumbar spine, and Dr. H's evaluation and recommendation for a chronic pain program, and which asks Dr. V for a brief statement addressing claimant's ability to work from February 1999 to the present. Dr. V wrote a letter on September 9, 1999, stating that he rescinds his release to work of February 5, 1999, based on subsequent diagnostic testing and on Dr. H's recommendations for further diagnostics and treatment.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an 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 a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work.

We observe that the 15th and 16th quarters are governed by the "new SIBS rules." *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished), and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 *et seq*. (Rule 130.100 *et seq*.). Rule 130.102(d) relating to the requirement for a good faith effort provides that 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; or (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." Rule 130.102(e) provides, in part, that "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." With regard to the documentation, this rule goes on to provide that the reviewing authority may consider such factors as applications or resumes documenting the efforts, cooperation with the TRC, and the amount of time spent in attempting to find employment.

Section 408.146(c) provides that an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. The carrier introduced decisions of the Commission's Appeals Panel which affirmed decisions of hearing officers determining that claimant was not entitled to SIBS for the 12th, 13th, and 14th quarters. Claimant did not contend that she was entitled to SIBS for any of those quarters.

The hearing officer found, among other things, that claimant did not file any job applications or resumes, did not have interviews, and did not receive any job offers; that claimant's medical reports did not specifically show a total inability to perform any kind of work; and that during the qualifying periods for the 15th and 16th quarters, claimant did not attempt in good faith to obtain employment commensurate with her ability to work. Claimant had the burden to prove that she made good faith efforts to obtain employment commensurate with her ability to work during the qualifying periods for the15th and 16th quarters. 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 including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, 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 are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge