

APPEAL NO. 000208

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 January 19, 2000. The issue at the CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 12th quarter, which ran from November 7, 1999, through February 5, 2000. The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on January 26, 1996, with an 18% impairment rating; that the qualifying period for the 12th quarter was from July 25, 1999, through October 23, 1999; and that the claimant had no earnings during the qualifying period. The hearing officer determined that during the qualifying period the claimant's unemployment was the direct result of her impairment from the compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer made six findings of fact concerning the claimant's efforts to seek employment and concluded that she did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period and that she is not entitled to SIBS for the 12th quarter. The claimant appealed, stated her disagreement with six findings of fact, presented information, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the 12th quarter. The respondent (self-insured) responded; stated that new information provided in the claimant's appeal should not be considered; contended that the "new" SIBS rules that became effective January 31, 1999, apply and the claimant did not document her employment efforts during each week of the qualifying period as required by those rules; urged that the evidence is sufficient to support the appealed determinations of the hearing officer; and requested that his decision be affirmed.

DECISION

We reverse two findings of fact, but affirm the conclusion of law that the claimant is not entitled to SIBS for the 12th quarter and the decision and order based on that conclusion of law.

The claimant cut and bruised her right leg below the knee, an infection developed, and she had flesh removed and had a skin graft. A report of a functional capacity evaluation dated August 18, 1999, indicates that the claimant could not perform the work she was doing at the time she was injured and that her activities during the evaluation were limited secondary to subjective pain complaints in the right lower extremity and deconditioning. The report states:

According to the results of the functional capacity testing, [claimant] exhibits the physical capabilities of sedentary work physical demands with primarily sitting with occasional standing and walking activities for a short duration. [Claimant] appears content to function at this sedentary work level and did

not appear to be motivated to perform increased conditioning and strengthening exercises. I did not see any physical reason that she should not be able to improve her functional activities to perform at least in the light work physical demand level with alternating sitting, standing and walking activities.

The Statement of Employment Status (TWCC-52) dated October 28, 1999, indicates that during the qualifying period the claimant contacted 26 potential employers; that 15 contacts were made by telephone and 11 contacts were made in person; and that 24 of the potential employers were not hiring. The TWCC-52 also indicates that the claimant applied for anything within her ability at three employers; at nine she applied for cashier only; at seven she applied for cashier or anything available; at three she applied for clerk only; at two she applied for clerk and anything available; at one she applied for clerk or designer; and one she applied for waitress, clerk, or cashier. In addition, the TWCC-52 reveals that 23 of the potential employers are in the city in which the claimant receives her mail, but that three other potential employers have addresses that are in three separate cities. The record does not indicate how far those cities are from the city in which the claimant testified she resides. The earliest date on the TWCC-52 on which the claimant sought employment is August 9, 1999. The parties stipulated that the qualifying period for the 12th quarter began on July 25, 1999.

The claimant testified that she looks for work at two or three places a week; that she completed applications for some of the jobs; that she completed some of the applications in her car when she received them and completed some of them at home; that the time spent looking for a job varied and ranged from about five minutes to about 45 minutes; and that she looked for work on July 27 and 28, 1999, but did not list those places on her TWCC-52 for the 12th quarter. She said that she looked in a local newspaper for places that were hiring, heard about some places that may be hiring, and saw signs at businesses; that some days her primary goal was to find a job; that she did not have a plan to find a job; but that she wanted to find a job. She stated that most of the jobs she looked for were working part time as a cashier or clerk, that she had experience in those areas, that a doctor had not limited her to only part-time work, that she could not stand for a long time and would like a cashier job where she could use a stool, and that she looked for something that she could do. A vocational rehabilitation specialist testified that she contacted 22 of the employers listed by the claimant; that seven of them remembered the claimant; that, in her opinion, working as a cashier or clerk would be beyond the claimant's restrictions; that the claimant did not have upper extremity restrictions resulting from the compensable injury; and that work within the claimant's restrictions was available.

The hearing officer made the following findings of fact concerning the claimant's efforts to obtain employment during the qualifying period for the 12th quarter:

FINDINGS OF FACT

4. Claimant sought employment during the qualifying period for the twelfth quarter, but primarily inquired about positions which were not commensurate with her ability to work.
5. Claimant voluntarily restricted her job search to her home town.
6. Claimant has not formulated a job search plan.
7. Claimant has a high school education, is presentable and well-spoken, and has the potential for employment in a number of settings.
8. Claimant voluntarily restricted her job search to employment as a cashier or clerk.
9. Claimant spent a minimal amount of time seeking employment during the qualifying period.
10. Claimant did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period for the twelfth quarter.

The claimant appealed Findings of Fact Nos. 4, 5, 6, 8, 9, and 10. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That a different factual determination may be drawn from the same evidence is not a sufficient basis to overturn a hearing officer's factual determination. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Findings of Fact Nos. 4 and 6 are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Findings of Fact Nos. 5 and 8 are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are reversed. The meaning of Finding of Fact No. 9 is subject to different interpretations and by itself is not determinative of the good faith criterion.

The claimant and the carrier stipulated that the qualifying period for the 12th quarter began on July 25, 1999. That was a Sunday. The TWCC-52 indicates that the claimant first sought employment during the qualifying period on Monday, August 9, 1999. In Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, the Appeals Panel quoted some of the provisions of the SIBS rules that became effective January 31, 1999; stated that to meet certain requirements of the rules, a claimant 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; and held that only documented efforts should be considered in determining if the requirements were met. The claimant testified that she made notes of job searches in a book and put them on a TWCC-52. A copy of the book is not in evidence. Even if the job searches the claimant testified she made on July 27 and 28, 1999, are considered; there is no evidence that the claimant sought employment during the time beginning on July 29, 1999, and ending on August 8, 1999, or during the week that began on August 1, 1999. The Appeals Panel has held that it should affirm a decision of a hearing officer if it can be sustained on any reasonable theory supported by evidence authorized by law. Texas Workers' Compensation Commission Appeal No. 92102, decided April 24, 1992. The record does not contain documentation that the claimant sought employment during each week of the qualifying period. We affirm Finding of Fact No. 10 that the claimant did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period and the conclusion of law that the claimant is not entitled to SIBS for the 12th quarter.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge