APPEAL NO. 991922

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 4, 1999. With respect to the sole issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the sixth quarter. The claimant appeals the hearing officer's findings that he had an ability to work and did not make a good faith effort to obtain employment commensurate with his ability to work, and asserts that the respondent's (self-insured) dispute of sixth quarter SIBS is deficient and results in the self-insured's waiver of its right to dispute SIBS. The self-insured replies that the hearing officer did not have jurisdiction to rule on the sufficiency of the self-insured's dispute because it was not an issue, that the self-insured did not waive its right to contest the claimant's entitlement to SIBS, and that there is sufficient evidence to support the hearing officer's decision.

DECISION

Affirmed.

The claimant's counsel in opening statement stated that the self-insured had not sufficiently disputed the SIBS quarter as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(e) (Rule 130.104(e)), and had therefore waived its right to contest SIBS. The self-insured objected to the issue stating that it was not included in the benefit review officer's (BRO) statement of disputes, that the claimant did not file a response to the BRO's report, and that there was no request made to add an issue pursuant to Rule 142.7. The claimant argued that the issue was subsumed in the issue of entitlement to sixth quarter SIBS and the self-insured argued that the issue was not subsumed. The hearing officer, after reviewing the BRO report, which clearly indicates that the issue was discussed, ruled that the issue would be litigated by the parties and declined to state whether the issue is subsumed or a separate issue. The self-insured's response is timely as a response, but untimely as an appeal; consequently, we will disregard that portion of the self-insured's response which asserts that the hearing officer should not have considered the issue of sufficiency of the dispute and that it is not subsumed in the entitlement issue.

The parties stipulated that the claimant sustained a compensable injury to his low back on _____; that the claimant reached maximum medical improvement on October 28, 1996, with a 23% impairment rating; that the claimant did not commute any portion of the impairment income benefits (IIBS); that the qualifying period for the sixth SIBS quarter was February 11, 1999, through May 12, 1999; and that the claimant's sixth SIBS quarter was May 25, 1999, through August 23, 1999. The claimant's treating doctor is Dr. G who has performed three back surgeries: on September 6, 1995, the claimant had a lumbar laminectomy and decompression at L4-5, L5-S1; on March 24, 1997, the claimant had a lumbar laminectomy and discectomy with fusion from L4-S1 with bone graft

and insertion of an internal bone stimlator; and on March 3, 1998, the bone growth stimulator was removed. In July 1998, Dr. G recommended another surgery, a three level laminectomy with exploration of the nerve roots. Both the claimant's second opinion doctor, Dr. H, and the self-insured's second opinion doctor, Dr. I, issued a nonconcurrence. Dr. G's request for spinal surgery has not been resubmitted.

According to the claimant, Dr. G has told him that he cannot work, he is completely unable to work, and he did not make an effort to look for any employment during the qualifying period. The claimant testified that during the qualifying period he saw Dr. G on a monthly basis, he suffered from back and leg pain and spasms, used a cane, was on medication, and wore a back brace and used a TENS unit. Dr. G has issued many reports concerning the claimant's work ability both during and near the qualifying period. On February 4, 1999, Dr. G states that the claimant was awaiting another back surgery and was unable to return to gainful employment. On March 3, 1999, Dr. G states:

> [The claimant] is a surgical candidate for the lumbosacral spine. He has a failed fusion and segmental instability of the lumbosacral spine. He is in pain on a daily basis. This requires pain medication and lumbosacral brace support. He has positive EMG Studies for a left S1 radiculopathy. If anybody needs surgery, it is this man. He is unable to work in this condition and will never be able to work as a laborer again.

On March 23, 1999, at the request of the self-insured, the claimant underwent a functional capacity evaluation (FCE) and was examined by Dr. K. Based on the FCE, Dr. K opined that the claimant was capable of retraining in a different type of work in a light to medium category with limitations. The claimant testified that the adjuster for his claim told him that based on Dr. K's report, he needed to search for employment. The claimant took Dr. K's report to Dr. G and asked Dr. G for another report. In a letter dated April 14, 1999, Dr. G states that the claimant is "unable to return to work at this time for any type of work."

On May 12, 1999, the claimant filed a Statement of Employment Status (TWCC-52) with the self-insured. On May 12, 1999, the self-insured wrote Dr. G a letter requesting the claimant's work limitations. On May 17, 1999, the self-insured checked the box "Employee Not Entitled to [SIBS]" on the TWCC-52 and indicated that the reason for nonentitlement was "Carrier requesting benefit review conference (BRC) due to incomplete medical information from Dr. [G]." The self-insured filed a Request for [BRC] (TWCC-45) on May 17, 1999. On May 19, 1999, Dr. G responded to the self-insured's letter stating:

> [The claimant's] limitations, in relation to working, at this time, are that he is unable to lift anything greater than 5 pounds; avoid repetitive squatting and bending; avoid heavy lifting; avoid sitting for more than 30-40 minutes at one time; avoid standing in one position for more than one hour at one time. Those are the current limitations.

The claimant testified that when he received the TWCC-52 from the self-insured, he knew his SIBS might be cut off and he obtained an attorney on May 19, 1999.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Rule 130.102(d), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; . . ." Rule 130.102(e), effective January 31, 1999, provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

The hearing officer made findings that during the qualifying period for the sixth quarter the claimant possessed a sedentary ability to work, and did not attempt in good faith to obtain employment commensurate with his ability to work. The claimant asserts that Dr. G's reports, taken as a whole, thoroughly explain the inability of the claimant to work. Pursuant to Rule 130.102(d)(3), a total inability to work must be supported by a detailed medical narrative. The record does not contain a narrative report from Dr. G which specifically explains how the injury causes a total inability to work. Although Dr. G has stated that the claimant is unable to work, he also stated that the claimant has work restrictions. Other records, those of Dr. K, also indicate that the claimant is capable of returning to work in some capacity.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the opinion of Dr. G and Dr. K sufficient to support the hearing officer's determination that the claimant had a sedentary ability to work. Having failed to seek employment commensurate with his ability, he was not entitled to sixth quarter SIBS.

The claimant asserts that the self-insured has waived the right to contest entitlement to sixth quarter SIBS because its dispute does not meet the criteria of Rule 130.104(e). Rule 130.104(e) states "[t]he notice of determination of non-entitlement shall contain

sufficient claim specific information to enable the employee to understand the carrier's determination. A generic statement such as 'not a good faith effort', 'not a direct result', or similar phrases without further explanation does not satisfy the requirements of this section." The hearing officer made a finding that the self-insured did not sufficiently notify the claimant of the reasons for his non-entitlement for the sixth quarter of SIBS under the May 17, 1999, notice of non-entitlement. The claimant argues that this situation is similar to a carrier's restriction to the grounds listed on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), and the self-insured has waived its right to dispute that the claimant did not make a good faith job search. According to the claimant, Rule 130.108(f) provides a remedy for the carrier's failure to sufficiently notify the claimant of the reasons for his non-entitlement.

Section 409.022 provides that the grounds for the refusal listed on the TWCC-21 constitute the only basis for the carrier's defense on the issue of compensability, unless there is newly discovered evidence that could not reasonably have been discovered at an earlier date. Thus, there is a specific statutory provision for limiting the grounds of a carrier's contest of compensability. There is no comparable statutory provision which indicates a remedy for an insufficient contest of SIBS. The claimant's argument that Rule 130.108(f) applies is misplaced. Rule 130.108(f) states:

> (f) Liability. An insurance carrier who unsuccessfully contests a commission determination of entitlement to [SIBS] is liable for:
>
> (1) all accrued, unpaid [SIBS], and interest on that amount, and;
>
> (2) reasonable and necessary attorney fees incurred by the employee as a result of the carrier's dispute which have been ordered by the commission [Texas Workers' Compensation Commission] or court.

Rule 130.108(f) refers to the success or failure of the carrier on a SIBS issue after a benefit proceeding has been held and is inapplicable to the issue of an insufficient contest of SIBS. We note that there is a specific statutory provision and corresponding rule which provides that a carrier waives the right to contest entitlement to SIBS if a carrier fails to make a request for a BRC within 10 days after the date of the expiration of IIBS or within 10 days after receipt of the employee's statement. *See* Section 408.147 and Rule 130.108(d). Absent either a statutory or rule provision for a carrier's insufficient contest of SIBS, there is no authority for the claimant's position that an insufficient contest of SIBS results in a waiver of the dispute.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge