

APPEAL NO. 000807

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 23, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) did not make a good faith effort to find work commensurate with his ability to work and, therefore, is not entitled to supplemental income benefits (SIBs) for the 16th or 17th compensable quarter. The claimant appealed, asserting that he had made a good faith effort to seek employment during the applicable periods and requesting that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responded, urging affirmance, citing the applicable Texas Workers' Compensation Commission rules.

DECISION

Affirmed.

The medical evidence indicates that claimant was carrying a stack of trays in a restaurant, slipped on a wet surface, and fell to the floor in a supine position. Claimant testified that he sustained a low back injury and had spinal surgery (medical records indicate a laminectomy) in January 1994. The parties stipulated that claimant sustained a compensable (low back) injury on \_\_\_\_\_; that claimant has an impairment rating (IR) of 15% or greater; that impairment income benefits (IIBs) have not been commuted; and that the qualifying period for the 16th quarter was May 30 through August 28, 1999, with the qualifying period for the 17th quarter being from August 29 through November 27, 1999. The parties acknowledge that the "new" SIBs rules, those in effect after January 31, 1999, apply.

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 his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

At issue in this case is whether claimant's job search efforts amounted to a good faith effort to obtain employment commensurate with his ability. Claimant's restrictions are not in evidence other than claimant testified that he had difficulty standing or sitting for any period of time. A functional capacity evaluation in 1996 and a report dated December 12, 1996, by Dr. B indicated that claimant was capable of performing light or sedentary duty

four to eight hours a day. (It is questionable how probative a 1996 report is for a mid- to late-1999 qualifying period.)

Claimant's Application for Supplemental Income Benefits (TWCC-52) for the 16th quarter contains a list of 35 job contacts. The list is not in chronological order and skips from week to week and month to month. Carrier points out some discrepancies such as there is at least one alleged contact made after the TWCC-52 was submitted to carrier. Carrier attempted to verify the job contacts and found some businesses had moved years ago, that other businesses did not have anyone working there by the name listed as a contact and other businesses had their telephones disconnected. Claimant testified that all his job contacts were cold calls made by personally walking into the business and asking for a job. For the 17th quarter, claimant lists 40 job contacts and these are listed sequentially. Claimant did not make any job contacts during two weeks of the 16th quarter qualifying period and four weeks during the 17th quarter qualifying period. Claimant explained that at times his back hurt so bad that he could not get out of bed.

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.

Rule 130.102(e) goes on to list some of the factors that the hearing officer may consider in determining a good faith effort. These include the number of jobs applied for, amount of time spent in looking, "any job search plan" and "applications or resume which document the job search efforts."

The hearing officer, in his Statement of the Evidence, commented that claimant's inability to look for work during the six weeks that he made no job contacts was "not documented [by] doctor visits or even self-created notes." The hearing officer went on to comment:

Many of Claimant's alleged job contacts during the 16th quarter did not check out when followed up by the adjustor. It is not unusual for a business to not remember an applicant, but when the business has moved some time before, or the employee contacted has not been employed there for one or two years, the accuracy of the job contact information can be called into question.

The hearing officer found that claimant did not make a good faith effort to find work commensurate with his ability.

We find the hearing officer's decision supported by the evidence. 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 v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); 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 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:

Susan M. Kelley  
Appeals Judge

Alan C. Ernst  
Appeals Judge