APPEAL NUMBER 94234

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 4, 1994. The issue at the hearing was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer found that the claimant was not entitled to SIBS because the reason he had not returned to work for the quarter in question was a later unrelated injury and not the earlier injury for which he received an impairment rating on which he based his claim for SIBS. The claimant has appealed this decision arguing that he is entitled to receive SIBS for his earlier injury concurrently with temporary income benefits (TIBS) for his later injury. The respondent (carrier) replies that the decision of the hearing officer is correct as a matter of law and based on sufficient evidence.

DECISION

We affirm.

It is undisputed that the claimant suffered a compensable injury to his lower back and left knee on (first date of injury), for which he was assigned a 15% impairment rating (IR). This injury was the subject of Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. According to his testimony, the claimant was paid both TIBS and impairment income benefits (IIBS), which were not commuted, based on the 15% IR. His treating doctor for that injury was Dr. P. The claimant said that he returned to work in January 1993 and continued working, at a slightly higher pay rate, until (second date of injury), when he had another accident that injured his right knee, shoulder and arm, and lower back. His treating doctor for this later injury was Dr. B, whom he first saw on April 19, 1993. The claimant stated that Dr. B excused him from work as a result of the second injury and that he was, as of the time of the hearing, receiving TIBS for that injury.

Having received all the TIBS and IIBS he was entitled to for the first injury, the claimant testified he applied on September 21, 1993, for SIBS pursuant to Section 408.142 of the 1989 Act for this injury for his first quarter which began on this same date. On his request for SIBS, he listed no wages for the previous calendar quarter and checked the block "I have not returned to work." On October 5, 1993, this request was denied without explanation by a disability determination officer (DDO). In response to this denial, the claimant submitted to the DDO a Specific and Subsequent Medical Report (TWCC-64), dated October 12, 1993, from Dr. P which contained the statement "undetermined" for the anticipated dates of return to limited and full-time work. Presumably in response to this TWCC-64, the DDO rescinded the prior denial and approved SIBS for the first compensable period. The carrier disputed this claim on October 27, 1993, based on the contention that the claimant was not working because of his second injury in (second date of injury), not his first injury in (first date of injury).

The claimant testified that he was "pretty sure" that Dr. B was correct in his Initial Medical Report (TWCC-61) of April 19, 1993, wherein he stated: "The patient has had an accident in the past, but states that it was well as [sic] the time of this accident/injury." He further testified on cross-examination and reaffirmed this testimony when questioned by the hearing officer that the (first date of injury) injury had no bearing on his (second date of injury) injury, that they were totally different accidents and he would still, albeit in some pain, be working had the injury of (second date of injury), not occurred. Additional evidence submitted by the claimant includes a Report of Medical Evaluation (TWCC-69) by Dr. P, dated November 9, 1993, in which Dr. P states: "The carrier has refused to comply with this recommendation [for left knee surgery]. Therefore, the patient, at the present, stays totally incapable of returning back to any type of work until this surgery is carried out." According to the claimant, Dr. P reached this conclusion on the basis of an MRI examination on September 23, 1993. The actual report of this MRI examination was not introduced into evidence.

The hearing officer found that the claimant was not entitled to SIBS for the first compensable quarter "because he has not returned to work due to the injury he suffered on (second date of injury)." In his appeal, the claimant contends that the occurrence of the later injury does not under the 1989 Act preclude SIBS for the first injury and that to deny him SIBS under these circumstances would "penalize" him simply because he has met eligibility requirements for separate benefits for separate injuries.

Section 408.142(a) provides:

An employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period . . . the employee:

(1)has an impairment rating of 15 percent or more as determined by this subtitle 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 <u>as a direct result of the employee's impairment</u>;

(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. [Emphasis added.]

SIBS are calculated quarterly and paid monthly. The entitlement for the initial period of SIBS is determined prospectively, based on whether the employee met all the requirements listed above upon termination of his entitlement to IIBS. Tex. W.C. Comm'n,

28 TEX. ADMIN. CODE §§ 130.102(b) (Rule 130.102(b)) and 130.103 (Rule 130.103). *See also* Texas Workers' Compensation Commission Appeal No. 931160, decided February 1, 1994. Section 401.011(23) defines impairment as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury. . . ."

As set forth above, to be entitled to SIBS, a claimant must establish by a preponderance of the evidence that he has not returned to work or has returned to work at less than at 80% of his former average weekly wage as a direct result of his impairment. The claimant testified repeatedly that had it not been for his later accident, he would still be working. Dr. B confirmed in his report that the claimant was of the same opinion at the time he examined him on April 19, 1993. This case is similar to that considered in Texas Workers' Compensation Commission Appeal 93630, decided September 9,1993, where the Appeals Panel found the basic issue as to SIBS entitlement in that case was not whether the claimant made a good faith effort to find employment, but whether her non-employment was a direct result of her impairment. The claimant in Appeal No. 93630 testified she could handle almost any kind of job, but was still not hired. Not wishing to speculate on the motives of potential employers in not hiring the claimant, the Appeals Panel concluded, based principally on the claimant's own testimony, that there was sufficient evidence to support the decision of the hearing officer that the claimant did not prove by a preponderance of the evidence that her unemployment was the direct result of her impairment. Likewise, in the case now under appeal, we agree that the testimony of the claimant is clearly sufficient to support the decision of the trier of fact that the claimant did not return to work as the result of the second injury. We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

One final matter deserves brief comment. Dr. P's medical reports dealing with the claimant's alleged inability to work all derive from the time frame after the start of the claimant's first compensable quarter and are therefor not probative evidence of his condition in the quarter immediately prior to his first compensable quarter which, for purposes of SIBS entitlement, is determinative. *See* Rule 130.102(b).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge