APPEAL NO. 000964

These appeals arise pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 13, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter but is entitled to SIBs for the second quarter. The appellant/cross-respondent (carrier) has requested our review of the second quarter determination, asserting that the evidence fails to establish that claimant looked for work each week during the qualifying period for that quarter. Claimant has appealed the first quarter determination, asserting that during the qualifying period for that quarter he did "look for jobs during the portion of the period he was able." The parties filed responses.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement on January 28, 1999, with a 16% impairment rating (IR); that claimant did not commute any portion of the impairment income benefits (IIBs); that the first quarter qualifying period was from September 18, 1999, through December 17, 1999; that the second quarter qualifying period was from December 18, 1999, through March 17, 2000; and that the Texas Workers' Compensation Commission (Commission) made the initial determination that claimant was not entitled to SIBs for the first quarter.

The hearing officer's finding that during both qualifying periods at issue claimant was unemployed as a direct result of his impairment from the compensable injury has not been appealed.

Claimant testified that he has an eighth grade education; that he worked for the employer for two years before his injury and that this work involved lifting 100-pound sacks of peanuts; that he injured his low back lifting a heavy pallet; and that he has not worked since his injury. He further stated that he has severe back pain, with numbness in the left leg and that the doctor has told him he cannot return to his previous work and has given him lifting restrictions. Claimant indicated that during the first quarter qualifying period he did not commence a job search until October 18, 1999, after receiving a copy of a report from Dr. B stating he could work with restrictions, because his doctor had previously told him not to work. He indicated that when he received Dr. B's report, he sent it to the Commission; that the Commission sent it back to him; and that is when he commenced his job search activities. He also said, referring to the first quarter qualifying period, that he knew he was supposed to find a job but did not know he had to look weekly. Claimant also testified that he contacted the Texas Rehabilitation Commission (TRC) but was not provided with any schooling or retraining and he introduced a December 20, 1999, letter from the TRC stating the following: "Client as per doctor is not able to pursue any form of gainful employment due to the extent of his injuries and restrictions. As for this he does not qualify for TRC services."

Claimant's Application for Supplemental Income Benefits (TWCC-52) for the first quarter, signed on "10-4-99," is checked "yes" to the question whether his doctor documented that he cannot do any type of work in any capacity and also reflects that claimant contacted various potential employers on October 18, 26, 27, and 29; November 3; and December 6 and 7, 1999.

Claimant's TWCC-52 for the second quarter reflects that he contacted 34 businesses between December 21, 1999, and March 15, 2000. Claimant said he went to these businesses in person seeking work he could do within his restriction against heavy lifting and that in most instances he had the person he spoke with sign off on his TWCC-52.

Concerning the second quarter qualifying period, claimant stated that he looked for work every week; that he knows (city) well and always goes in person to businesses looking for jobs because that is what he has always done in the past; that he left applications at some of the businesses; and that he was not called for an interview or hired. He also stated that while he only listed up to three businesses on his paperwork for any one day, he sometimes would make more than three contacts but would just not list them. He indicated that he would sometimes list some of the contacts exceeding three on the next day or another day.

Claimant introduced a May 12, 1999, letter from Dr. F, stating that due to the nature of the injury, claimant is unable to return to his previous employment. Dr. F's letter of September 27, 1999, states that "regarding gainful employment, it is highly unlikely that any future employer would accept [claimant] under the extreme work restrictions we have placed on him"; that "we feel he is certainly a candidate for SIBS"; and that he is "unable to pursue any form of gainful employment due to the extent of his injuries and his restrictions."

The October 7, 1999, report of Dr. B states that claimant was reevaluated on September 30, 1999; that since Dr. B's last evaluation of claimant on June 17, 1998, claimant has not worked, has continued with conservative treatment, and continues to have pain in his low back with radiation down his left leg. Dr. B further reported that while he does not feel claimant can return to his previous work which involved a lot of lifting, he does feel that claimant could return to work at a type of job that will allow frequent changes in body position such as sitting and standing several times an hour, as well as the ability to sit at different heights. He also stated that claimant will have to be restricted significantly with lifting.

The hearing officer found that claimant had some ability to work during the qualifying periods involved; that during the first quarter qualifying period claimant did not make a good faith effort to find work commensurate with his ability to work; and that during the qualifying period for the second quarter, he made the required good faith effort to find work.

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.

This is a "new" SIBs rules case. Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). In the version in effect when the qualifying periods in this case commenced, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) addressing "Good Faith Effort" provides in Rule 130.102(d)(5) that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "(5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment." Rule 130.102(e), which addresses "Job Search Efforts and Evaluation of Good Faith Effort," provides, in part, that an 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. Rule 130.102(e) also sets out a number of factors that may be considered in the evaluation of a claimant's job search efforts.

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, will not disturb the challenged factual determinations 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:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge