APPEAL NO. 000449

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 31, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the second quarter, from October 29, 1999, through January 27, 2000. The hearing officer determined that the claimant was not entitled to SIBS for the second quarter. The claimant appeals, asserting that she cannot drive to a job because of her medications and requesting that we reverse the hearing officer's decision and render a decision in her favor. The respondent (self-insured) contends that the evidence is sufficient to support the finding that claimant failed to make a good faith effort to obtain employment and that she is not entitled to SIBS for the second quarter.

DECISION

Affirmed.

Claimant attached to her request for review certain documents containing information on four medications prescribed by Dr. R. One is dated July 14, 1999, and the remaining three are dated December 31, 1999, a date outside the qualifying period. These documents were not introduced into evidence at the hearing and are offered for reconsideration for the first time on appeal. The Appeals Panel review is generally limited to the record developed at the hearing. *See* Section 410.203. In determining whether evidence adduced for the first time on appeal requires that we remand the case for consideration by the hearing officer, we consider whether the evidence came to the proponent's knowledge after the hearing, whether the evidence is cumulative of other evidence in the record, whether the proponent failed to offer the evidence at the hearing through a lack of diligence, and whether the new evidence is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. We are satisfied that the new evidence does not require that we remand the case for its consideration.

The parties stipulated that claimant sustained a compensable injury on _____; that she reached maximum medical improvement (MMI) on May 14, 1998, with an impairment rating (IR) of 21%; that she did not commute any portion of her impairment income benefits (IIBS); that the second quarter ran from October 29, 1999, through January 27, 2000, and that the qualifying period for that quarter was from July 16 through October 14, 1999; and that during the qualifying period, claimant had no earnings and made no job search.

Claimant testified that she worked as a sewing machine operator for approximately 16 years before the compensable injury to her neck and left upper extremity; that in August 1996, she had surgery on her left shoulder; and that neck surgery has not been recommended. She said that since referring her to Dr. R, a pain management specialist,

Dr. Y, her treating doctor, simply sees her occasionally to monitor her progress and that Dr. R has not actually physically examined her since checking the tenderness of her neck in a July 1999 visit but does authorize the refills on her prescribed medications on a monthly basis. Claimant stated that she has headaches, neck pain which radiates down her left arm and hand, and tingling in her left hand and fingers, and that she also has depression, anxiety, and sleep disturbance. She said she takes Methadone, Neurontin, Prozac, and Amitryptline and that these medications interfere with her ability to concentrate, sometimes make her dizzy, and most of the time make her sleepy. Claimant further stated that she is able to drive and "probably" drove during the qualifying period; that she spends most of her days watching television and sleeping; and that her husband and four sons take care of the cooking and other household tasks. She also stated that she has not discussed the matter of returning to work with either Dr. Y or Dr. R and that she feels she cannot do any work because she cannot hold her head in a position without having neck pain and getting a headache. Claimant also indicated that she was examined by Dr. JG in November 1999 for her Social Security disability claim, that she understands the standards are different for Social Security disability and SIBS benefits, and that the carrier did not dispute her application for SIBS for the first quarter.

In his June 8, 1998, report to Dr. Y, Dr. BG, who evaluated claimant for impairment, wrote that claimant was at statutory MMI as of May 15, 1998; that she had a 21% IR; and that based on her own residual functional capacity evaluation, "she should be able to perform sedentary and light work based on the Dictionary of Occupational Titles." Dr. BG went on to state certain physical restrictions but also stated that claimant has no limitations when driving a motor vehicle.

Dr. Y wrote on April 26, 1999, that claimant "has this noted [IR], which is high, and we need to see about outlining some work restrictions to take to her work situation." Dr. Y wrote on September 1, 1999, that he performed surgery on claimant's shoulder on October 22, 1996; that after physical therapy he referred her to Dr. R; and that she still has significant pain from her neck into her shoulder. Dr. Y further wrote as follows: "The patient in my best estimate should not do any kind of work due to the constant pain and the medication that [claimant] is taken [sic] for the pain. And with her best interest at heart I believe she needs to be considered a significant candidate for disability." In a nearly identical letter of November 17, 1999, Dr. R wrote as follows: "The patient in my best estimate should not do any kind of work due to the constant pain and the medication that [claimant] is taken [sic] for the pain. And with her best interest at heart I believe she needs to be considered a significant candidate for disability."

Dr. R wrote on October 5, 1999, that claimant, then 38 years of age, has "chronic pain" and "very limited function at this time"; that she has a 21% IR and three-level degenerative cervical discs and is not felt to be a surgical candidate; and that "it is unlikely that with her current rate of functioning that she is able to work full-time doing physical labor."

Responding on January 14, 2000, to claimant's written questions to him, Dr. R stated that his "Return to Work Evaluation" of March 15, 1999, stated that claimant is highly restricted and must only do sedentary work, if any; that claimant cannot use her left arm and hand for any overhead use or repetitive use; that she has lifting, pushing, and pulling restrictions of 10 pounds and cannot lift any weight overhead on the left and only five pounds on the right; and that she be able to change position every two hours. Dr. R further wrote that his return to work evaluation does not constitute a release to full duty and that claimant obviously cannot do any kind of heavy physical labor.

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 parties stipulated to the IR and IIBS commutation requirements. The hearing officer's finding that claimant is physically unable to return to her preinjury employment or to employment with the same or similar physical demands and that her unemployment during the qualifying period was a direct result of her impairment has not been challenged on appeal and thus has become final. Section 410.169. Claimant contended that she had no ability to work during the qualifying period and thus satisfied the requirement that she have made a good faith effort, during the qualifying period, to seek employment commensurate with her ability to work.

The hearing officer found that claimant has some ability to work though that ability is highly restricted as a result of her impairment, and that claimant did not make a good faith effort to seek employment commensurate with her ability to work.

This is a "new" SIBS rules case. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), the version in effect for the qualifying period in this case, 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; . . . ."

Claimant had the burden to prove by a preponderance of the evidence that she made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Claimant's appeal focuses almost exclusively on the contention that she cannot drive while taking her prescribed medications and that to require her to do so would set her up for an arrest and charge of driving under the influence of drugs.

The hearing officer, in discussing the evidence, states why he found the medical evidence insufficient to prove that claimant had no ability to work. The hearing officer did not make findings on the remaining elements of Rule 130.102(d)(4). While not error in this case, hearing officers are encouraged to do so. 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge