

APPEAL NO. 001245

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 2, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, second, or third quarter. The hearing officer also determined that claimant was late in filing his Applications for [SIBS] (TWCC-52) for the second and third quarters, that no benefits accrued for the second quarter, and that, if they had been payable, no benefits would have accrued for the third quarter until January 28, 2000, when claimant filed his TWCC-52. Claimant appealed these adverse determinations on sufficiency grounds. The respondent (carrier) responded that the hearing officer's determinations are supported by sufficient evidence. The direct result determination in claimant's favor was not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBS for the first three quarters. He asserts that he had no ability to work during the qualifying periods for these three quarters and that the narrative from his doctor, Dr. M, specifically explains how the injury caused a total inability to work. He also contends that the report from Dr. S stating that he could work lacked credibility because Dr. S did not thoroughly examine claimant and because he did not consider claimant's chronic pain or the effect of claimant's medications on his ability to work.

The qualifying periods in question ran from March 27, 1999, to December 24, 1999. Claimant testified that he sustained a compensable injury when he twisted his ankle and fell, rupturing a disc. He said he has undergone caudal peridural injections in his spine and that his doctors told him that he is not a candidate for surgery because of scar tissue. He said he has not been able to work because of the medications he takes, his loss of concentration, and inability to sit or stand for very long. When asked whether he could work, claimant said he might be able to do part-time work if he took his medication. He said he might be able to attend classes, depending on how long they last.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. The rules provide an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work 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. 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)).

Rule 130.102(e) provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured 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." Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Our appellate standard of review is set forth in Section 410.165(a); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); and Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Under the facts of this case, claimant had the burden to prove that he had no ability to work due to the compensable injury. Texas Workers' Compensation Commission Appeal No. 991616, decided September 15, 1999. In a report written during the qualifying period for the third quarter, Dr. M stated that claimant is unable to work in any capacity; that he has consistent lumbar pain radiating into his leg with a burning sensation; and that due to these symptoms and his inability to push, pull, lift, sit or stand "for extended periods," claimant "has remained off work . . . since he has been in treatment with me." There was evidence from Dr. S, written during the qualifying period for the first quarter, that claimant was capable of medium-level work. The hearing officer was the sole judge of the credibility of this medical evidence and he specifically found that claimant was capable of doing some work. Because claimant did not look for work every week of the qualifying period, he did not meet the good faith SIBS requirement. The hearing officer made her determinations regarding good faith and ability to work based on the evidence before her. Because the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for hers. Cain.

Claimant contends that the hearing officer erred in determining that: (1) he did not timely file his Applications for [SIBS] (TWCC-52) for the second quarter, and (2) the TWCC-52 for the third quarter was late so that, if benefits had been due, they would not have begun to accrue until the day after carrier received the TWCC-52, on January 29, 2000. Claimant contends that carrier did not receive his TWCC-52s until January 28, 2000, because carrier failed to send him TWCC-52 forms for the second and third quarters and, apparently, that he received them from another source. The initial determination of the Texas Workers' Compensation Commission (Commission) was that claimant was entitled to first quarter SIBS.

We affirmed the determination that claimant is not entitled to SIBS for either quarter, so this issue is moot. However, we will briefly address this issue. Claimant's contention is that he was late filing his TWCC-52s for the second and third quarters because carrier did not send him TWCC-52 forms. However, claimant did not testify to that fact at the CCH. Claimant said he was not sure who sent him the TWCC-52s and he was not sure whether he mailed them or whether he gave them to his attorney to mail to carrier. The TWCC-52s for the second and third quarters are date stamped received by carrier on

January 28, 2000. The hearing officer determined that claimant filed his TWCC-52s for the second and third quarters with carrier on January 28, 2000.

Assuming that carrier was required to send these forms to claimant, whether carrier did so was a fact question for the hearing officer to consider and she resolved this issue against claimant. See Rule 130.104(b). The TWCC-52 for the second quarter was due seven days before the quarter began. Rule 130.104(c). The second quarter started on October 8, 1999, and ended on January 6, 2000. The TWCC-52 for that quarter was filed on January 28, 2000, so that, even if claimant had been entitled to benefits, none would have accrued because the TWCC-52 was filed after the quarter ended. Rule 130.104(f). The third quarter began January 7, 2000, and ended April 6, 2000. The TWCC-52 for that quarter was filed before the quarter ended, so partial benefits would have accrued beginning on January 28, 2000, when claimant filed the TWCC-52, had claimant been entitled to them. We conclude that the hearing officer did not err in her determinations regarding late filing of the TWCC-52s, any exceptions to the time for filing, and whether benefits would have accrued regarding the second and third quarters. We will not reverse the hearing officer's determinations in this regard because they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Kathleen Decker
Appeals Judge

Alan C. Ernst
Appeals Judge