

APPEAL NO. 931019

This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (V.A.C.S., Article 8308-1.01 *et seq.*), a hearing on remand was held on October 14, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13-week quarter beginning February 8, 1993. The appellant (carrier) appeals urging that several of the hearing officer's findings of fact and conclusions of law are against the great weight and preponderance of the evidence and asks that the decision be reversed. No response has been filed.

DECISION

Not finding the determinations of the hearing officer to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The issue on remand involved the claimant's entitlement to SIBS following the final payment of impairment income benefits. As we noted, different and more demanding rules involving good faith efforts to obtain employment come into play in establishing entitlement to SIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.103 (Rule 130.103). Since the record was not sufficiently developed to make an informed decision on this matter, remand was necessitated. Some additional evidence was received at the hearing on remand and a new decision has been rendered.

The evidence will only be very briefly summarized. The claimant sustained a compensable injury to his knee on (date of injury), for which he underwent arthroscopic surgery in May 1991 and reconstructive surgery in July 1991. In a letter dated December 27, 1991, from his treating doctor, he was released to work with some lifting restrictions. He was determined to have reached maximum medical improvement by his treating doctor on January 27, 1992, with an 18% whole body impairment rating. According to the record at the earlier hearing, he did not seek employment from January 1992 to December 1992 and he was not employed until January 4, 1993, when he obtained a part time job of 18 to 22 hours a week. He was referred to the Texas Rehabilitation Commission (TRC) before his first surgery and began college level study under one of that agency's programs. At the earlier hearing he indicated he had accumulated about 18 hours but that he was not at that time (June 9, 1993) taking any courses (not further developed). He was working in the part time job but was not seeking any other employment. Although acknowledging he was capable of working 40 hours a week, he stated he was not able to do so because he was a full time student.

In the hearing on remand, the claimant testified to other limited efforts at seeking employment during the SIBS qualifying period involved (November 9, 1992 to February 7, 1993). He also indicated that he was a full time student under the TRC program during the SIBS qualifying period taking 12 hours of courses. The evidence was somewhat nebulous

concerning his earlier indication that he has only accumulated 18 hours when he first entered the TRC program before his first surgery in May 1991. He stated that he retained his part time employment which started in early January 1993.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence, and is the finder of fact. Sections 410.165(a) and 410.168(a). Under these somewhat better developed conditions, the hearing officer determined that the claimant "has more than made good faith efforts to obtain employment commensurate with his ability to work as well as to cooperate with the referral to the TRC" and awarded SIBS. The carrier disagrees with these determinations as well as determinations that the claimant has fully cooperated with the TRC and a finding, more in the nature of a comment, that the Appeals Panel seems to recognize that cooperation by the claimant. With the exception of the finding concerning what the Appeals Panel seems to recognize, we do not find the great weight and preponderance of the evidence to be so contrary to the hearing officer's findings as to be clearly wrong or manifestly unjust. Accordingly, we affirm. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

So that we should not be misunderstood, we comment on the qualifications for SIBS and the matter of cooperation with TRC under circumstances as present in this case. First, to make determinations in this area, there must be some probative evidence from which findings and the follow-on conclusions can be intelligently made. That was the purpose of the remand in this case---we simply could not do so under the state of the evidence. As we indicated above, there are more stringent requirements under the 1989 Act and Texas Workers' Compensation Commission (Commission) rules concerning attempts to seek employment where SIBS are involved. And, we fully recognize and totally agree with the concepts of Commission Rule 130.103 concerning referral to the TRC to assist an injured employee, in every appropriate case, and the exhortation that such injured employee must cooperate with the TRC or face potential loss of benefits. This should not be seen as placing the injured worker "on the horns of a dilemma." Rather, it should be recognized that the injured employee is expected to act in good faith as he progresses through the workers' compensation stages, from initial injury to the hoped-for restoration, ultimately, to gainful employment consistent with his capabilities. As we stated in Texas Workers' Compensation Appeal No. 93936, decided November 29, 1993, where we upheld a hearing officer's determination denying SIBS for the third compensable quarter where the claimant was a full time student under a TRC program but made no good faith efforts to obtain employment commensurate with his ability to work:

Under the particular facts of this case which demonstrate that the claimant had time outside of school hours in which to work if he had found employment commensurate with his ability to work, we agree with the hearing officer's rationale that attendance in a retraining program can be considered in evaluating the claimant's good faith efforts to attempt to find employment commensurate with the employee's abilities (which may include availability for work), but it did not remove the claimant's responsibility to make a good faith

attempt to find some employment.

In sum, because an injured employee is in a study program with TRC does not automatically remove him from the statutory requirements of making a good faith effort to obtain employment commensurate with his ability to work. Section 408.142(a). It may well be an appropriate factor to be considered along with other factors in determining his good faith efforts and eligibility for SIBS. We in no way state a requirement that an injured employee who is cooperating with TRC to assist him in alleviating or overcoming the effects of an on-the-job injury is required, nonetheless, to seek out full or any particular level of employment to be entitled to SIBS. Rather, all the factors affecting the qualifications for SIBS must be considered under the particular circumstances of the case. Our remand was predicated upon not having evidence sufficiently developed to make the necessary determinations.

For the reasons set forth above, we affirm.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge