

APPEAL NO. 002941

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) and asserts the insufficiency of the evidence. The hearing was held on December 6, 2000. He decided that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter. The respondent (carrier) urges the sufficiency of the evidence to support our affirmance.

DECISION

Affirmed.

The hearing officer did not err in finding that the claimant had some ability to work during the qualifying period (June 10 to September 9, 2000) and, thus, that in making no job search he failed to attempt in good faith to obtain employment commensurate with his ability to work.

The claimant said he underwent surgery for his injured right knee (in March 1998) and that Dr. J, whom he has requested to be his new treating doctor, has said that he needs a knee replacement. He stated that the carrier did not dispute his entitlement to SIBs for the third quarter and indicated that while he did not look for employment during the qualifying period for the fourth quarter, because he had no ability to work, he has since been looking for employment. The claimant further stated that both Dr. J and Dr. S, a carrier doctor, have said that he has no ability to work; that for more than a year he has had no treatment for his knee injury, other than taking prescription medication; that he can walk and drive; that he drove his pickup truck 40 miles to attend the hearing; and that he lives alone and takes care of himself, including the preparation of his meals. Dr. S reported on July 18, 2000, that he did not think the claimant, then 67 years of age, was at maximum medical improvement nor did he think the claimant could consistently do any type of work due to the disease process of his right knee. Dr. J wrote on January 20, 2000, that the claimant has numerous health disorders and that given his age and these disorders, including a recent brachial plexus injury, it is his opinion that the claimant is unable to work. The extensive and detailed March 8, 2000, report of a functional capacity evaluation concludes that the claimant "is able to work at the SEDENTARY Physical Demand Level for an 8 hour day"

The claimant had the burden to prove that he is entitled to SIBs and, to meet that burden, is required to satisfy the statutory elements in Section 408.142 as well as the implementing requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). 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

Thomas A. Knapp
Appeals Judge