APPEAL NO. 002406

Following a contested case hearing held on September 12, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the two disputed issues. He determined that because the appellant (claimant) did not prove that she was totally unable to work during the qualifying periods for the 16th and 17th quarters, she did not make a good faith effort to obtain employment commensurate with her ability to work during those periods and thus is not entitled to supplemental income benefits (SIBs) for the 16th and 17th quarters. The claimant has appealed, asserting, in essence, that her medical evidence did establish that she had no ability to work during the qualifying periods. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury while employed by (employer); that the qualifying period for the 16th quarter began on November 29, 1999, and ended on February 26, 2000; and that the qualifying period for the 17th quarter began on February 27 and ended on May 27, 2000.

The hearing officer's Decision and Order contains a detailed summary of the evidence with which neither party takes issue on appeal. Thus, we will set out only such evidence as is necessary to support our decision.

The medical records reflect that the claimant was injured at work when she slipped on a wet floor and landed in a seated position. The claimant testified that she underwent spinal surgery (hemilaminectomy at L5-S1) for her low back injury in _____; that she has since had a lot of back pain, has tried both an implanted stimulator, which was unsuccessful in relieving her pain, and an intrathecal morphine pump to which she became allergic; that she takes various medications three to four times a day which "knock [her] out"; and that she has not been released by a doctor to return to work. She said she looked for jobs during the qualifying periods only because she was instructed to do so by the carrier; that all of her contacts during the 16th quarter qualifying period were by telephone; and that she did not look for a job every week of the qualifying periods because sometimes she was "knocked out" by the medications. The Application for Supplemental Income Benefits (TWCC-52) forms in evidence reflect that during both qualifying periods, the claimant's job search contacts, by telephone or otherwise, were clustered on several days of the 90-day periods. The claimant further testified that although she received various job leads from Ms. B, with (disability management company), she did not follow up on them. She also indicated that she first went to the Texas Rehabilitation Commission (TRC) in June 1999 and was told to return in July 1999 which she failed to do. She said she was again told in April 2000 to go to the TRC and that she did so sometime during the 17th quarter. The claimant also indicated that at some unstated time she also registered

with the Texas Workforce Commission. She said she lives at home with her four sons who help with the cooking and other household chores and she conceded that she used to take care of two young grandchildren.

The November 30, 1999, report of a functional capacity evaluation (FCE) obtained by Dr. P states that the claimant is capable of sedentary work and that her score of five out of seven Waddell's signs demonstrated "a high propensity for symptom magnification."

Dr. P, who remains the claimant's treating doctor, wrote on a "Disability Certificate" dated March 14, 2000, that the claimant remains under his care and "still remains off work since 12/14/99."

Dr. M, to whom the claimant was referred for pain management, wrote on March 23, 2000, that the claimant, whom he previously reported as having severe failed back syndrome with multiple nerve root injuries, continues with severe pain in the low back and down both legs; that she developed severe allergic reactions to trials of various narcotics; and that he does "not feel at this time that she is able to hold a job or work in a meaningful manner." Dr. M wrote on June 23, 2000, again reviewing the unsuccessful trials of various pain medications and stating that the claimant is left with a severe pain state that has been unresponsive to the most advanced therapy and that he feels that "at this point she cannot return to work."

Dr. C, who reviewed the claimant's medical records, reported on August 10, 2000, that the claimant's condition is compatible with a release to work at a sedentary-to-light duty level with no repetitive lifting of greater than 15-20 pounds.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating 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 SIBs criterion in dispute on appeal is that of the good faith effort to obtain employment.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) sets out five ways in which a claimant may establish having met the good faith criterion. The claimant's position at the hearing was that she had no ability to work and only made the efforts documented on her TWCC-52 forms because she was instructed to do so. Rule 130.102(d)(4) provides 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: . . . (4) 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 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 every week of the qualifying period and document the job search efforts.

The claimant had the burden to prove that she is entitled to SIBs for the 16th and 17th quarters. 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). As the hearing officer comments, the FCE report and Dr. C's report reflect that the claimant had some ability to work during the qualifying periods; and the TWCC-52 forms and the claimant's own testimony established that she did not look for employment during each week of the qualifying periods.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge