

APPEAL NO. 000299

Following a contested case hearing held on January 14, 2000, 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 concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 11th and 12th compensable quarters and that she "has permanently lost entitlement to [SIBS] for the eleventh and subsequent quarters because she was not entitled to them for twelve consecutive months."

Claimant has appealed these conclusions and the underlying factual findings on evidentiary grounds. She also expresses various disagreements with every portion of the Decision and Order, including the statement of the evidence and recitation of the parties' exhibits, and further asserts that not all evidence favorable to her was presented. The respondent (self-insured) urges in response that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed as reformed.

The parties stipulated that claimant sustained a compensable injury on _____, received an impairment rating (IR) of 16%, and did not commute any portion of her impairment income benefits (IIBS); that the 11th quarter began on May 29, 1999, and continued through August 27, 1999, for which the qualifying period began on February 12, 1999, and continued through May 14, 1999; that the 12th quarter began on August 28, 1999, and continued through November 26, 1999, for which the qualifying period began on May 15, 1999, and continued through August 13, 1999; and that claimant was not entitled to SIBS for the eighth, ninth, and tenth quarters. In Texas Workers' Compensation Commission Appeal No. 990141, decided March 3, 1999 (Unpublished), the Appeals Panel affirmed the determinations of the hearing officer that claimant was not entitled to SIBS for the eighth and ninth quarters. In Texas Workers' Compensation Commission Appeal No. 991736, decided September 20, 1999 (Unpublished), the Appeals Panel affirmed the hearing officer's determination that claimant was not entitled to SIBS for the 10th quarter. Some of the medical and other evidence introduced in those cases is also in the record we here consider.

According to the February 28, 1997, narrative report of the designated doctor, Dr. W, the 16% IR included ratings for the left shoulder, the lumbar spine, and the cervical spine. Dr. W noted that while she may include fibromyalgia as part of the impairment, there is no chapter in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, which addresses fibromyalgia. Dr. W also noted significant symptom magnification and failure to give a good effort on range of motion testing.

The hearing officer states in his Decision and Order that the parties further agreed on the record that claimant's injury included a cervical and lumbar sprain/strain, a torn left rotator cuff, pain in the left arm with radiation into the left lower extremity, fibromyalgia, and thoracic outlet syndrome, and that the injury did not include bilateral carpal tunnel syndrome (CTS), depression, and sleep disorder. Claimant states in her appeal that she disagrees about the depression, asserting that she did not hear all of the conversation about the agreement. We observe that in Texas Workers' Compensation Commission Appeal No. 992211, decided November 18, 1999 (Unpublished), the Appeals Panel affirmed the hearing officer's determinations that claimant's compensable injury did not extend to or include bilateral CTS or depression but did extend to and include a sleep disorder as part of the symptoms of fibromyalgia.

Claimant testified that her neck, back and left shoulder were injured on _____, while employed at a state hospital where she supervised a group of mentally retarded men, when two of the men pushed a bed onto her; that during the 11th quarter filing period, February 12 to May 14, 1999, she was employed by the (school district) as a school bus driver, a job she started in 1997 and which begins in mid-August and ends in late May each year; that she worked at this job on school days from 6:00 a.m. to 8:00 a.m. and, variously, from 2:00 p.m. or 3:00 p.m. to 5:00 p.m.; and that she also drove for some "co-curricular trips." Claimant attached documents to her Statement of Employment Status (TWCC-52) forms reflecting four such trips, all made during the 11th quarter qualifying period. Claimant also stated that during the hiatus between 8:00 a.m. and 2:00 p.m. or 3:00 p.m. on the days she drives the bus, she attends medical appointments, goes shopping, does housework, and, "if [she] needs to look for a job, she puts in an application." She stated that after the school term ended on May 28, 1999, she applied for various jobs and was hired in July 1999 by (home health care agency) as a companion and light housekeeper for two elderly patients; that she assisted one patient during the week for a total of eight hours a week; and that she assisted the second patient for five hours each on Saturdays and Sundays. Claimant said she also looked for additional employment, "whatever was available," in (city), a small community of 25,000, as reflected on her TWCC-52 forms; and that she resumed driving the school bus when the new school term commenced in August 1999.

Claimant further stated that she had been a client of the Texas Rehabilitation Commission (TRC) since 1994 and had taken some basic computer courses through that agency. A TRC letter of June 7, 1999, stated that claimant was provided with computer training on March 26, 1998, and on December 18, 1998, and was also provided with "two wrist orthosis [sic]." A TRC letter of August 30, 1999, states that claimant has been a client since January 19, 1995, that rehabilitation services are being provided for her to return to work, and that she will continue to be sponsored until she completes the rehabilitation and returns to work. The letter did not specify the nature of the services provided and when they were provided.

Claimant further testified that she has constant fatigue and discomfort from the fibromyalgia; that she has pain all over her body from the fibromyalgia from her hair to the bottoms of her feet; that she cannot stand or sit for more than 20 minutes at a time; that

she cannot lift more than five pounds; and that she is restricted from heavy pushing and pulling. She indicated that she felt obliged to advise the prospective employers she has contacted that she is a workers' compensation case and about her physical restrictions and the medications she takes, commenting that an employer "would be taking a chance" if she were hired. Claimant stated that Dr. M, an orthopedic surgeon, is her treating doctor and that she also sees a rheumatologist, Dr. D, and a chiropractor, Dr. B. The March 17, 1999, letter from Dr. M states that claimant has been able to engage in jobs such as being a school bus driver, that "she is quite capable of working any sedentary job as in a secretarial position," and that her permanent restrictions include only 30 hours of work a week, no lifting, pushing or pulling of more than 10 pounds, no standing for long periods of time, and no bending, stooping, kneeling, or use of stairs. Dr. D's letters of December 7, 1998, and August 4, 1999, contain similar restrictions. Dr. M's August 7, 1999, letter stated that he reviewed claimant's job description with the home health care agency and that he agreed with restrictions of no lifting over 15 pounds and light housekeeping.

Claimant's TWCC-52 for the 11th quarter filing period reflects that she contacted nine potential employers including the school district for a teacher's aide position; that one contact was made on an unspecified day in February 1999; that one contact was made on March 21, 1999; that six contacts were made on dates in April 1999; and that one contact was made in "1998-1999." Claimant conceded not being qualified for one of the positions, a dietary aide. Four of the contacts made were for the position of "sitter" for elderly or infirm patients. Claimant's TWCC-52 for the 12th quarter qualifying period reflects that she contacted nine potential employers including the school district for a teacher's aide position and her chiropractor, Dr. B, for an office assistant position; that several of the employers were contacted on dates prior to and following the 12th quarter qualifying period; and that seven of the contacts were made during the 12th quarter qualifying period. Dr. B's letter of August 27, 1999, addressed "To Whom It May Concern," stated that claimant "has been inquiring about employment at this office since the following date" and then lists 15 dates, weekly, between "05/20/99" and "08/25/99." At one point in her testimony, claimant said she could have contacted every employer advertizing in the newspaper but that the result would have been the same, given her physical restrictions of which she felt obliged to inform the employers she contacted.

The carrier's independent medical examination doctor, Dr. P, wrote on August 29, 1998, that claimant underwent a functional capacity evaluation on August 26, 1998, and that he agrees that claimant is able to work an eight-hour day in a sedentary to light capacity. He also stated that the examiner noted symptom exaggeration and inappropriate illness behavior.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's 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.

The hearing officer found that during both pertinent qualifying periods, claimant was not unemployed or underemployed as a direct result of her impairment and that she did not attempt in good faith to obtain employment commensurate with her ability to work. He further found, consistent with the parties' stipulation, that claimant was not entitled to SIBS for the eighth, ninth, and tenth quarters.

The hearing officer's discussion makes clear that given his assessment of the evidence, claimant could have worked more than the approximately four hours a day she worked driving the bus on school days and the hours she worked in July for the home health care agency and, thus, that her underemployment was not a direct result of her impairment.

Both quarters at issue involve the "new," SIBS rules. See Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) in effect at the time of the qualifying periods in issue provides, in part, that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: (1) has returned to work in a position which is relatively equal to the injured employee's ability to work; (2) has been enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period; (3) has been unable to perform any type of work in any capacity; or (4) has provided sufficient documentation (as described in subsection (e)) 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 efforts. This rule goes on to set out a number of factors to be considered in regard to the job search.

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. As noted, the parties stipulated that claimant was not entitled to SIBS for the eighth, ninth, and tenth quarters and because we affirm the hearing officer's determination that claimant is not entitled to SIBS for the 11th and 12th quarters, claimant is not entitled to further income benefits. However, the hearing officer's Conclusion of Law No. 5 and Decision state that claimant has permanently lost entitlement to SIBS "for the eleventh and subsequent quarters." Accordingly, we reform those portions of the Decision and Order to state that claimant has lost entitlement to any additional income benefits.

The hearing officer is the sole judge of the weight and relevance 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 will not disturb the challenged factual findings of the 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 hearing officer could conclude from the evidence that claimant had the ability to work more than the hours she worked driving the school bus and sitting for two patients and that she made no genuine effort to obtain additional employment. As was observed by the majority decision in Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996, "[w]e do not believe that the 1989 Act contemplates that part-time work, limited essentially by the initiative of the claimant and not his or her physical condition as a result of the compensable injury, can in itself excuse the job search effort." *And see* cases cited in Appeal No. 990141, *supra*.

The decision and order of the hearing officer, as reformed, are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge