

APPEAL NO. 001177

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 May 4, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter, from February 23, 2000, through May 23, 2000. The claimant appeals the hearing officer's findings that he contacted 24 prospective employers; that he spent approximately two percent of his time conducting a job search; that he did not seek employment during each and every week; that he did not have a job search plan; that his job search was self-restricted, selective, and lacked timing, forethought, and diligence; and that he did not in good faith attempt to obtain employment commensurate with his ability to work. The respondent (carrier) replies that the hearing officer's decision is supported by the great weight and preponderance of the evidence and should be affirmed. The hearing officer's findings that the claimant had the ability to perform some work during the qualifying period and that his unemployment was a direct result of his impairment have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The only issue in this case is whether the claimant made the required good faith job search effort. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), the version then in effect, provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "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." Subsection (e) further provides that the injured worker who "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." There follows a list of information that may be provided by the injured worker and considered on the question of a good faith job search.

The claimant sustained a compensable cervical injury on _____. As a result of the injury, the claimant had cervical surgery performed on September 24, 1996; April 28, 1997; and September 13, 1998. During the qualifying period at issue, November 11, 1999, through February 9, 2000, the claimant testified he was capable of performing a job within the restrictions identified by the carrier's doctor, Dr. E. According to Dr. E, the claimant was "at best" capable of part-time sedentary work with occasional lifting/carry of five to ten pounds, up to four hours a day maximum.

The claimant testified that he sought employment at all twenty places listed on his Application for Supplemental Income Benefits (TWCC-52), and documented four other contacts with potential employers made during the last two weeks of the qualifying period.

The TWCC-52 indicates a weekly job search through January 24, 2000. The claimant said that he sought part-time jobs which he was capable of performing, given his restrictions. The claimant testified that he did not have a job search plan, but did contact five potential employers provided by the carrier's vocational rehabilitation consultant.

The claimant had the burden to prove that he made a good faith effort to seek employment commensurate with his ability to work during the qualifying period. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer found that the claimant spent approximately two percent of his time conducting a job search during the qualifying period. In reaching this determination, the hearing officer relied on the claimant's testimony that he spent a total of 50 hours conducting a job search, and based his calculation on 24 hours in a day during the 90 day qualifying period. The hearing officer could consider the amount of time spent in attempting to find employment; however, he inappropriately based such a determination on a 24-hour period, failing to take into account activities of daily living such as sleeping and eating. We reverse such finding as being against the great weight and preponderance of the evidence.

The requirement to look for work every week of the filing period does not mean that there must be an employment application filed or employer visited every week of the filing period. Rather, there must be some search for a job. The search can include looking in a newspaper, meeting with an employment counselor, or assessing one's postinjury employment skills. In Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, we held that documentation was mandatory to establish a good faith job search. See *also* Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999. Such documentation need not be limited to the information on the TWCC-52, but can exist in other forms, such as memoranda, notes, copies of applications, or statements of persons with knowledge of the relevant facts. The hearing officer properly did not consider those contacts testified to by the claimant which were not documented.

The hearing officer determined that the claimant did not seek employment during each and every week of the qualifying period. With regard to this finding, the hearing officer states that the claimant "apparently" did not submit the four contacts to the carrier when he submitted the TWCC-52 and attachments for the qualifying period, and that "if so, this would mean [c]laimant did not seek employment during the last two weeks of the qualifying period, and the [four contacts] were an afterthought by [c]laimant." The claimant's failure to provide such documentation to the carrier when he submitted the

TWCC-52 was not fatal, but could be considered by the hearing officer in determining whether such contacts were made.

The hearing officer considered all of the evidence and concluded that the claimant did not make any job search efforts during the last two weeks of the qualifying period. Applying our standard of review to the record of this case, we find the evidence sufficient to support this determination. Under Rule 130.102(e), the hearing officer properly determined that the claimant did not make a good faith effort to look for work commensurate with his ability to work in the qualifying period for the fourth quarter because he found that the claimant did not look for work during each and every week during the qualifying period as he was required to do.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge