APPEAL NO. 002059

Following a contested case hearing held on August 9, 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 second quarter. The claimant has appealed, asserting that despite the hearing officer's finding to the contrary she did make a good faith attempt during the qualifying period for the second quarter to obtain employment commensurate with her ability to work. The respondent (carrier) urges in response the sufficiency of the evidence to support the hearing officer's determination.

DECISION

Affirmed.

The carrier asserts at the outset that the Appeals Panel does not have jurisdiction over the appeal because the claimant states in her Request for Review that she received a copy of the hearing officer's decision order "on August 11, 2000," which would have yielded a filing deadline of August 28, 2000, and that the claimant's certificate of service states that she mailed her appeal on August 31, 2000. We find no merit in the carrier's contention since it is obvious that the claimant incorrectly stated the date she received the decision and order. The Texas Workers' Compensation Commission's (Commission) letter transmitting the decision and order is dated August 16, 2000, and the Commission records reflect that the decision was distributed to the parties on that date.

Not appealed are findings that the second quarter was from May 6 through August 4, 2000; that the claimant sustained a compensable injury on_____, with an impairment rating (IR) of 21% and has not commuted any portion of the impairment income benefits (IIBs); and that during the qualifying period for the second quarter, she was unemployed or underemployed as a direct result of her impairment. The parties agreed that the qualifying period was from January 23 through April 22, 2000.

The claimant testified that on the date of her compensable injury, she was working as a floor supervisor, answering the questions of the operators, and dealing with the more difficult customers over such things as loss of packages, and so on. She said that prior to her employment with (employer), she worked as a telephone sales representative. She also indicated that she has one year of college courses in business management and that she has a home computer and uses the Internet.

The December 4, 1997, report of Dr. B, who performed a required medical examination of the claimant, reflects that the claimant was injured when she slipped on wet pavement outside the building and landed on her right knee. Dr. B's diagnosis was low back pain/nonspecific, sacroiliac joint pain on the right, and insulin dependent diabetic. Dr. B, who assigned an IR of five percent, further reported that the claimant underwent a functional capacity evaluation and that she should "refrain from any repetitive lifting,

bending, twisting, turning, squatting, stooping, crouching or maintained in any body encumbering position." Dr. B further stated that the claimant should not be maintained in any mechanically paced tasks, should not work overhead, and could be anticipated to have difficulty with carrying because of her use of a cane although she does not have any significant gait disorder.

The January 20, 2000, report of Dr. Z, the claimant's treating doctor, states as follows: "[Claimant] is not able to work at any full time job because of the symptom complex since her injury of_____." The claimant stated that she has a 25-mile driving limitation from Dr. Z.

The claimant testified that she completed an Application for Supplemental Income Benefits (TWCC-52) for the first quarter, received SIBs for the first quarter, and knew she was required to look for work each week of the qualifying period for the second quarter. She said she thought she received the TWCC-52 for the second quarter on a Friday or Saturday and made her first contact for that quarter on February 8, 2000. According to the claimant, on February 8, 2000, a women came to her house to discuss part-time employment for the claimant making insurance sales "cold calls" from her home. She stated that she described her restrictions to the woman and did not get the job. The claimant was asked, "So you could have done this job, correct?" And she replied, "I could have given it a good try, yes." The claimant further stated that although she did go into an Office Max store for an interview for a sales clerk position, which lasted about 15 minutes, most of her contacts were made by telephone calls from her house and lasted approximately 10 minutes. She felt she could not work at a book store and a video store she contacted after learning she would have to do some lifting. The claimant stated that she would read Dr. B's restrictions over the telephone to prospective employers or take them with her to give to prospective employers if going in person because she felt such information should not be withheld only to be revealed later after an employer had completed all the paperwork and hired her.

As noted above, the parties agreed on the record that the qualifying period was from January 23 (a Sunday) through April 22, 2000 (a Saturday). Although the claimant has annotated her TWCC-52 with 14 job contacts, the 14th contact occurred on April 24, 2000, and was, thus, outside the agreed qualifying period. According to the TWCC-52, the claimant's first job search contact took place on February 8, 2000, a date within the third week of the filing period. She made two contacts during the fourth week, one contact during the fifth week, two contacts during the sixth week, and one contact during the seventh through the thirteenth weeks. The claimant said she was not sure she was going to receive a TWCC-52 form for the second quarter and did commence her job search within a few days of receiving it. Incidentally, on her TWCC-52 the claimant lists the month, day, and year of her job contacts as "2/8/00, 2/14/00, 2/18/00, 3/24/00, 3/1/00, 3/3/00,3/7/00" and so on. It seems apparent that the claimant intended to write "2/24/00" instead of "3/24/00." However, on cross-examination she was asked why she did not look for work during the period from February 20 to 26, 2000, and she responded that she thought she had an ear infection at that time. In her statement of the evidence, the hearing

officer states, in part, that the claimant "did not look for work for three weeks of the qualifying period . . . " If, indeed, writing March 24 instead of February 24 was a writing error, then the claimant did not look for work during the first two weeks of the qualifying period and did not miss three weeks. This matter was not further developed or clarified at the hearing. In her appeal, the claimant's alternative position is that she should receive SIBs for at least 10 weeks even if she is penalized for the first two weeks of the qualifying period when she did not have the TWCC-52 form and for that third week when she had a short term illness and was unable to interview with anyone for a job.

The hearing officer made only the conclusory finding that during the qualifying period for the second quarter the claimant did not attempt in good faith to obtain employment commensurate with her ability to work. However, the hearing officer did state in her statement of the evidence that the claimant "did not look for work for three weeks of the qualifying period and was sabotaging her job search by providing employers a copy of her restrictions with her resume"; that she "knew she was required to search for employment every week of the qualifying period and failed to do so as required by Rule 130.102(e) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e)]"; and that considering the evidence and testimony, the claimant's job search was "not reasonably calculated to result in success."

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 only issue on appeal is the whether the hearing officer's finding on the "good faith" criterion is sufficiently supported by the evidence.

Rule 130.102(d), which addresses the "good faith" 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 she was entitled to SIBs for the second quarter. 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 a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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

Gary L. Kilgore
Appeals Judge