APPEAL NO. 001358

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 23, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fourth quarter. The appellant (carrier) appealed, contending this determination is against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

Background facts about the claimant's injury are contained in Texas Workers' Compensation Commission Appeal No. 000626, decided May 8, 2000. 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 (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs depends on whether the employee meets the criteria during the qualifying period. The fourth SIBs quarter was from February 22 to May 22, 2000, and the qualifying period was from November 9, 1999, to February 7, 2000.

At issue in this case is whether the claimant made the required good faith job search commensurate with his ability to work. Rule 130.102(e) provides that the injured employee shall look for such work every week of the qualifying period and document the job search efforts. There follows a nonexclusive list of factors to consider in evaluating whether a job search was made in good faith. The claimant submitted an Application for [SIBs] (TWCC-52) in which he listed 22 job searches or contacts. Because the listing on the TWCC-52 had no entries for the first two weeks of the qualifying period, the claimant offered additional documentation reflecting that resumes were sent to two additional employers, one in each of these two weeks. This evidence, on its face, reflects a weekly job search. In addition, the claimant had a part-time job involving approximately 14 hours per week as a driver. The claimant said he lived in a rural area and developed these job leads through friends and the newspaper. Some contacts were in person, others were by phone or fax. Also in evidence was the opinion of Dr. M that based on the claimant's physical condition and age (60 at the time of the CCH) he was "simply not a candidate for rehabilitation." Dr. M further limited him to sedentary work. There was also evidence that the claimant declined the help of a vocational counselor during the first and second SIBs quarter qualifying periods, but the offer of this assistance was not made for the fourth quarter.

Whether the claimant made the required good faith job search presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. In this case, the hearing officer found the claimant credible in his assertion and supporting documentation, that he was looking for work in good faith commensurate with his ability to work. The claimant testified that he believed he could do the work applied for or that if he got his foot in the door, so to speak, with an interview, there would likely be some job he could do. Mr. B, the carrier's vocational consultant, testified that in his confirmation of some of the job contacts, he could not agree the actual work available was within the claimant's physical abilities. It was up to the hearing officer to determine which evidence was more credible. Section 410.165(a).

In its appeal, the carrier argues that the hearing officer erred in his determination of a good faith job search because the claimant "failed to comply with [the Texas Rehabilitation Commission (TRC)] and denied vocational rehabilitation by the [carrier]." The failure to comply with the TRC assertion presumably is a reference to evidence at the CCH from Mr. B about the so-called STEP (senior Texan employment program) program of the TRC. There was no other evidence about this program other than Mr. B's testimony that it existed. The claimant himself said that in an earlier quarter he had gone to the TRC but was told retraining was not indicated because of his age. There was no evidence of a referral of the claimant to any TRC program. Based on the record before us, we cannot conclude that the claimant should as a matter of law be denied SIBs for failure to "comply with TRC." Similarly, as stated above, the evidence established that the carrier did not offer vocational assistance for the fourth quarter. The adjuster testified that because the claimant rejected such assistance for the first and second quarters, she saw no reason to offer it again. This was her choice, but we cannot conclude that it was fatal to claimant's application for fourth quarter SIBs that he did not use vocational services that were not offered.

The carrier also argues that it was improper for the hearing officer to consider as separate "job applications" the submission of a resume and a follow-up call to see if the resume created any interest in the potential employer. It should be pointed out that a job search is not coextensive with the submission of job applications. Other activities undertaken with a general objective of finding employment but not involving the submission of a job application may be considered part of a job search. With this in view, we observe that it is not evident in the decision and order that the hearing officer considered the submission of a resume and a follow-up call to be two separate job searches. Nothing, however, precluded him from considering the follow-up call an additional job search effort.

Finally, the carrier appeals the finding of a weekly documented job search. Clearly, there was evidence considered credible by the hearing officer that reflected a weekly job search throughout the qualifying period.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and

unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the findings of fact and conclusions of law of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Gary L. Kilgore
Appeals Judge