

APPEAL NO. 020614
FILED APRIL 25, 2002

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 February 26, 2002. The hearing officer resolved the disputed issue before her by determining that while the appellant (claimant) did work during the qualifying period for the 13th quarter, he did not return to work in a position which was relatively equal to his ability to work; that he did not make a good faith effort to obtain employment commensurate with his ability to work; and that he is not entitled to supplemental income benefits (SIBs) for the 13th quarter. The claimant appealed, asserting that he was working in a position which was relatively equal to his ability to work during the qualifying period for the 13th quarter, and that he is entitled to SIBs. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the qualifying period in issue began on June 28 and ended on September 26, 2001. The claimant testified that he has been working as a part-time security guard for approximately 2 years, and that during the qualifying period, he worked 3 days a week for a total of 15 to 18 hours a week. He stated that he could not work any more than that due to his pain and the effects of his medication. He further testified that during this time period he earned \$1,500.00, did not seek full-time employment, and made six job contacts.

Section 408.142(a) provides that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) 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 parties stipulated that the claimant's IR is greater than 15% and that his earnings during the relevant qualifying period were less than 80% of his AWW. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(d)(1) 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 returned to work in a position which is relatively equal to the injured employee's ability to work. The hearing officer found that during the qualifying period, the claimant did not return to work in a position relatively equal to his ability to work and did not make a good faith effort to obtain employment commensurate with his ability to work.

The hearing officer notes that the functional capacity evaluation (FCE) done in October of 2000 indicates that the claimant had an ability to work 4 hours a day, with the expectation to progress to full-time work, and that the FCE done in June of 2001 does not restrict the claimant's hours. The claimant asserts that the hours he is working are

consistent with the recommendations made by his treating doctor in a report dated September 26, 2001. The hearing officer determined that the treating doctor's report is inconsistent with the preponderance of the credible and persuasive medical evidence. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, 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)). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We cannot say that the challenged findings and conclusion 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).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge