

APPEAL NO. 000753

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 28, 2000. With regard to the two issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 15th quarter, from December 17, 1999, through March 16, 2000; and that the respondent (carrier) did not waive its right to contest claimant=s entitlement to SIBs for the 15th quarter by failing to timely request a benefit review conference (BRC). The claimant appealed, contending that her job searches had been made in good faith and that carrier had not disputed entitlement to SIBs by timely filing its request for a BRC. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responded to the points raised by claimant and urged affirmance.

DECISION

Affirmed.

Claimant had been employed as a casino manager and contracted a compensable occupational disease in the form of reactive airway dysfunction syndrome as a result of working in a smoke-filled environment. The parties stipulated that claimant sustained a compensable injury on _____; that claimant's impairment rating (IR) is 15%; and that impairment income benefits (IIBs) have not been commuted. Although there was no stipulation or finding regarding the qualifying period, the parties and the hearing officer appear to accept that the qualifying period for the 15th quarter was from September 5 through December 4, 1999. Claimant stipulated that she earned no wages during the qualifying period and the parties appear to agree that the "new" SIBs rules, effective January 31, 1999, were applicable. Claimant testified that she continues to suffer allergic reactions and is unable to work in an environment where she is exposed to smoke, dust, etc. Dr. C, claimant's treating doctor, in a report dated December 29, 1998, imposed the following restrictions:

Patient is able to work less than 20 hours per week as long as she avoids any exposure to dust, chemicals, fumes, cigarette smoke or any extreme changes in weather.

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. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(e) (Rule 130.102(e)). Rule 130.102(e) provides, in pertinent part, that:

an injured employee who has not returned to work and is able 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.

In evidence is claimant's Application for [SIBs] (TWCC-52) listing some 45 job contacts claimant made during the qualifying period, documenting the advertisement which led to the contact, who was contacted and when. Carrier attempted to verify the contacts and submitted a verification report which indicated many of the alleged contacts were no longer in business; had incorrect or disconnected telephone numbers; or had answering machines. Claimant testified that she had prepared a resume but that all contacts were made by telephone. Claimant had completed a nursing assistant certification program in 1996 but she had not renewed her certification. Claimant had also participated in a medical billing program sponsored by the Texas Rehabilitation Commission (TRC) which would allow claimant to work out of her home. The hearing officer, in her Statement of the Evidence, commented:

Rule 130.102(e) sets out the criteria to be considered when assessing whether or not a good faith effort has been made. Although the Claimant did conduct a job search every week as required by Rule 130.102, Claimant's job search was conducted on approximately 13 days of the 13 week qualifying period. Claimant testified that she has received retraining through the P.I.C. program in 1996 and the TRC in 1999 yet she has failed to follow-up or utilized [sic] these marketable skills. Claimant also testified that she has prepared a resume but that she made all her contacts by telephone. Based on the credible evidence and testimony presented, the Claimant failed to meet her burden of proving that she made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the fifteenth quarter.

Claimant, in her appeal, stated that the "law does not state contacts to be made in person." (Emphasis in original.) That is true; however, the hearing officer could consider that all the contacts were by telephone, the provisions of Rule 130.102(e)(6), the amount of time spent in attempting to find employment and claimant's qualifications as opposed to the type of jobs sought (Rule 130.102(e)(2)). We do not find the hearing officer's determinations on this issue to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the issue of whether carrier's request for a BRC was timely, Rule 130.104(a) provides, in part, that carrier "shall issue a determination of entitlement or non-entitlement within 10 days after receipt" of claimant's TWCC-52. It is relatively undisputed that claimant

sent her 18-page TWCC-52 to carrier on Friday, December 3, 1999, by facsimile (fax) transmission and that the fax was incomplete in that only a few pages were received. It is also relatively undisputed that there was a telephone conversation between claimant and Ms. B on Friday, December 3rd. Who called whom and what was said is disputed, although claimant appeared to agree that she was aware that carrier had not received a complete TWCC-52. Claimant retransmitted another copy of her TWCC-52 on Monday, December 6, 1999. Carrier filed its dispute requesting a BRC on December 15, 1999. Claimant contends that she submitted her TWCC-52 on December 3, 1999; that carrier received the form the same day; and that carrier's dispute on December 15, 1999, was untimely. That continues to be claimant's position on appeal. The hearing officer found that carrier received claimant's "completed application (TWCC-52)" for the 15th quarter of SIBs on December 6, 1999, and carrier's dispute was timely. We find the hearing officer's decision supported by the evidence.

On both issues, claimant's credibility is at issue and it is the hearing officer who is the sole judge of the weight and credibility that is to be given to the evidence. (Section 410.165(a).) We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, supra; Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge