

APPEAL NO. 000223

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 January 6, 2000. With respect to the sole issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 15th quarter. The claimant appeals the hearing officer's finding that she did not make a good faith effort to obtain employment commensurate with her ability to work, asserting that she offered overwhelming proof that she searched for employment commensurate with the requirements set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)), that the respondent (carrier) failed to get a Texas Workers' Compensation Commission (Commission)-appointed functional capacity evaluation (FCE), that the hearing officer erred in stating that the claimant must show what her restrictions are for the qualifying period, and that she is entitled to SIBS for the 15th quarter. The carrier replies that the hearing officer's decision is correct, is not against the great weight and preponderance of the evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury to her spine and both knees on \_\_\_\_\_. On October 18, 1998, the claimant had a fusion with screws at L4-5. The parties stipulated that the claimant reached maximum medical improvement on July 19, 1994, with a 29% impairment rating; that the claimant did not commute any portion of her impairment income benefits; that the 15th quarter began on September 9, 1999, and ended on December 8, 1999; and that the 15th quarter qualifying period ran from May 28, 1999, through August 26, 1999. The claimant testified that she had the ability to perform part-time sedentary work, 25 to 30 hours per week during the qualifying period. According to the claimant, she spent two to four hours, five days per week looking for employment; she sought employment every week; her job search consisted of sending resumes, applying through the Internet, attending job fairs, applying in person, and looking in various newspapers; and she made 43 job contacts during the qualifying period. All of the claimant's 43 job contacts are documented on the claimant's Application for Supplemental Income Benefits (TWCC-52) and pages attached to the TWCC-52.

The claimant testified that she searched for jobs within the restrictions of the carrier's doctor, Dr. S, and submitted a medical report from Dr. S dated August 25, 1998. In that report, Dr. S states: "In my opinion, this patient can answer telephone calls. I recommend she do sedintary [sic] type of work, part time to begin with." The claimant presented medical reports from her treating doctor, Dr. M, from the qualifying period; however, they do not address the claimant's work ability.

The carrier presented the testimony of Ms. S, an employee of a private rehabilitation agency, who was referred by the carrier to provide vocational assistance to the claimant. Ms. S testified that sometime prior to the 15th quarter, the claimant's attorney refused to allow her to contact the claimant, so she did not assist the claimant. Ms. S contacted 22 of the employers listed on the claimant's TWCC-52 and found that 9 of the employers said they did not have or could not find the claimant's application. According to Ms. S, the claimant was qualified for the jobs that she applied for.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. The only issue in this case is whether the claimant made the required good faith job search effort. The "new" SIBS rules, effective January 31, 1999, apply to the 15th quarter. Rule 130.102(d)(4), the version then in effect, 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 "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) further provides that the injured worker who "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." There follows a list of information that may be provided by the injured worker and considered on the question of a good faith job search.

The claimant had the burden to prove that she made a good faith effort to seek employment commensurate with her ability to work during the qualifying period. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. It was incumbent upon the claimant to prove that she was under restrictions, and what those restrictions were, at the time that she was required to seek employment so that it could be determined whether she fulfilled the requirement to search in good faith for employment commensurate with her ability to work. The hearing officer did not err in requiring the claimant to prove that she was restricted to part-time sedentary work during the qualifying period.

On appeal, the claimant argues that her doctor does not recommend work, the carrier's doctor recommends work, and it was the carrier's responsibility to get a Commission-appointed FCE under the "new rules" which it failed to do. There are no "new rules" which require the carrier to request a Commission-appointed FCE. The provision which may be the basis of the claimant's argument is Section 408.151(b), effective September 1, 1999, which provides that "[i]f a dispute exists as to whether the employee's medical condition has improved sufficiently to allow the employee to return to work, the commission shall direct the employee to be examined by a designated doctor chosen by the commission," and implementing Rule 130.110, effective November 28, 1999. Neither Section 408.151 nor Rule 130.110 apply to the quarter at issue.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(4), the hearing officer had to judge the credibility of the evidence before her. The hearing officer determined that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work. In SIBS cases in which the new 1999 rules apply, findings of fact should address the criteria imposed by those rules. The hearing officer considered all of the evidence and concluded that the claimant's evidence was insufficient to support a finding that the claimant was restricted to part-time sedentary work. In reaching her determination, the hearing officer considered that Dr. S's report predated the qualifying period by nine months, that no other medical records were offered near or at the time period which reflected restrictions or a part-time status, and that the claimant's applications reflected she only looked for part-time work. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work and is not entitled to SIBS for the 15th quarter.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge