

APPEAL NO. 001185

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 May 4, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first five quarters; that the respondent (carrier) is relieved of liability for paying any SIBs, were any owing, for the second, third, and fourth quarters; and that because the claimant was not entitled to SIBs for 12 consecutive months, he has permanently lost entitlement to SIBs. The claimant has requested our review of these determinations, contending that his testimony and medical evidence established that he had no ability to work and that his testimony established that both he and his former attorney timely forwarded his SIBs applications to the carrier. The carrier responded, urging the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed as reformed.

The parties stipulated that on _____, the claimant sustained a compensable injury to his low back and abdomen; that he reached maximum medical improvement on April 25, 1996, with an impairment rating (IR) of 17%; that he did not commute any portion of his impairment income benefits (IIBs); that the filing period for the first compensable quarter was from January 18 through April 17, 1997; and that the Texas Workers' Compensation Commission (Commission) determined on May 19, 1997, that the claimant was entitled to SIBs for the first quarter, which was disputed by the carrier.

The claimant testified that he injured his low back and sustained bilateral inguinal hernias on _____, while lifting scaffolding at work; that he had three operations to repair the hernias; and that he is 53 years of age and has an 11th grade education. Responding to a question about the period from January 1997 to April 1998, the claimant acknowledged having undergone a functional capacity evaluation (FCE) in January 1997 but stated that he was on pain medication at the time. He also said he was in the hospital for a few days in August 1997 for chest pain related to stress. The claimant indicated that during that filing period he lived in (city).

Concerning the first quarter filing period, the claimant said he did not look for employment because he was still under the care of his former treating doctor, Dr. H. He maintained that he could not work in January 1997 because of his pain.

Concerning the second through the fifth quarters, the claimant said he started looking for a job "wherever [he] was supposed to" and that he looked for a job "wherever I could stop." The claimant acknowledged that he advised the prospective employers he contacted that he was "pending back surgery." The claimant's Statement of Employment Status (TWCC-52 forms for the second through the fifth quarters each reflected 15 job

contacts averaging approximately one contact per week. The claimant also introduced 14 Job Search Verification Forms signed by prospective employers all of which stated that the claimant advised the person contacted of his limitations/restrictions and that he could not perform the job requirements with such limitations/restrictions. The claimant also acknowledged that during the filing periods he did not register with the Texas Workforce Commission or its predecessor agency, that he did not contact the Texas Rehabilitation Commission (TRC) despite receiving a notice from the Commission that he may be eligible for TRC services, and that he declined the assistance of the carrier's vocational consultant on the advice of his former attorney.

Concerning the filing of his TWCC-52 forms for the second through the fourth quarters, the claimant said he could not recall having given them to the carrier's representative at a benefit review conference (BRC) on March 24, 1998, despite a notation on the bottom of the second quarter TWCC-52 to that effect. He testified that he gave some of the TWCC-52 forms to his former attorney and some to the Commission but he could not be specific as to the dates and the quarters involved. A Dispute Resolution Information System (DRIS) note of October 16, 1997, reflects that a Commission employee explained to the claimant the importance of continuing to file even though a dispute was ongoing and provided the claimant with TWCC-52 forms for the second and third quarters. A DRIS note of March 24, 1998, pertaining to a BRC, states that the claimant had the TWCC-52 forms for the second through fourth quarters with him and that he hand delivered them to the carrier's attorney at that time.

According to the January 27, 1997, report of Dr. W, apparently the designated doctor, the claimant's 17% IR consisted of zero percent for the right inguinal hernia, five percent for the left inguinal hernia, seven percent for a herniated nucleus pulposus at L5-S1, and six percent for loss of lumbar spine range of motion.

The report of the FCE of January 28, 1997, reflects that the claimant demonstrated a physical capacity at the medium-light work level. The report also noted that the claimant perceives his low back functional status as "severe disability."

Dr. H wrote on May 9, 1997, that the claimant is pending a work conditioning program and is "temporarily totally disabled." Dr. H wrote on November 13, 1997, that the January 1997 FCE recommended an exercise regimen; that in May 1997 he, Dr. H, recommended a work hardening program which the claimant was unable to complete due to high blood pressure; that the claimant has been authorized to see a psychiatrist and a pain management specialist; that the claimant has been off work since January 1997; that the claimant has recurrent, unpredictable pain episodes in his low back and inguinal areas; and that the claimant is "temporarily totally disabled until further notice." Dr. H wrote on November 18, 1997, that in October 1996 the claimant was released to return to work due to the hernia injury only; that had the lumbar spine been compensable at that time, the claimant would have been off work completely; that the claimant is not off work due to his hernia; and that the claimant has been unable to finish a work hardening program "due to various problems involving mental, lumbar, and cardiac." Dr. H wrote on April 18, 1998,

that the claimant "has been unable to work from "[illegible]-16-98 to 4-16-98" and is pending pain management for his post-surgical hernia pain.

According to a DRIS note of September 7, 1999, Dr. R, the claimant's current treating doctor, called to advise that while he can write a report on the claimant's current condition, he cannot state that the claimant had no ability to work during the first several quarters. Dr. R further stated that the claimant could possibly have done some sedentary work at that time but he could not say so for certain because he did not examine the claimant at that time.

Dr. C, a neurosurgeon, issued the report of his second opinion on spinal surgery on January 13, 2000, which noted that the claimant's examination was "completely histrionic" with exaggeration of every physical finding and "bazaar antics in an attempt to get my attention focused on his pain." Dr. C concluded that the mere presence of a small herniated disc at the L5-S1 level with minimal displacement of the S1 nerve root does not contribute to the claimant's "bazaar symptomatology"; that the claimant has no findings of acute or chronic nerve root irritation and no neurological deficits; and that Dr. C does not concur with a recommendation for spinal surgery.

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. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, citing BLACK'S LAW DICTIONARY (6th ed. 1990). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

The hearing officer found that during the five filing periods the claimant had not returned to work as a direct result of his impairment from his compensable injury. The claimant disputes this finding in spite of the fact that it is favorable to him. The claimant also challenges findings that during the filing periods he had an ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work. The hearing officer makes clear in his discussion of the evidence, which we need not repeat here, why he views the claimant's job search efforts as just "going through the motions" and merely attempting to qualify for SIBs rather than actually attempting to obtain employment.

The claimant also challenges findings that on March 24, 1998, he gave the carrier his TWCC-52 forms completed for the first five quarters and that the carrier had not received any TWCC-52 forms from the claimant or his attorney prior to that time. However,

the hearing officer states in his discussion of the evidence that in May 1997 the claimant presented his first quarter TWCC-52 to the Commission and that the Commission approved the application but the carrier disputed it; and that the claimant did not provide any other TWCC-52 forms to the carrier until the March 24, 1998, BRC. Since this scenario comports with the evidence, we reform Finding of Fact No. 10 to state that on March 24, 1998, the claimant gave the carrier his TWCC-52 application forms for the second through fifth quarters.

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 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).

We affirm the decision and order of the hearing officer as reformed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Dorian E. Ramirez
Appeals Judge