APPEAL NO. 000502

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 February 7, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to reimbursement of travel expenses for medical treatment; and whether the claimant was entitled to supplemental income benefits (SIBs) for the second quarter. At the start of the CCH, the parties agreed to add the following issue: whether the claimant was entitled to SIBs for the third quarter. The hearing officer determined that the claimant was not entitled to SIBs for the second or third quarters; and that claimant is entitled to reimbursement of travel expenses.

The claimant appeals, contending that he should be entitled to SIBs for the second and third quarters because he was unable to work, but nevertheless also made a good faith search for employment. The respondent (carrier) responds, urging affirmance. There is no appeal of the determination on travel expenses.

DECISION

We affirm the hearing officer's decision.

The periods of time under review ran from June 11 through December 8, 1999. The claimant sustained a back injury on _____. He had undergone two cervical surgeries and stated that he might be evaluated for thoracic surgery in the future. His last surgery was December 7, 1999. The claimant's first treating doctor was Dr. W; the claimant said he changed to Dr. L, who took him off work on November 10, 1999. There is a fill-in-the-blank off-work slip from Dr. L dated October 19, 1999, that simply states that claimant will be disabled from that date to "undetermined" and that he needed surgery. Dr. L referred claimant for pain management treatment; a report from Dr. S at this clinic noted that claimant was not a good historian and was evasive about some matters; that he had chronic intractable pain with some psychogenic overlay; and that he was a heavy user of medications.

Dr. W evaluated claimant's ability to work on March 17, 1999, and recommended work at the sedentary level, with flexibility to change positions every 15 minutes, and no lifting from floor to waist level. Dr. W said that claimant's prognosis to return to work was poor since he had limited ability to use a keyboard. A March 25, 1999, letter from Dr. F, a psychiatrist, stated that claimant took opiates for pain relief and should not be driving automobiles with others present or work in the automobile industry. He said he concurred with Dr. W's assessment of his work status. A longer narrative from Dr. F noted that claimant's disc problem alone would not preclude total disability, he would be unable to work in any "sustained capacity" due to positional intolerance, diffuse chronic pain, and multiple medications. Dr. F noted that claimant was beginning retraining in July through the Texas Rehabilitation Commission (TRC). The claimant's answers to interrogatories (October 1999) indicate that he had not yet started this program pending the outcome of the dispute.

On June 30, 1999, Dr. W took claimant off work pending the results of a functional capacity evaluation. If one was performed, it was not put into evidence. Dr. W noted on July 20, 1999, that claimant's subjective pain did not entirely correlate with objective findings.

The claimant contended there were a few companies he had visited that were within walking distance. He also contended that much of his searching was done over the Internet through some dot-com job posting services. The claimant expressed dissatisfaction with some job leads he was sent by a vocational services company hired by the carrier, as these jobs were essentially minimum wage and paid far less than he had made at the time of his injury. He stated that he had shown up for at least two appointments arranged by the vocational services company. He also said there was "no way" he could have performed some of the jobs either due to his temperament or his medication. The documentation he presented on his Statement of Employment Status (TWCC-52) forms in evidence did not list a weekly search.

The director of the vocational employment service, Mr. B, testified as to his efforts to assist the claimant. Mr. B was himself an injured worker, and said that this had been his motivation to start his company. He said that his services would usually begin with an interview with the injured worker to determine his/her aptitudes and abilities. He said that claimant declined to have an interview. The next step would be analysis of medical information and then identification of jobs in the community within that level. Mr. B said that this was done, and claimant was considered within the sedentary category. Then, Mr. B's company would set up appointments for the injured worker to meet with a specific person at a business, rather than just walk into the company, and afterwards Mr. B's company would do follow-up with the employer to determine the outcome of any contact. According to Mr. B, claimant kept none of his appointments. Mr. B found a note in claimant's file stating that claimant contacted his company and told them he would not keep any of his appointments because he did not feel he was able to return to work.

The SIBs rules were amended to clarify those circumstances under which a person who did not search for employment would nevertheless be found to have fulfilled the "good faith" job search requirement. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(1), (2) and (3) (Rule130.102(d)(1), (2) and (3)) define these provisions of good faith as follows:

> Good Faith Effort. 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, 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 . . . [.]

A job search undertaken for fulfilling this statutory requirement must meet the criteria set out in Rule 130.102(e):

(e) Except as provided in subsections (d)(1), (2), and (3) of this section, 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 job search efforts.

It is the hearing officer's duty, as the finder of fact, to determine if the requirements of these rules have been met factually. We would note that the job search requirement is only for jobs commensurate with the ability to work. This may not mean a full-time job in every case. While the evidence in this case supports the fact that claimant cannot return to the automotive industry, and there is some doubt as to his ability to work full time, we cannot agree that the hearing officer erred by finding that claimant nevertheless had "some" ability to work. The hearing officer could determine from this record that one of claimant's primary impediments to searching for work was a sincere subjective conviction that he could not work. We note that the requirement to search for employment as a threshold requirement for SIBs is a legislatively imposed requirement, Section 408.143(a)(3), and the Texas Workers' Compensation Commission may not obviate it unless the provisions set out in the rules are clearly established. We note that although the claimant complains on appeal that he was misclassified as to his abilities by the vocational services company, he would bear some responsibility for any misclassification because he declined an initial interview.

An appeals level body is not a fact finder, and 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

We have reviewed the record here and find the decision sufficiently supported, and accordingly affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge