APPEAL NO. 000291

Following a contested case hearing (CCH) held , on January 19, 2000, 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 determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 14th compensable quarter. The claimant appeals, contending that he should be entitled to SIBS for the 14th quarter because he was working within his restrictions during the qualifying period and that a portion of his evidence was improperly excluded. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable back injury, including disc bulging and herniation, on _____, for which he received an impairment rating of at least 15%. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." The 14th SIBS quarter was from August 24 to November 22, 1999. The parties stipulated that the qualifying period was from May 25 through August 23, 1999.[1] At issue in this case is whether the claimant made the required good faith job search commensurate with his ability to work.

The claimant testified that his treating doctor released him to return to light or sedentary duty for two to four hours per day. He drove a school bus three or four hours a day until May 3, 1999, when the school term ended. Within a day or two thereafter, he began another job at a propane store filling propane bottles and selling bait. The pay for this position was less than that of a school bus driver and the hearing officer commented that for several weeks in July the claimant worked less than four hours. The claimant then began working for another school district as a bus driver, presumably working three to four

[1]We note that Rule 130.101(4) defines the qualifying period as ending on the 14th day before the beginning date of the quarter and consisting of the 13 previous weeks. The qualifying period agreed to by the parties in this case was not calculated in accordance with this rule. Neither party asserts prejudicial error in this regard, nor do we perceive any under the facts of this case.

hours per workday, beginning on or about August 8, 1999. He documented no other job searches during the qualifying period.

In a series of letters in July, September, and October 1999, (Dr. W), the claimant's treating doctor, stated that the claimant had good days and bad days and "has limited his resuming gainful employment at more than a part time status and then only to sedentary types of work. He works as a school bus driver for the local school district." (Mr. G), Dr. W's physician's assistant, on September 17, 1999, issued a "Physical Capabilities Form" which stated that the claimant was able to work up to four hours per day over a five-day week. Dr. W referred the claimant to (Dr. S), who, on November 3, 1999, issued a return-to-work slip limited to two to four hours per day.

Other evidence included a June 30, 1999, functional capacity evaluation (FCE) in which the physical therapist found the claimant able to work light duty for five hours per day; an FCE on March 3, 1999, requested by Dr. W, which found the claimant able to work light duty for "8+" hours per day; and a report of a carrier-requested examination by (Dr. WM) on August 12, 1998, which recommended that the claimant be returned to "full-time gainful employment" and that "the true determinant to the success of this [rehabilitation] program is [claimant's] motivation to break this maladaptive cycle and to alter his lifestyle."

There was no dispute that the claimant could only work at a light or sedentary level. The claimant clearly worked part time during the qualifying period. The controlling question was whether he was restricted to less than full time in his limited capacity to work. The hearing officer considered this conflicting evidence on the amount of time per day the claimant could work and commented that Dr. W's reports were repetitive in nature "and gave little indication regarding Claimant's inability to work more." She further found that the claimant had the ability during the qualifying period to work light duty full time. Finding of Fact No. 4. The claimant appeals this determination, contending that his treating doctor should be given greater deference, that he cannot work full time, and that any evidence to the contrary is not a true reflection of his present condition to perform at this level every day.

The claimant had the burden of proving he could only work part time. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether the claimant had the ability to work only part time or full time was a question of fact for the hearing officer to decide. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, she could accept or reject all, part, or none of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. On this question she simply did not find the claimant's evidence credible or persuasive. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex.

1986). Applying this standard of review to the record of this case, we find the evidence deemed credible and persuasive by the hearing officer sufficient to support her determination that the claimant could work light duty full time during the qualifying period. Having failed to make or document any effort to seek full-time employment commensurate with this ability to work, he was not entitled to 14th quarter SIBS.

The claimant also offered into evidence a December 9, 1999, report of (Dr. E), together with a work release of the same date, which reflected an ability to work two to four hours per day beginning January 18, 2000. The claimant represented that he received the report in the week of December 20, 1999, and the work release on January 17, 2000. He exchanged it with the carrier's representative on the day of the CCH. Parties are generally required to exchange documents within 15 days of the benefit review conference (in this case, November 19, 1999) and thereafter as they become available. Rule 142.13. Failure to comply with this rule precludes the introduction of these documents at a later CCH, absent a finding of good cause. Evidentiary rulings are reviewed under an abuse of discretion standard. The hearing officer failed to find good cause to admit the medical report of Dr. E because the claimant had no explanation for why he waited from the time he received the report during the week of December 20, 1999, until he exchanged it on the date of the CCH. She similarly found no good cause for failure to exchange the limited duty release even though it was not received by the claimant until January 17, 1999, because it was in existence at the same time as the report of the same date and the claimant offered no evidence of any steps he may have taken to obtain a copy of the release earlier. We find no abuse of discretion in the determination to deny admission of these documents into evidence.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge