

APPEAL NO. 002576

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 20, 2000. With respect to the issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. In his appeal, the claimant argues that the hearing officer's determinations that he did not make a good faith effort to look for work commensurate with his ability to work and that he is not entitled to SIBs for the fifth quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on April 2, 1997, with an impairment rating of 36%; that the claimant did not commute his impairment income benefits; and that the qualifying period for the fifth quarter of SIBs ran from January 14 to April 13, 2000. The dates of the fifth quarter were identified as April 27 to July 26, 2000. The claimant proceeded on alternative theories to establish good faith and his entitlement to SIBs. He contended that he had no ability to work and thus was entitled to SIBs under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) and, alternatively, that he made a good faith effort to look for work and thus was entitled to SIBs under Rule 130.102(d)(5) and (e). The claimant introduced evidence from his treating doctor, Dr. JM, stating that the claimant was "totally disabled"; that neither he, nor the orthopedic surgeons to whom he referred the claimant, "has much to offer [claimant] as far as allowing him to return to gainful employment"; and that the circulatory flow in his leg is marginal at best because of his compensable vascular injury such that he is unable to work because of the problems that ambulation causes with pain and swelling. Finally, Dr. JM stated that the claimant is "not fit for any realistic gainful employment because he must have his leg elevated most of the day, his walking is limited to a few steps, and he cannot sit or stand for greater than 30 minutes at a time and can walk only about three to five minutes at a time." The carrier had Dr. DM examine the claimant. In a report dated June 26, 2000, Dr. DM stated that the "only type of eventual gainful employment the [claimant] could potentially hold, at this time, would be a purely sedentary type job, with the ability to change his positions and intermittently elevate his leg, with almost no walking, standing, or any lifting activities." Dr. DM concluded that "if this type of limited scope work is not available, then I would feel he is incapable of gainful employment, at this time, and will be so indefinitely, for the future."

The claimant testified that he looked for work in the qualifying period because he had been advised that he was required to do so. The documents attached to the claimant's Application for [SIBs] (TWCC-52) indicate that there were two weeks in the

qualifying period that the claimant did not make any job search efforts. The claimant was hospitalized one of those weeks in conjunction with the cellulitis in his right leg. The claimant testified that in the other week he did not look for work because his leg was so swollen that he was not able to walk. On cross-examination, the claimant acknowledged that he applied for jobs as a janitor/maintenance worker in the qualifying period; that he did so because his past relevant work experience has been in those types of jobs; and that he is not physically able to perform the lifting, standing and walking required in that type of job.

The questions of whether the claimant satisfied the good faith requirement under either Rule 130.102(d)(4) or 130.102(e) presented questions of fact for the hearing officer. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer considers the evidence and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work during the qualifying period. His determination in that regard is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust as to compel its reversal. As such, the hearing officer did not err in determining that the claimant did not establish his entitlement to SIBs under Rule 130.102(d)(4). The hearing officer also determined that the claimant did not satisfy the good faith requirement under Rule 130.102(e) because he did not look for work in each week of the qualifying period and because he applied for jobs that were not within his sedentary restrictions. The hearing officer was free to consider those factors in evaluating whether the claimant made a good faith search. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not make a good faith effort to look for work commensurate with his ability to work is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists to reverse that determination. Although another fact finder may well have drawn different inferences from the evidence, which would have supported a different result, that does not provide us with a basis to disturb the hearing officer's good faith determination on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge