APPEAL NO. 001474
FILED AUGUST 9, 2000

Following a contested case hearing held in_____, Texas, on June 1, 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 17th quarter. The claimant has requested our review of the sufficiency of the evidence to support the hearing officer's findings that the claimant had some ability to work and did not find attempt in good faith to obtain employment commensurate with his ability to work. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

This is a "new rules" SIBs case. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 *et seq*.(Rules 130.101 et seq.) The only SIBs entitlement criterion in issue on appeal is the requirement in Sections 408.142 and 408.143 of the 1989 Act that the claimant have attempted in good faith to obtain employment commensurate with his ability to work.

The claimant testified that his face, jaw, chin, mouth, neck, and low back were injured on _____, when, while working for the employer as a painter, a crane dropped a piece of metal which struck the right side of his head; that he had no surgical treatment for his spinal injuries but did have jaw surgery; that he has had more than 100 sessions of physical therapy; and that he takes various medications.

The parties stipulated that the qualifying period for the 17th quarter was from November 19, 2000, through February 17, 2000, inclusive. The claimant testified that during that period he did not look for work because he believes he had no ability to work in any capacity. He did acknowledge that he has since begun to seek employment because the carrier told him to do so. He indicated that he had two years of college in (country) and was a grade school teacher in that country before coming to the United States. The claimant further stated that on some occasions during the qualifying period, he drove his car, drove his two children who live with him to school, did household chores, did some work in the yard, and drove to doctor's offices. He stated that he could not return to his painting occupation because the fumes increase the pain of his headaches. The claimant acknowledged that his physical condition had not changed over the past year.

The claimant's treating doctor, (Dr. N), wrote on April 10, 2000, that the claimant complains of pain in all three spinal regions and of headaches; that he has muscles

spasms in his spinal musculature; and that his condition is unchanged since his last visit. Dr. N stated his opinion that the claimant "did not have the ability to work in any capacity during the period of 11-19-99 through 01-17-000 due to his severe persistent neck and back pain" and that he disagrees with the opinion of (Dr. MB) that the claimant can work.

Dr. MB, who performed an independent medical examination of the claimant, reported on September 30, 1999, that his assessment is mild fascial pain syndrome and temporomandibular joint dysfunction. Dr. MB also stated that it appeared that the claimant would be able to perform work at the light duty range with no lifting greater than 10 pounds and that on examination, the claimant was noted to be in fairly good physical condition and obviously uses his upper extremities on a daily basis given his musculature and the calluses on his hands.

(Dr. KB), a clinical neuropsychologist, wrote on March 22, 2000, that she has serious concerns about the claimant's ability to go to work on a consistent, daily basis because of his physical pain and his cognitive deficits.

The version of Rule 130.102(d) in effect at the beginning of the qualifying period provides, in pertinent part, that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) 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[.]" Rule 130.102(e) provides, in pertinent part, 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.

The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See, e.g.* Texas Workers' Compensation Commission Appeal No. 001294, decided July 20, 2000, and cases cited therein. We have also repeatedly encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3). Appeal No. 001294.

The claimant had the burden to prove that during the qualifying period at issue he made a good faith effort to obtain employment commensurate with his ability to work. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), 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)), and

determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel 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).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge