

APPEAL NO. 931188

On November 24, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). The issue at the hearing was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for her second compensable quarter. The hearing officer determined that the claimant is entitled to SIBS for her second compensable quarter and ordered the appellant (carrier) to pay SIBS for that quarter. The carrier disagrees with the hearing officer's decision. The claimant did not file a response.

DECISION

The hearing officer's decision is reversed and a decision is rendered that the claimant is not entitled to SIBS for her second compensable quarter.

The issue to be decided at the hearing was whether the claimant is entitled to SIBS for her second compensable quarter. The second compensable quarter was from September 6 to December 4, 1993, and entitlement to SIBS during that quarter depended on whether the claimant met eligibility criteria during the prior filing period, which was from June 8 to September 5, 1993.

The claimant worked as a medical transcriptionist. She sustained work-related bilateral carpal tunnel syndrome on (date of injury), had surgery, and reached maximum medical improvement (MMI) on February 4, 1992, with a 22% impairment rating. She was paid impairment income benefits (IIBS) for 66 weeks based on the 22% rating. She said her treating doctor told her shortly before she reached MMI that she could not type for more than two hours consecutively and that she could not continue in her line of work so she contacted the Texas Rehabilitation Commission (TRC). The claimant said that (MT), a counselor at TRC, recommended that she find "some type of retraining or re-education" in order to find a new line of work. The claimant said that in January 1992 she became a full-time student at the (the College). The claimant testified that she was in school full time "through her [MT's] recommendations" and that the TRC gave her the "opportunity" to attend college full time to "retrain." The claimant also attended the college full time during the fall semester of 1992. Apparently, the claimant did not attend college during the spring semester of 1993. She said her IIBS were about to end and that she wasn't sure at that time about continuing her schooling so she started to look for secretarial work and applied for unemployment benefits with the Texas Employment Commission (TEC). The claimant said that she felt that she was able to do the jobs she applied for but had to tell several of her prospective employers that she would have to use plastic wrist supports prescribed by her doctor to do typing and transcription work. The claimant said that she could not find work in her usual line of work and that she was paid unemployment benefits from February to May 1993.

The claimant testified that she attended college full time during the summer of 1993. She said that this is when she started the "respiratory therapy program" which, she said, leads to an Associate of Science Degree in respiratory therapy. Apparently, the summer semester started sometime in May 1993 because the claimant said that she was denied unemployment benefits by the TEC at the end of May 1993 on the grounds that she was attending school as a full-time student and was therefore not available for work. On June 3, 1993, the claimant applied for SIBS for her first compensable quarter which Texas Workers' Compensation Commission (Commission) documents show was from June 8 to September 5, 1993. Her Statement of Employment Status indicated that she had applied for employment at three places during the 13 weeks preceding the first compensable quarter. At the hearing, the claimant testified that she had applied for work at several other places not listed on her statement. The claimant noted on the statement that she had not returned to work and that she had in good faith sought employment commensurate with her ability to work. The types of jobs listed on the statement were receptionist, secretarial, and managerial. The claimant also noted on the statement that she had contacted the TRC for vocational retraining. The claimant testified that at some point in time after she had already been to the TRC and started college, the Commission sent her a letter which told her that she needed to go to the TRC. The letter was not in evidence. A document entitled "Work Search Contacts" was also in evidence. On this document the claimant indicated that she had contacted 14 employers from March through May 1993. The jobs she contacted the employers about included secretarial, transcriptionist, receptionist, clerical, data entry, and software support representative. The Commission approved the request for SIBS for the first compensable quarter and the claimant was paid SIBS for that quarter. The claimant testified that she was informed by the Commission and by the TRC that failure to comply with TRC recommendations would disqualify her for SIBS.

The claimant said that while she was attending college full time during the summer of 1993 she did not look for any employment because she was "accepting" TRC services and was not "denying" TRC services. She said she thought that entitlement to SIBS was an "or" situation, that is, either look for work or take what TRC offered. While the claimant did not directly testify that TRC was paying her college tuition, she indicated that that was the case when she said that TRC would not pay for college unless "you are attending full time." The claimant also testified that she was a full-time student at the time of the hearing, November 24, 1993, which coincides with the fall semester of 1993. The claimant was asked about the number of credit hours she took and the number of hours she was "spending in school," but it is unclear from her answers whether she was testifying about the summer or fall semester of 1993 because she said "I attend 14 credit hours" and "I attend from 8 to 2:30 Monday and Tuesday and from 7 to 3 on Wednesday, Thursday, and Friday." A handwritten exhibit the claimant introduced into evidence has written on it "School Schedule," indicates the dates covered were "6/8/93 - 9/5/93," and that the hours are "8-3" and "7-4." Neither the number of credit hours taken during the time period indicated nor the days of the week school was attended are noted on the exhibit.

On August 25, 1993, the claimant applied for SIBS for the second compensable quarter which Commission records indicated was from September 6 to December 4, 1993. (The

hearing officer found that the second compensable quarter was from August 6 to December 4, 1993, which finding is in error because it covers more than a 13 week period). In her Statement of Employment Status the claimant did not list any places to which she applied for employment during the last 90 days. She wrote that she was a full-time student at the College "per [TRC] M-F 8-4." She also noted that she had not returned to work and did not check the box regarding good faith attempt to obtain employment. The carrier denied the request for SIBS for the second compensable quarter on the grounds that the claimant had not, in good faith, attempted to obtain employment commensurate with her ability to work.

The claimant further testified that she had "just reapplied" to TEC for unemployment benefits under a "stipulation" with TEC that she would quit school if she found a job. A TEC document dated October 19, 1993, stated that effective October 9, 1993, the claimant would be eligible to receive unemployment benefits. A letter to the Commission from the claimant's TRC vocational rehabilitation counselor dated August 24, 1993, advised that the claimant "has been certified to receive vocational rehabilitation services from the [TRC]," and that "at this time she is participating in vocational training." The counselor further stated that the claimant is in need of financial support and that any assistance would be appreciated.

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior filing period. The issue at the hearing was whether the claimant is entitled to SIBS for the second compensable quarter which Commission records indicated was from September 6 to December 4, 1993. Thus, in order to be entitled to SIBS for the second compensable quarter, SIBS requirements had to be met in the prior filing period which Commission records indicated was from June 8 to September 5, 1993. The prior filing period roughly equates to June, July, and August of 1993, during which time the claimant was a full-time college student retraining to be a respiratory therapist. Her retraining was at the recommendation of the TRC. The claimant admitted that she did not look for any type of work during this period.

Pursuant to Section 408.142, an employee is entitled to SIBS if on the expiration of the impairment income benefit period the employee:

- (1) has an impairment rating of 15 percent or more from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the impairment income benefit; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Section 408.143(a) provides, in part, that after the Commission's initial determination of SIBS, the employee must file a statement with the insurance carrier stating, among other things, that the employee has in good faith sought employment commensurate with the employee's ability to work.

Section 408.150, relating to vocational rehabilitation, provides as follows:

- (a) The commission shall refer an employee to the [TRC] with a recommendation for appropriate services if the commission determines that an employee entitled to [SIBS] could be materially assisted by vocational rehabilitation or training in returning to employment or returning to employment more nearly approximating the employee's preinjury employment.
- (b) An employee who refuses services or refuses to cooperate with services provided under this section loses entitlement to [SIBS].

Rule 130.104(a) provides that an injured employee initially determined by the Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period:

- (1) has been unemployed, or underemployed as defined by Rule 130.101 (relating to Definitions), as a direct result of the impairment from the compensable injury; and
- (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work.

Rule 130.103(e) provides as follows:

- (e) Referral to the [TRC]. If the commission determines that the employee may be materially assisted by vocational rehabilitation or training, the notice described in subsection (d) [determination of entitlement] of this section shall additionally contain:
 - (1) a referral to the [TRC] for appropriate services; and
 - (2) a warning to the employee that refusing such services, or refusing to cooperate with such services, will result in loss of entitlement to [SIBS].

The hearing officer found that the Commission referred the claimant to the TRC and the TRC recommended to the claimant that she seek training in a field other than medical transcriptionist; that the claimant enrolled in school on a full-time basis to get training in another field which would allow her to seek employment "with her injury;" that Rule 130.103(e) requires the claimant to follow referrals from the TRC in order to qualify for SIBS;

that the claimant followed the instructions of the Commission and the TRC as prescribed by statute; and that the claimant is entitled to SIBS for the second compensable quarter. The carrier disagrees with the hearing officer's decision essentially contending that the claimant is not entitled to SIBS for the second compensable quarter because she did not make good faith efforts to obtain employment commensurate with her ability to work as required by Rule 130.103(a) during the prior filing period.

Basically, the question before us is whether a claimant who has not attempted in good faith to obtain employment commensurate with the claimant's ability to work during the prior filing period is automatically entitled to SIBS when the claimant is referred by the Commission to the TRC and the claimant complies with the recommendations of the TRC during the prior filing period. Based on applicable statutes, rules, and prior Appeals Panel decisions, we hold that entitlement is not automatic.

First, Section 408.150(b) only provides that a claimant who refuses services or refuses to cooperate after referral to the TRC loses entitlement to SIBS. It does not say that cooperation with the TRC automatically entitles a claimant to SIBS.

Second, Rule 130.104(a), which provides that an employee is entitled to SIBS if during the prior filing period the employee is unemployed or underemployed as a direct result of the impairment from the compensable injury and if the employee has made good faith efforts to obtain employment commensurate with the employee's ability to work, does not contain an exception to the stated requirements for employees who are cooperating with the TRC.

Third, we have addressed similar situations in prior decisions and held to the effect that attendance at a retraining program at the recommendation of the TRC is a consideration in determining good faith efforts to attempt to find employment commensurate with the employee's ability to work, but it does not automatically remove the employee's responsibility to make a good faith effort to attempt to find some employment. See Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993. Appeal No. 93936 involved an employee who was a full-time college student whose tuition was being paid by the TRC and who applied for only one job during the qualifying filing period. The hearing officer denied SIBS based on his finding that the claimant had not made any diligent efforts to find employment consistent with his ability to work during the appropriate period and we affirmed stating that:

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.

Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993, affirmed a hearing officer's decision that the claimant in that case was entitled to SIBS for his first compensable quarter where the claimant was a full-time college student under a TRC program during the qualifying time period preceding the first compensable quarter and held a part-time job during part of the qualifying period and testified to other efforts at seeking employment during that period. The claimant acknowledged that he was capable of working 40 hours a week, but stated he was not able to do so because he was a full-time student. In affirming the hearing officer's decision we stated that:

As we indicated above, there are more stringent requirements under the 1989 Act and [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 exhortion 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.

* * * *

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.

In Texas Workers' Compensation Commission Appeal No. 931063, decided January 4, 1994, we reversed and remanded a hearing officer's decision that a claimant was not entitled to SIBS for the first compensable quarter where the claimant was referred to the TRC for vocational rehabilitation and as a result of that referral was a full-time college student during the qualifying period and during the qualifying period held a part-time job at the college he was attending. The claimant testified that he did not make efforts to find other employment because his schooling was full time. The hearing officer held that the claimant was not entitled to SIBS because he had not attempted in good faith to obtain employment commensurate with his ability to work. Citing our decisions in Appeal No.

93936, and Appeal No. 931019, we remanded the case to the hearing officer for further consideration and development of evidence.

In the instant case, the claimant testified that she did not attempt to obtain any employment during the filing period preceding her second compensable quarter because she was a full-time college student at the recommendation of the TRC for retraining. As per our prior decisions, attendance at a study or retraining program is a factor to be considered in determining entitlement to SIBS, but it does not automatically remove the claimant from the requirement of making a good faith effort to find some employment commensurate with her work ability. Consequently, there being no evidence of a good faith attempt to obtain some type of employment commensurate with the claimant's ability to work, and the only explanation given for the failure to make such an attempt being that the claimant was cooperating with the TRC in attending school, which we have held to not automatically entitle a claimant to SIBS, we reverse the hearing officer's decision and render a decision that the claimant is not entitled to SIBS for her second compensable quarter. We observe that the claimant did not testify that cooperation with the TRC in attending the retaining program precluded her from attempting to obtain some type of employment even if it were part-time employment, and that she did not testify that, if she had found some type of employment, even if it were part-time employment, that such employment would preclude her from cooperating with the TRC recommendation or substantially interfere with her retraining program.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge