APPEAL NO. 002035

Following a contested case hearing held on August 2, 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 determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first, second, and third quarters. The appellant (carrier) appeals, asserting that the hearing officer's determination that the claimant made a good faith job search is against the great weight of the evidence. The claimant's response counters the carrier's contentions and urges that the evidence is sufficient to warrant our affirmance.

DECISION

Affirmed.

Inexplicably, the dates of neither the quarters nor the qualifying periods are stipulated. The parties did stipulate that the claimant was the employee of (employer), when he sustained a compensable injury on _____; and that he had at least a 15% impairment rating (IR) and did not elect to commute any part of his impairment income benefits (IIBs).

The claimant testified that he is 50 years of age and has worked as an upholsterer for 25 to 30 years; that he had worked for the employer for more than two years when he sustained his back and knee injury at work; that he underwent knee surgery but has not had back surgery; and that he is on a number of pain and other medications and uses a cane to walk because of sharp pains in both legs caused by his lumbar spine injury. He said that while his current treating doctor, Dr. L, has not released him for work, both Dr. J and Dr. G have said that he can perform sedentary work and that during the qualifying periods for the first, second, and third quarters, he looked for employment at the businesses listed on his Application for Supplemental Income Benefits (TWCC-52) forms. These forms reflect the periods of the qualifying periods as July 17, 1999, through October 15, 1999; October 16, 1999, through January 14, 2000; and January 15, 2000, through April 14, 2000. According to these applications, the claimant contacted 14 businesses during the first quarter qualifying period, 20 during the second, and 43 during the third. The claimant indicated that he received many of the job leads from the Texas Workforce Commission (TWC), an agency he visited approximately 10 times a month, but also from the newspapers and friends and acquaintances. He said he left applications at the business establishments and for the most part obtained business cards with the names and phone numbers of the persons he contacted, and that he recontacted several of the businesses because he had been invited to do so. The claimant acknowledged that he made errors in checking that he had received a job offer from several of the employers listed, stating that he received no job offers. He also indicated that some of the contact dates may be erroneous in that they reflected the week of the visit and perhaps not the exact date in that week.

The claimant's 23% IR from a designated doctor included a 19% rating for the low back and 5% for the knee. Dr. G reported on August 12, 1999, that the claimant should avoid deep knee bends and heavy lifting. Dr. L's several reports in the October 1999 to April 2000 period simply state that the claimant is "totally disabled at this time." The claimant further stated that he contacted the Texas Rehabilitation Commission (TRC) but was told he could not be provided with services until he obtained a release to work from his doctor. He introduced TRC correspondence which corroborated this testimony and also introduced a document reflecting contact with the TWC.

The carrier introduced the typewritten 34-page recorded question and answer statement of Ms. B, a senior claims examiner for the carrier. In this statement Ms. B details her efforts to verify the claimant's having both contacted and left employment applications with the businesses listed on his three TWCC-52 forms. The relative success of Ms. B's efforts can only be described as mixed and varied. Incidentally, the carrier complains in its appeal that the hearing officer totally ignored Ms. B's statement and never mentioned it in his Decision and Order. Though highly desirable, a hearing officer is not required by the 1989 Act to state the evidence. *See* Section 410.168(a).

Section 408.142(a) provides 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. The parties stipulated to the IR and non-commutation of IIBs requirements. While the carrier does state that it challenges the finding that the claimant's unemployment during the qualifying period for the first through third quarters was a direct result of his impairment from the compensable injury, the carrier devotes the entirety of its recitation of the evidence and its argument to disputing the finding that during the qualifying periods the claimant made a good faith effort to seek employment commensurate with his abilities.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), which addresses the "good faith effort" requirement, 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 provided sufficient documentation as described in Rule 130.102(e) to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides, in 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 shall document such job search. This rule goes on to list a number of factors that may be considered in the evaluation of the good faith effort.

The claimant had the burden to prove that he is entitled to SIBs for the first through third quarters. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge