

APPEAL NO. 000626

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 29, 2000. The issue at the CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the third compensable quarter, from November 23, 1999, through February 21, 2000. The hearing officer found that, throughout the qualifying period, claimant failed to make a good faith effort to seek employment commensurate with his ability to work and concluded that he is not entitled to SIBs for the third quarter. Claimant requests our review, asserting that the evidence established that he did make the required good faith effort and is entitled to SIBs. In response, the respondent (carrier) contends that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that on _____, while employed by (employer 1), claimant sustained a compensable injury; that he reached maximum medical improvement on April 20, 1998, with an impairment rating (IR) of 19%; that he did not commute any portion of the impairment income benefits (IIBs); that the qualifying period for the third quarter was from August 10 through November 8, 1999; and that the third quarter was from November 23, 1999, through February 21, 2000. This is a "new SIBs Rules" case. See Texas Workers= Compensation Commission Appeal No. 991634, decided September 14, 1999.

Not appealed are findings that claimant was employed during the qualifying period as a part-time driver for (employer 2); that he earned less than 80% of his average weekly wage (AWW) during the qualifying period for the third quarter; and that his impairment from the compensable injury was a cause of his underemployment during the qualifying period. These findings have not been appealed.

Claimant testified that he is 60 years of age and that he worked at the employers= brewery for 33 years performing heavy labor; that subsequent to his fall at work on _____, he underwent the repair of his right shoulder (rotator cuff and fracture dislocation) and the replacement of his right hip; and he indicated that he later underwent a right knee replacement which was not part of the compensable injury. He made the point in argument that he was awarded Social Security disability benefits on basically the same medical evidence and without a hearing. Claimant stated that he was not aware of any medical records which restricted him to part-time work. He further stated that he resides in a rural area, 26 miles from (city 1), indicated that he also lives near (city 2), and stated that during the qualifying period he worked as a part-time driver for employer 2 at the minimum wage rate, a job he has held for nearly two years. Claimant indicated that he worked part time at one of employer 2=s three locations i n city 1; that this business is busier at some times than at others, such as during holiday seasons and when the rental cars are turned over; that he

averaged approximately 14 hours per week; that on one occasion he drove 38 hours in three days and it was too much but that he could drive that many hours if the driving was spread over a week; and that he could drive six to eight hours a day without a problem so long as he could stop every hour or so and walk around.

Claimant further testified that all of the 19 job contacts listed on his Statement of Employment Status (TWCC-52) were made by telephone and were unsuccessful. Claimant said he obtained the names of the businesses from the telephone book and that, as he put it, "I just called them on pot luck to see if they had any opening for a driver." These businesses and other entities, including the Texas Rehabilitation Commission (TRC) and the Texas Workforce Commission, were in city 1, city 2 and several other nearby cities and the TWCC-52 reflects that all of the jobs claimant inquired about by telephone were for driving. Claimant indicated that he made all the calls in October and November 1999 and that in September 1999, he just worked his part-time job and made a call to Ms. F at the TRC.

Mr. B, a certified rehabilitation specialist hired by the carrier, testified about the largely negative results of his efforts to verify all of claimant's telephone contacts with potential employers. He also described the one meeting he had with claimant in early September 1999 and indicated that claimant declined to meet further with him. Mr. B's detailed written report is in evidence.

The June 4, 1998, report of Dr. J, apparently claimant's treating doctor, states that claimant would be "best suited for office type work or modified light work" involving no lifting of more than 20 pounds and no lifting at all above claimant's head. Dr. J later increased the weight lifting restriction to 50 pounds and on November 8, 1999, wrote that claimant's restrictions are for life due to his artificial joints and that as far as the line of work for which he is suitable, claimant is not a candidate for any type of manual labor.

The June 14, 1999, report of Dr. M, who apparently examined claimant for the carrier, stated that claimant could return to "a sedentary type desk job" and that if he cannot be placed in a sedentary job situation, then Dr. M doubts that claimant is going to be able to rejoin the workforce.

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 AWW 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. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

In addition to the dispositive legal conclusion, claimant challenges findings that he had the ability to engage in full-time sedentary employment throughout the qualifying period for the third quarter; that he did not seek any alternate or additional employment during the period from September 4 through October 5, 1999, although he had the ability to work full time and was only working at a part-time job; and that he did not make a good faith effort to seek employment commensurate with his ability to work throughout the qualifying period for the third quarter.

The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) in effect at the beginning of claimant's third quarter qualifying period 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;" The Preamble for Adoption of new Sections 130.100 - 130.108 states, among other things, that "[t]his standard eliminates arguments regarding the rate of pay for the job because it ties the finding to whether or not the employment is appropriate considering the injured employee's ability to work."

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 (*Garza v. Commercial Insurance Company of Newark, New Jersey*, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, does 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). Whether claimant's position with employer 2 is "relatively equal" to claimant's ability to work is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 000331, decided March 29, 2000; and Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000. As the hearing officer commented about claimant in his discussion of the evidence, "[b]y working part-time and not attempting to find alternate or additional work, he failed to make a good faith effort to seek employment commensurate with his ability to work." The hearing officer could consider the evidence showing that claimant had the ability to work full time in a sedentary job and the evidence that he restricted himself to part-time work.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge