APPEAL NO. 010300

Following a contested case hearing held, on January 17, 2001, 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 finding that the appellant (claimant) did not look for work every week of the second quarter qualifying period; that she had some ability to work during the qualifying periods for both the second and third quarters; that she did not make a good faith effort to seek employment during either qualifying period; and that she is not entitled to supplemental income benefits (SIBs) for the second and third quarters. The claimant appeals, asserting that the evidence established that she had no ability to work during the qualifying periods for the second and third quarters and that she therefore made a good faith attempt to obtain employment commensurate with her ability to work. The respondent (carrier) urges that the Appeals Panel affirm the hearing officer's decision and order.

DECISION

Affirmed.

The parties stipulated that during the qualifying period for the second quarter the claimant did not seek employment nor work nor earn any wages and that during the qualifying period for the third quarter the claimant did not work or earn any wages. The claimant testified that she looked for employment during the last two weeks of the third quarter qualifying period. Although the claimant sought work for two weeks of the third quarter qualifying period, she maintains that she was completely unable to work during both qualifying periods. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides 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 for the quarter. The claimant admitted that she looked for work only in the last two weeks of the third quarter qualifying period and claimed she was totally unable to work during that time.

The hearing officer did not err in determining that the claimant had some ability to work and that she did not make a good faith effort to find work commensurate with her ability during the two qualifying periods. Rule 130.102(d)(4) provides 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 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[.]"

Evidence supporting the hearing officer's determinations include a functional capacity evaluation, performed by Dr. S on June 15, 2000, which stated that the claimant's efforts were "minimal" and her cooperation "poor"; that "[b]ased on physical exam and medical history, she may return to work at light duty level . . . "; and that she could lift "up to 20 pounds occasionally and 10 pounds frequently." Further evidence upon which the hearing officer may have relied includes a work status report dated June 22, 2000, recommending that the claimant return to work with restrictions.

The claimant testified that she was not able to work during the qualifying periods for the second and third SIBs quarters and that her treating doctor, Dr. W, advised that she could not return to work as she was likely to reinjure herself. The claimant introduced two "work excuse" notes from Dr. W which read that she is excused from work until October 1, 2000, and January 1, 2001, respectively. Dr. W's notes did not include any explanation as to why the claimant could not work.

The parties introduced conflicting evidence regarding whether the claimant had some ability to work during the qualifying periods for the second and third SIBs quarters and whether, not looking for employment, she therefore failed to make a good faith effort to obtain employment commensurate with her ability. Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); 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.). This tribunal 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. 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). We do not find them so here.

We observe that while the claimant asserts in her request for review that the hearing officer erred in determining that the claimant's unemployment was not a direct result of her impairment, such assertion is unfounded. Contrary to the claimant's contention, the hearing officer did find that her unemployment during the time frame in dispute was a direct result of her impairment.

For these reasons, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge