APPEAL NO. 001327

Following a contested case hearing held on May 17, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter. The claimant requests our review, asserting that the evidence established that he made a good faith effort to obtain employment. The respondent (carrier) urges in response that the evidence is sufficient to support the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on March 10, 1999, with a 16% impairment rating (IR); that the claimant has not commuted any portion of his impairment income benefits (IIBs); that the Texas Workers' Compensation Commission (Commission) made an initial determination that the claimant was not entitled to SIBs for the first quarter; that the first quarter began on February 10 and ended on May 10, 2000; and that during the first quarter qualifying period the claimant earned no wages. Though not stipulated, the parties referred to the first quarter qualifying period as the period from October 29, 1999, to January 27, 2000.

The claimant testified that on _____, he injured his left elbow and back from the neck on down when he stumbled backwards while carrying a 4 foot by 10 foot sheet of sheetrock at work. The claimant said that Dr. JBB, his treating doctor, had released him for light-duty work. He indicated that he lived in (state A), and that in addition to the entities listed on his Application for Supplemental Income Benefits (TWCC-52) he contacted both state A's department of labor and vocational rehabilitation division but that he did not hear further from these agencies.

The claimant, who indicated that he has worked in construction since he was 18 years of age, testified that he went in person to the businesses listed on his TWCC-52 and that he was looking for light-duty work because his doctor said he cannot return to construction work. The claimant's TWCC-52 reflects that he contacted state A's labor department on October 29 and one business each on the days of October 30, November 4, November 10, November 16, November 30, December 7, December 14, December 22, and December 28,1999; that he contacted the Texas Rehabilitation Commission on January 5, one business each on January 10 and January 18, the Texas Workforce Commission on January 27, and one business on January 27, 2000. The TWCC-52 further reflects that none of the businesses listed were hiring and that the claimant filed no application or resume at any of these businesses.

Dr. JB, the designated doctor who assigned a 16% IR, reported on March 23, 1999, that he diagnosed an undisplaced left radial head fracture without residual discomfort and symptomatic degenerative disc disease at L5-S1 with referred left leg "and symptom magnification." Dr. JB further reported that the claimant said he was released to return to work in 1998 but that his company had not rehired him and he has not since returned to any other employment. Dr. X, who examined the claimant for the carrier on May 28, 1999, and assigned a five percent IR, reported on June 3, 1999, that he diagnosed a resolved lumbar strain; that the claimant has degenerative disc disease at L5-S1 but no herniated disc; and that he recommends that the claimant return to normal work without restrictions.

In evidence is a Commission letter of February 8, 2000, advising the claimant that the Commission found that he is not entitled to SIBs because he had not made a good faith effort to obtain employment equal to his ability to work. A March 6, 2000, letter from Dr. JBB states that the claimant is under his care for chronic chondral back pain and is unable to return to his preinjury job. The April 22, 1998, report of a functional capacity evaluation concludes that the claimant could work full time at the sedentary work level. The report also notes that the claimant did not give a consistent effort, had poor pain management skills, was markedly deconditioned, and manifested non-organic signs. Also in evidence is an Employee's Request to Change Treating Doctors (TWCC-53) reflecting that the Commission on March 22, 2000, approved the claimant's request to change treating doctors from Dr. JBB to Dr. T.

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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides that 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. This rule goes on to list a number of factors which may be considered in determining whether a good faith effort was made including the number and types of jobs sought, the existence of applications or resumes to document the job search efforts, any job search plan, and the amount of time spent in attempting to find employment.

The hearing officer found that the claimant had some ability to work; that the claimant's unemployment was a direct result of his impairment; that the claimant conducted his job search on 15 days during the 13-week qualifying period; that the claimant was registered with state A's labor department and vocational rehabilitation division; that the claimant did not conduct and document a job search effort every week of the qualifying period, specifically November 17 through November 29, 1999; and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work.

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:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge