

APPEAL NO. 001244

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 3, 2000. The hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first four quarters because she did not meet her burden to prove that she made a good faith job search. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order. The direct result determination in claimant's favor was not appealed.

DECISION

We affirm in part and reverse and render in part.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBs for the first three quarters. Claimant asserts that she had no ability to work during the qualifying periods for these three quarters.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying periods is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. The Appeals Panel's standard of review in this case is also set forth in Appeal No. 000004. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an employee may be in good faith if the employee:

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

The hearing officer summarized some of the background facts in his decision. Briefly, after claimant's compensable injury in September 1995, she had four surgeries for carpal tunnel syndrome (CTS), one shoulder surgery, and neck surgery. The hearing officer determined that the qualifying periods for the first three quarters ran from approximately January 16, 1999, through October 15, 1999.

The hearing officer determined that: (1) claimant did not meet her burden to prove that she had no ability to work during the qualifying periods in question; (2) claimant did not look for work and was unemployed during the qualifying periods in question; (3) an October 6, 1999, work capacity report stated that claimant had the ability to perform sedentary work; (4) Dr. G had not released claimant to work during the qualifying periods in question; and (5) Dr. G's narratives did not "explain or even establish" that claimant had no ability to work at all during the qualifying periods in question.

Claimant had the burden to prove that she had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. The hearing officer was the sole judge of the credibility of the evidence and he judged the credibility of the medical evidence regarding whether claimant had an ability to work during the qualifying periods, from January 16, 1999, through October 15, 1999. There was evidence from Dr. G that claimant's functional limitations and pain behaviors prevent her "from returning to the normal activities of daily living" and that she should remain off work. However, the hearing officer judged the credibility of this evidence and determined that claimant was able to do some type of work during the applicable qualifying periods. The hearing officer determined that claimant did not provide a "narrative report from a doctor which specifically explains how the injury causes a total inability to work," as required by Rule 130.102(d)(4). Because claimant did not look for work, the hearing officer did not err in determining that claimant did not meet her burden of proof regarding the good faith SIBs criterion. The hearing officer's determinations regard good faith are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we will not substitute our judgment for his. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant contends the hearing officer erred in determining that she is not entitled to SIBS for the fourth quarter. Claimant asserts that she had no ability to work during the qualifying period, which was from October 16, 1999, to January 14, 2000. The hearing officer determined that: (1) Dr. G's narrative reports did not establish that claimant had no ability to work at all during the qualifying periods in question; (2) claimant did not prove that she had no ability to work at all; (3) claimant "had returned to work for the last two weeks of the qualifying period in a position which was relatively equal to claimant's ability to work"; and (4) claimant's employment "excused claimant from a job search" only for the last two weeks of the qualifying period; (5) claimant did not look for work every week of the qualifying period when she was not employed; and (6) claimant did not make a good faith effort to search for work commensurate with her ability to work and is not entitled to fourth quarter SIBS.

One way a claimant may establish entitlement to SIBS is by proving that he or she "has returned to work in a position which is relatively equal to the injured employee's ability to work." Rule 130.102(d)(1). The use of the phrase "relatively equal" permits some discretion to the fact finder. Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000. This standard for establishing entitlement to SIBs stands somewhat alone and does not require that a claimant must look for work in each week leading up to the "relatively equal" employment or that The claimant work some set portion of the qualifying period. Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000.

In this case, the hearing officer found that claimant had returned to work full time during the last part of the qualifying period. Carrier did not appeal this determination. The hearing officer determined that, even though claimant had returned to work within her restrictions, she still had to prove that she looked for work every week of the qualifying

period before she was hired. However, we have held otherwise. Appeal No. 000616. Because claimant returned to work in a position relatively equal to her ability to work, claimant met her burden regarding the SIBs good faith job search. As indicated by the express exceptions set forth in Rule 130.102(e), claimant was not required to prove that she also looked for work every week during the remainder of the qualifying period. We conclude that the hearing officer's determination regarding good faith and the fourth quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and we reverse it. Cain, supra.

We affirm that part of the hearing officer's decision that determined that claimant is not entitled to SIBs for the first, second, and third quarters. We reverse that part of the hearing officer's decision that determined that claimant is not entitled to SIBs for the fourth quarter and we render a decision that claimant is entitled to SIBs for the fourth quarter.

Judy L. Stephens
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge