

APPEAL NO. 990284

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 12, 1999, a contested case hearing (CCH) was held. With respect to the only issue before her, the hearing officer determined that the respondent (claimant) was entitled to the 22nd quarter of supplemental income benefits (SIBS) and that claimant's unemployment during the filing period for the 22nd quarter was a direct result of her impairment. The hearing officer's finding on good faith effort to obtain employment has not been appealed.

Appellant (carrier) appeals, contending that claimant has a total inability to work but asserting that her unemployment was solely the result of her age and that individuals of claimant's age are normally retired and, therefore, her unemployment was due to her age rather than her impairment. The file does not contain a response from claimant.

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. 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 injured employee during the prior filing period. Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]."

The parties stipulated that claimant sustained a compensable (left leg, left knee and back) injury on _____; that she has a 25% IR; that IIBS were not commuted; and that the filing period for the 22nd quarter was from July 8 through October 6, 1998. Carrier concedes that claimant has a total inability to work and that fact is supported by medical records of Dr. E, the treating doctor, and Dr. C, carrier's doctor who in a report dated August 12, 1996, stated "I do not feel the patient is capable of returning to any type of occupation or that she will be able to in the foreseeable future."

At issue is claimant's age. Claimant testified that she was 62 years old at the time of her injury in _____ and that she was 70 years old during the filing period at issue. In a status report dated August 5, 1998, Dr. E wrote "she is permanently disabled & furthermore is @ retirement age anyway. She therefore can not get & keep a job 2E to injury related symptoms." There is other medical evidence, including Dr. C's 1996 report which specifies

exactly why claimant cannot return to work, and claimant testified that she has had five or six surgeries. No doctor whose reports are in evidence has suggested claimant has some ability to work; nonetheless, carrier contends that the "evidence is internally inconsistent and contradictory," citing Dr. E's passing remark that "furthermore [claimant] is @ retirement age anyway" to conclude "that the *real* reason for Claimant's inability to work is her age and work status" Both the hearing officer and carrier cite Texas Workers' Compensation Commission Appeal No. 982612, decided December 21, 1998, as authority for their positions. In that case, as in the instant case, the claimant was 70 years old and was receiving social security benefits. (In Appeal No. 982612, the injured employee was drawing a pension and social security retirement benefits.) In this case, claimant was not receiving a pension and the social security benefits are disability benefits. Appeal No. 982612, and cases cited therein, affirm the Appeals Panel position "that retirement or termination, standing alone, does not necessarily foreclose SIBS and that a claimant is not required to demonstrate that the compensable injury (impairment) was the only cause of the unemployment, but rather that the compensable injury was a cause of the unemployment. While we agree that retirement, and in this case, age, may be a factor to be considered in determining eligibility for SIBS, carrier, in response to a direct question from the hearing officer, assumed the burden of proving that claimant's age was the sole reason for her unemployment. Carrier attempted to meet that burden through the one quoted phrase in Dr. E's August 5, 1998, report. The hearing officer commented:

There is insufficient evidence that Claimant's age was the sole reason why she was unemployed. In this case, a direct result finding is sufficiently supported based on evidence that Claimant sustained a serious injury with lasting effects, and she could not reasonably have performed the type of work being done at the time of injury. A Claimant need not establish that her impairment is the only cause of her unemployment in order to satisfy the direct result criteria. Rather, a Claimant need only establish that her impairment is a cause of the unemployment.

The hearing officer's finding is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We find no reversible error and, accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge