

APPEAL NO. 990849

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 8, 1999, a contested case hearing was held. With regard to the three issues before him, the hearing officer determined that: (1) appellant (claimant) "is not entitled" to supplemental income benefits (SIBS) for the first through fifth compensable quarters; (2) claimant has "permanently lost entitlement" to SIBS because she was not "entitled" for four consecutive quarters; and (3) "Carrier [respondent] did not waive its right to contest Claimant's entitlement to SIB's [sic]."

Claimant appeals the adverse findings, contending that she has a total inability to work, as supported by her treating doctors; that the carrier did not file a Request for Benefit Review Conference (TWCC-45) requesting a benefit review conference (BRC); and that carrier, by failing to timely and properly dispute the SIBS quarters in question, waived its right to dispute entitlement to SIBS. Claimant specifically states, "I agree I am not entitled to SIBS on two claims concurrently; however, relief from liability and loss of entitlement are two different concepts." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, pointing out that portions of claimant's appeal dealt with "items" (facts and opinions) not in the record. Otherwise, carrier contends that the hearing officer's decision regarding claimant's ability to work is correct, that the definition of the word "entitlement" is a question of law, rather than fact, and that claimant "is not entitled to draw SIBS on another injury for the same quarter" (cannot receive double SIBS concurrently for two different injuries), and that Section 408.146(c) provides that if an employee's "lack of entitlement extends over twelve months . . . that person should lose entitlement to additional benefits." Carrier says that "it would be a waste of time for all concerned to require a Carrier that is not required to make SIB's payments to file a 'dispute.'" Carrier urges affirmance.

DECISION

Reversed and rendered.

This case is complicated by the fact that claimant sustained a compensable bilateral carpal tunnel syndrome (BCTS) injury in (prior date of injury) (not the injury at issue here) and subsequently returned to work. The parties stipulated that claimant sustained a second compensable (shoulder, right ankle, cervical and lumbar spine) injury on (subsequent date of injury), that claimant was assessed with an 18% impairment rating (IR) for the second injury, and that impairment income benefits (IIBS) for that injury were not commuted. At the end of her IIBS period, claimant was receiving SIBS due to her first 1991 injury. The parties stipulated that the filing period for the first compensable quarter began on August 12, 1997, with the filing period for the fifth compensable quarter, ending on November 9, 1998. It is undisputed that claimant was receiving SIBS payments for her 1991 injury when the Texas Workers' Compensation Commission (Commission) made an

initial determination that claimant was entitled to SIBS for the first compensable quarter on November 20, 1997. In an "Amended Initial Quarter Approval" dated November 26, 1997 (with a corrected average weekly wage (AWW)), there is a handwritten notation at the bottom of the form which states:

Note: You should continue to apply for each qtr so that if you are not found entitled on the other injury, but are found entitled to overlapping qtr of this injury, you will begin receiving SIBs on this injury. If found not entitled for 4 consecutive qtrs on either injury, you permanantly [sic] lose entitlement to SIBs on that injury. Keep applying on both injuries, showing your dr has you off work due to both injuries as long as that holds true [emphasis in original].

A similar notation is made on claimant's Statement of Employment Status (TWCC-52) for the first quarter, with the additional note that "you will be unable to receive overlapping benefits." Claimant did as she was told and continued to apply for SIBS on TWCC-52s for subsequent quarters. For the second quarter carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on February 19, 1998, stating:

43. Carrier respectfully disputes payment of [SIBS] for 2nd quarter beginning 2/10/98 thru 5/11/98 as stated previously by [Commission] on application dated 11/13/97 ". . . . cannot receive overlapping benefits." Currently [SIBS] are being paid under File No., (Docket No.).

The hearing officer, in his Statement of the Evidence, made the following comments:

On November 20, 1997, the [Commission] made an initial determination that claimant was entitled to SIB's for the 1st compensable quarter (from November 11, 1997 until February 9, 1998) with respect to the (subsequent date of injury) compensable injury. Claimant was not paid SIB's for the (subsequent date of injury) injury as she was receiving SIB's on the (prior date of injury) injury at the time of the initial determination.

The claimant filed applications for quarters 2, 3 and 4 and the carrier denied those because "she was already receiving SIB's under the (prior date of injury) injury."

Claimant filed an application for quarter number 5 which was denied by the carrier "because 4 quarters expired in which SIB's were not paid."

The claimant did not receive SIB's payments on the (subsequent date of injury) injury for quarters 1 through 4 because she was already receiving SIB's on the (prior date of injury) compensable injury.

The hearing officer incorporated the first paragraph of the above quote as his Finding of Fact No. 20 and then made the conclusion that "carrier did not waive its right to contest Claimant's entitlement to SIBs."

Section 408.147(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(c) (Rule 130.108(c)) provide that if a carrier "fails to make a request for a [BRC] within 10 days after the date of the expiration of the [IIBS] period or within 10 days after receipt of the employee's [TWCC-52], the insurance carrier waives the right to contest entitlement to [SIBS] . . ." (Emphasis added.)

As far as we can determine, carrier never requested a BRC to dispute claimant's entitlement to SIBS, and only filed one TWCC-21, quoted earlier. Carrier contends that "it would be a waste of time for all concerned to require a Carrier that is not required to make SIBs payments to file a 'dispute.'" We find no such exception in the 1989 Act or Commission rules that provides that a carrier is not required to dispute entitlement after a claimant has filed a TWCC-52, just because it feels it is not required to make payment. While we affirm the position cited in Texas Workers' Compensation Commission Appeal No. 972018, decided November 17, 1997 (Unpublished), which states:

A claimant may be eligible for SIBS for two separate injuries but he or she would not be entitled for more than one SIBS payment at a time. The Appeals Panel has said that the SIBS provisions do not allow double SIBS payments to the same individual at the same time even if there were two or more injuries or an accumulation of injuries. A carrier is not liable to pay double SIBS, even if a claimant's two injuries each reach the 15% IR threshold. Texas Workers' Compensation Commission Appeal No. 93989, decided December 16, 1993.

This does not mean that the carrier need not dispute the claim for entitlement by requesting a BRC as provided for in the 1989 Act and Commission rules. We would note as dicta that carrier should have requested a BRC and stated its position at that time, perhaps reaching some agreement with claimant on future quarters. Accordingly, we reverse the hearing officer's findings and conclusion that carrier did not waive its right to contest claimant's entitlement to SIBS and render a new decision that carrier waived the right to contest entitlement to SIBS by failing to request a BRC as required by Section 408.147(b) and Rule 130.108(c).

Since we reverse the hearing officer's decision that carrier waived its right to contest claimant's entitlement to SIBS for the first through fifth compensable quarters, we are compelled to likewise reverse the hearing officer's decision that claimant has permanently lost entitlement to SIBS because she was not "entitled" for four consecutive quarters. We render a new decision that claimant has not ceased to be entitled to any additional income benefits for the compensable injury. Section 408.146(c) and Rule 130.106(a) provide that an injured employee who is not entitled to SIBS for a period of 12 consecutive months

permanently loses entitlement to such benefits. In this case, where the carrier did not contest entitlement as required by the statute and rules, and where, in fact, the claimant did not receive SIBS benefits for the injury at issue here for the first four compensable quarters does not, in our opinion, mean that claimant is permanently precluded from all further income benefits. This is not to say that claimant is now eligible to receive SIBS for those quarters during which she received SIBS for the earlier 1991 injury. See Appeal No. 972018, *supra*, and Appeal No. 93989, *supra*.

Regarding the first issue, pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's 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 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]."

Claimant testified regarding six surgeries for her BCTS, a contemplated seventh surgery, what she could and could not do, the extensive medical treatment she has received, and her symptoms. Dr. D, claimant's treating doctor, in a report as early as June 13, 1997, stated claimant "is unable to return to work at this time." In another report dated November 12, 1997 (during the first quarter filing period), Dr. D discussed claimant's multiple injuries, diagnostic testing that had been performed, and recommended spinal surgery. In a December 2, 1997, report, Dr. D states that claimant "is limited in her daily activities and is restricted in caring only for her basic needs" and that claimant "is permanently disabled" due to complications and "re-occurrence of [BCTS]." In a February 2, 1998, report, Dr. D writes:

This patient is severely limited in her capability of being able to perform only minimal domestic functions and must rest frequently . . . As a result of her ongoing symptoms, she is unable to return to work. My earlier diagnosis of her medical condition remains unchanged; she is permanently disabled due to her back and cervical injuries as well as the re-occurrence of carpal tunnel syndrome.

Similar comments are repeated in some form in reports dated February 18, April 21, May 14, July 31, and October 13, 1998. Spinal surgery was recommended from time to time, but Dr. D notes that claimant "does not want to consider surgery for her lumbar spine." Claimant testified that some of the reasons that she has refused spinal surgery are that she "develops a lot of scar tissue," that she has hypertension and the seriousness of the proposed surgery. Claimant testified, and medical records reflect, that she has undergone pain management therapy and attends physical therapy twice a week.

The hearing officer, in the Statement of the Evidence, remarked:

Claimant admitted in cross-examination that she is able to drive, does grocery shopping, goes to the pharmacy, goes to physical therapy (twice a week), is able to do her personal grooming, cook one meal a day, is able to use the telephone, reads and watches TV.

In his factual determinations, the hearing officer found that during the relevant filing periods, the claimant had some ability to work, albeit with very severe restrictions, and that claimant therefore had not attempted in good faith to seek employment commensurate with her ability to work. Those findings are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). However, because carrier waived the right to contest entitlement to SIBS, as discussed previously, claimant is entitled to SIBS for those quarters. We reiterate that claimant will not receive any additional benefits for those quarters (unless it is for the second half of the fifth compensable quarter after claimant was no longer receiving SIBS for the first 1991 injury) because the SIBS provisions do not allow double SIBS payments (Appeal No. 93989, *supra*) and, in fact, claimant is not claiming double benefits.

Accordingly, we reverse the hearing officer's decision on all three issues and render a new decision that claimant is entitled to SIBS for the quarters at issue because carrier had waived the right to contest entitlement by failing to request a BRC within the required time period. We further render a decision that claimant has not permanently lost entitlement to SIBS.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge