APPEAL NO. 000337

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 18, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second quarter, October 2, 1999, through December 31, 1999. The hearing officer determined that because the claimant did not show by a preponderance of the evidence that he made a good faith effort to seek employment commensurate with his ability to work, and his impairment from the compensable injury was a cause of his reduced earnings, he is not entitled to SIBS for the second quarter. The claimant appealed, contending that his inability to work is a direct result of his compensable injury and that he has in good faith, according to the rules, performed a job search from which he obtained employment. The respondent (carrier) responds, requesting that the Appeals Panel affirm the decision and order of the hearing officer.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for the _____, injury to claimant; that the claimant had an impairment rating of 15% or greater from the _____, injury; that the claimant did not elect to commute any portion of his impairment income benefits; and that the second quarter is from October 2, 1999, through December 31, 1999. The qualifying period for the second quarter was from June 20, 1999, through September 18, 1999. The claimant testified that at the time of his injury, he was employed in the aviation department of the airport, maintaining the vans that supply fuel and refueling airplanes. No testimony was presented as to the scope of the compensable injury sustained by the claimant; however, the medical records from Dr. J in June 1999 indicate that the claimant had a left knee anterior cruciate ligament reconstruction as well as partial menisectomy, a right wrist sprain, a right foot fracture, and thoracolumbar radiculitis.

It is undisputed that from May 19, 1999, through July 16, 1999, the claimant did not search for employment and attended the Texas Pain and Stress Relief Center, five days a week for six hours per day, and that the claimant began a job search on or about July 20, 1999, and searched for work every week after that through September 18, 1999. The claimant's Application for [SIBS] (TWCC-52) indicates that he applied for 73 jobs from July 20, 1999, through September 18, 1999, and applied for a job with Café on September 10, 1999. The claimant testified that he was hired at Café on October 2, 1999, and documentation indicates that the claimant was scheduled for orientation. The claimant said that his employment at Café was part time and he obtained another part-time job on October 28, 1999.

A functional capacity evaluation performed on April 1, 1999, indicates that the claimant had the ability to perform work at a light-medium physical demand level, but was unable to meet his job requirements with regards to material handling. A letter from the Texas Rehabilitation Commission (TRC) dated August 19, 1999, states, in part:

> Upon review of diagnostic information, based on information obtained from the psychologist, there was no disability, general physical stated that applicant can go back to work with possible occupational modifications. Orthopedic evaluation stated that no disability existed and applicant could return to work. Based on this information listed above and in the case file, there is no disability or impediment to employment.

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 (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1), (2) and (4) (Rule 130.102(d)(1), (2) and (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: (1) the employee has returned to work in a position which is relatively equal to the injured employee's ability to work; or (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the TRC; 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 the ability to work every week of the qualifying period and document the job search efforts.

The claimant asserts that he met the good faith requirement of Rule 130.102(d)(1) because he returned to work in a position relatively equal to his ability to work. The claimant argues, in the alternative, that he met the good faith requirement of Rule 130.102(d)(4). It is the claimant's position that he had no ability to work or search for work during the time he was participating in the pain management program and he should not be forced to choose between treatment and a job search in order to be entitled to SIBS.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Whether the claimant met any of the good faith requirements of Rule 130.102(d) was a question of fact for the hearing officer to decide. The hearing officer found that during the qualifying period for the second quarter the claimant had not returned to work in a position relatively equal with the claimant's ability to work; did not participate in any full-time vocational rehabilitation program; was not unable to work in any capacity; did not seek employment in each week; and did not make good faith efforts to seek employment commensurate with his ability to work.

The hearing officer did not find persuasive the claimant's argument that he had no ability to work during the period he was involved in medical treatment for six hours per day, five days per week. Although the claimant argues that the job offers from his job search should be considered prima facie evidence that his search was made in good faith, citing Texas Workers' Compensation Commission Appeal No. 990302, decided March 31, 1999; Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997; Texas Workers' Compensation Commission Appeal No. 982880, decided January 21,

1999; the cases cited involve the "old" SIBS rules and are distinguishable from this case which involves the "new" SIBS rules, effective January 31, 1999. The claimant did not return to work during the qualifying period, so he could not satisfy the criteria of Rule 130.102(d)(1). Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not make a good faith effort to look for work commensurate with his ability in the qualifying period is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. The hearing officer determined that the claimant's impairment did not prevent the claimant from returning to his preinjury employment. There was no evidence presented to indicate that the claimant could not return to his job maintaining the vans that supply fuel and refueling airplanes. The hearing officer considered the letter from the TRC and concluded that the claimant's impairment did not prevent him from returning to his preinjury employment. From our review of the evidence of record, we cannot conclude that the direct result finding of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ).

The hearing officer's decision and order are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge