APPEAL NO. 001969

Following a contested case hearing held on August 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 issues by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, second, third, fourth, and fifth quarters; that she has permanently lost entitlement to SIBs because she was not entitled to them for 12 consecutive months; that the respondent (carrier) is relieved of liability for SIBs for the second quarter because of the claimant's failure to timely file the application; that the carrier is not relieved of liability for SIBs because of the claimant's failure to timely file applications for the third, fourth, and fifth quarters; that the claimant's weekly earnings to be used to calculate the monthly SIBs for the filing period from August 14 through November 12, 1999 (the third quarter), is $30.00; that the claimant's weekly earnings to be used to calculate the monthly SIBs for the filing period from November 13, 1999, through February 11, 2000 (the fourth quarter), is $67.88; and that the claimant's weekly earnings to be used to calculate the monthly SIBs for the filing period from February 13 through May 13, 2000 (the fifth quarter), is $117.31. The claimant has appealed on sufficiency of the evidence grounds the determinations that she is not entitled to SIBs for the first through the fifth quarters; that she has permanently lost entitlement to SIBs; and that she failed to timely file an application for the second quarter. The carrier urges in response that the evidence is sufficient to support the legal conclusions and certain underlying findings of fact which the claimant also challenges.

DECISION

Affirmed.

We note at the outset that although the hearing officer's Decision and Order reflects in the style of the case that (carrier) is the carrier, the hearing officer also records the parties' stipulation that the employer, (employer), is self-insured.

The parties further stipulated that on _____, the claimant sustained a compensable injury; that she reached maximum medical improvement with an impairment rating (IR) of 15% or greater and has not commuted any portion of her impairment income benefits (IIBs); and that the dates for the disputed quarters are as follows: first quarter–May 28, 1999, through August 26, 1999; second quarter–August 27, 1999, through November 25, 1999; third quarter–November 26, 1999, through February 24, 2000; fourth quarter–February 25, 2000, through May 26, 2000; and fifth quarter–May 27, 2000, through August 25, 2000. The parties did not stipulate to the dates of the qualifying periods. However, the new SIBs rules apply to all quarters at issue (Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished)), and a qualifying period ends on the 14th day before the beginning of the quarter and consists of the 13 previous consecutive weeks. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)).

The claimant contended at the hearing that she had no ability to work during the qualifying periods for the first and second quarters; that her light-duty employment during the qualifying periods for the second through the fifth quarters constituted a good faith attempt to obtain employment commensurate with her ability to work; and that her return to work during the second through fifth quarter filing periods earning less than her average weekly wage (AWW) was a direct result of her impairment. *See* Section 408.142 which sets out the statutory criteria for entitlement to SIBs.

The claimant's Statement of Employment Status (TWCC-52) for the first quarter and her Application for [SIBs] (TWCC-52) for the second quarter reflect that she earned no wages and made no job search efforts during the qualifying periods. The claimant's third quarter TWCC-52 reflects that she made two job contacts on August 20, 1999, and one on September 9, 1999, and that she earned $30.00 per week for the weeks ending August 27; September 3, 10, 17, and 24; October 1, 8, 15, 22, and 29; and November 5, 12, and 19, 1999. The claimant's fourth quarter TWCC-52 reflects that she made one job contact on November 1 and one on November 27, 1999, and that she earned $30.00 per week for the weeks ending November 12, 19, and 26, 1999; $80.00 per week for the weeks ending December 3, 10, and 17, 1999; $50.00 per week for the weeks ending December 24 and 31, 1999; $80.00 per week for the weeks ending January 7 and 14, 2000; $100.00 per week for the weeks ending January 21 and 28, 2000; $80.00 for the week ending February 4, 2000; $130.00 for the week ending February 11, 2000; and $142.50 for the week ending February 18, 2000. The claimant's fifth quarter TWCC-52 reflects that she made no job contacts during the qualifying period and that for the weeks ending between February 25 and May 19, 2000, her wages earned were, respectively, $110.00, $200.00, $135.00, $80.00, $105.00, $80.00, $100.00, $120.00, $140.00, $135.00, $105.00, $105.00, and $135.00.

The claimant testified that on _____, her neck and low back were injured when the van she was driving for the employer was struck by another vehicle. She said she was employed by the employer at a mental health/mental retardation facility as a caretaker and that her duties involved teaching clients how to clean their rooms and bathrooms, to cook, to do their laundry, and to perform other tasks, as well as driving them to stores, to church, to the barber shop, and so on. The claimant said that her preinjury wages varied from $550.00 to $1,000.00 every two weeks depending on the amount of overtime she worked and that she would work anywhere from 40 to 80 hours per week.

The claimant indicated that she initially received chiropractic treatment for her neck and low back injuries from Dr. P. She said that she also received conservative treatment from Dr. E at an occupational medicine clinic; that she was also treated by Dr. W, a pain specialist, who administered three epidural steroid injections; and that she has not had surgical treatment.

Dr. P wrote the employer on September 18, 1998, stating that he continues to treat the claimant on a periodic basis with the last treatment taking place on September 16, 1998; that she will probably experience various symptoms well into the future; and that it "remains [his] opinion that she is capable of performing full duties associated with being

a care giver for [employer]." Dr. P added that it would be in the claimant's best interest to work 8-hour shifts rather than 12.

According to a May 30, 1999, report of a functional capacity evaluation (FCE), the claimant tested at a light physical demand level of work. An FCE and return-to-work record of July 2, 1999, apparently signed by Dr. E, states that the claimant is able to return to modified work on that date and it lists certain permanent restrictions on lifting and on the frequency and duration of certain other physical activities.

According to the June 11, 1999, report of Dr. S, the designated doctor who assigned a 17% IR, the claimant, who was 64 years of age at the time of his examination and appeared "physically fit," reported having trouble remaining in one position for a long period of time but is able to walk for one mile daily, able to do all of her own self-care, and able to drive a motor vehicle. Dr. S's diagnoses are cervical, lumbar, and lumbosacral sprains with chronic pain, and mild spinal degeneration. The claimant introduced records reflecting that she attended physical therapy on 26 dates between August 3, 1999, and November 30, 1999. She also stated that she resigned from her employment on December 8, 1999, because she could not do her job due to her neck and back pain.

The claimant said that she did not look for work during the qualifying periods for the first and second quarters because of her pain. She said that in April 1999 she contacted the Texas Rehabilitation Commission (TRC) and also contacted that agency later on but felt she could not sit long enough to take a recommended computer training course. She indicated that she had some office skills but had no computer skills. A TRC form dated April 13, 1999, states that the claimant may need further treatment and was advised to contact the TRC again when she was released and ready to work. A TRC form dated July 1, 1999, states that the claimant inquired about TRC services and was cooperating with the TRC at that time.

The claimant further testified that in August 1999, she commenced a part-time, light-duty job driving little children from their homes to a school and back home again during the school terms; that the job paid $6.00 per hour; and that her earnings, as reported on her TWCC-52 forms, were $30.00 per week which equates to five hours per week. She indicated that the number of hours she worked varied depending upon the number of children she would pick up. She further stated that in late November or early December 1999, she commenced another part-time job working at a newly opened day care facility for $5.00 an hour; that she worked close to 20 hours per week; that this job was in addition to the child transportation job; that on or about January 20, 2000, her hours of work at the day care job were increased to 25 to 30 hours per week; and that from on or about January 20, 2000, to sometime in May 2000, she worked both jobs. She said she would not have had time to look for additional employment and needed to go home and rest after this work.

The claimant further testified that the carrier never sent her a TWCC-52 before the one she was sent for the sixth quarter. She said she obtained a TWCC-52 for the second quarter from the Texas Workers' Compensation Commission (Commission) and was

assisted in completing that form. The claimant signed the second quarter TWCC-52 form on June 23, 2000.

The claimant does not challenge a finding that during the five qualifying periods at issue she had some ability to work and that during the first two qualifying periods she was unemployed. Also undisputed are findings that during the qualifying periods for the fourth and fifth quarters, the claimant was working in a position relatively equal to her ability to work, and that during the qualifying periods for the first and second quarters she was unemployed. The claimant does dispute findings that during the qualifying periods for the first and second quarters she made no job search efforts; that during the qualifying periods for the third, fourth, and fifth quarters she did not make and document a weekly search for employment; that during the qualifying periods for the first, second, and third quarters she did not make a good faith effort to secure employment commensurate with her ability; that during the qualifying periods for the third, fourth, and fifth quarters she was underemployed; that during the qualifying periods for the first through fifth quarters her unemployment and underemployment were not direct results of the impairment from her compensable injury; and that she did not file a TWCC-52 for the second quarter until after the quarter had ended.

The claimant had the burden to prove by a preponderance of the evidence that she is entitled to SIBs for the first through the fifth quarters. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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. 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).

Section 408.142(a) provides, in part, that an employee is entitled to SIBs if on the expiration of the IIBs period the employee has not returned to work or has returned to work earning less than 80% of the employee's AWW as a direct result of the employee's impairment, and, has attempted in good faith to obtain employment commensurate with the employee's ability to work. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Rule 130.102(c), which addresses the "direct result" criterion, provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. Rule130.102(d), which addresses the "good faith" criterion, provides, in part, that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work; 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; or has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

Regarding the good faith criterion, we are satisfied that the hearing officer's determinations that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the first and second quarter qualifying periods are sufficiently supported by the evidence. As noted, findings that the claimant had some ability to work during the five qualifying periods at issue and that she was unemployed during the first and second quarter qualifying periods were not appealed. Consistent with her testimony, the claimant's TWCC-52 forms for those quarters reflect that she made no job searches. As for the third quarter, the hearing officer's findings determine that the claimant did not make and document a weekly search for employment during the qualifying period and that she did not make a good faith effort to secure employment commensurate with her abilities. We find the evidence sufficient to support this determination. The claimant worked only an average of five hours a week earning $30.00 a week during this qualifying period yet the claimant's treating doctor, Dr. P, as early as September 18, 1998, stated that she could return to her usual work as a caretaker working eight-hour shifts. The hearing officer's unappealed finding that during the fourth and fifth qualifying periods the claimant "was working in a position relatively equivalent to her ability to work" satisfies the "good faith" criterion for these quarters.

Regarding the "direct result" criterion, we are satisfied that the hearing officer's finding that during the qualifying periods at issue the claimant's unemployment and underemployment were not a direct result of the impairment from her compensable injury is not against the great weight of the evidence. Despite the 17% IR, the hearing officer could consider the diagnosis of cervical and lumbar sprains, the opinion of Dr. P that as of September 1998 the claimant could return to her regular duties but should limit herself to an eight-hour shift, the data in the two FCE reports, and the information from the designated doctor about the claimant's relative physical abilities, and conclude that the claimant's unemployment and underemployment did not at all result from her impairment.

Section 408.146(c) provides that an employee who is not entitled to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. *And see* Rule 130.106(a). Since we affirm the hearing officer's conclusion that the claimant is not entitled to SIBs for the first through the fifth quarters, we affirm the conclusion that the claimant has permanently lost entitlement to SIBs because she was not entitled to them for 12 consecutive months.

As for the issue of the timeliness of the claimant's filing of her TWCC-52 for the second quarter, the claimant testified that the Commission sent her a letter advising that she was entitled to SIBs for the first quarter and that the letter enclosed a TWCC-52 form which she said she sent in. The claimant's first quarter TWCC-52 bears a date stamp reflecting that it was received by the Commission on April 15, 1999. She testified that the carrier did not send her a TWCC-52 for the second quarter and that she obtained one from the Commission and filed it on June 23, 2000. The claimant further testified that a benefit review conference (BRC) was held in May 1999 concerning entitlement to SIBs for the first quarter but she acknowledged that she did not further pursue her entitlement to SIBs for the first or subsequent quarters until she commenced her current effort. There is no Request for [BRC] (TWCC-45) in evidence. However, the BRC report in evidence reflects

that a BRC was held on June 23, 2000. We are satisfied that the hearing officer's finding that the claimant did not file her TWCC-52 for the second quarter until after that quarter ended and his conclusion that the carrier is relieved of liability for SIBs because of the claimant's failure to file her TWCC-52 for the second quarter are sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge