

APPEAL NO. 000001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 13, 1999. In response to the issue at the CCH, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13th quarter. Self-insured (referred to as "carrier" herein) appeals this determination, contending that the hearing officer should not have determined that claimant was satisfactorily participating in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC). Carrier also complains that claimant had time to look for work and that he should have searched for more than five jobs. Respondent (claimant) responds that sufficient evidence supports the hearing officer's determinations. Carrier did not appeal regarding the direct result criterion for SIBS.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant met the good faith SIBS requirements. Carrier asserts that claimant did not act in good faith through his enrollment in college paid for by the TRC. Carrier contends that claimant took only six hours of courses during the filing period, that claimant is "considered a full-time student only because of his affiliation with [the] TRC," and that the hearing officer should have found that claimant was not in good faith because he was not considered a full-time student by the college he attended. Carrier asserts that, although the TRC suggested a certain number of study hours for each hour of classes enrolled in, claimant still had time to look for work. Carrier complains that the hearing officer should not permit the TRC to decide what constitutes "full time" participation in a vocational rehabilitation program.

The parties stipulated that the carrier accepted liability for a _____, injury; that the claimant was assigned an impairment rating of 15% or more for his compensable injury; that the claimant did not commute his impairment income benefits; and that the 13th quarter of SIBS ran from June 30, 1999, to September 28, 1999. The filing period for the 13th quarter was identified as the period from March 18 to June 16, 1999.

The "new" SIBS rules that are effective regarding filing periods after January 31, 1999, apply to determine the claimant's entitlement to 13th quarter SIBS. See Texas Workers' Compensation Commission Appeal No. 992645, decided December 17, 1999. The hearing officer apparently determined that the claimant satisfied the good faith requirement under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) which provides that an employee has made a good faith effort to obtain employment commensurate with his ability to work if he "has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period."

Claimant testified that he sustained a compensable back injury in _____ and that he cannot sit for more than one hour because of this injury. An April 1999 independent medical examination report from Dr. B states that with the assistance of a back support, claimant could perform a sedentary to light job which allowed him to move occasionally. Claimant testified that during the filing period in question, he attended college courses and completed six hours of course work. Claimant said he was working with the TRC and that the TRC approved him for vocational rehabilitation starting in the summer of 1997. He said he was working with a TRC vocational counselor and that he is a full-time student in good standing "at" the TRC. A July 16, 1999, letter from a TRC rehabilitation services technician states that claimant "is a full time client of the [TRC]" and that he is "currently attending [college] and communicating with his vocational rehabilitation counselor on a regular basis."

The term "full time participation in a vocational rehabilitation program" was not defined by Texas Workers' Compensation Commission (Commission) rule at the time of the filing period in this case. However, the preamble to the SIBS rules effective January 31, 1999, states that this issue is to be considered on a case-by-case basis. In this particular case, the hearing officer heard the evidence and made his determinations regarding good faith and claimant's participation in a TRC vocational rehabilitation program. As an appeals level body, we do not find facts, pass upon credibility, or substitute our judgment for that of the hearing officer. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Regarding whether the participation was "full time" and "satisfactory," the hearing officer could consider claimant's testimony and the TRC letter regarding claimant's participation. This involves a fact issue for the hearing officer. Texas Workers' Compensation Commission Appeal No. 992819, decided January 28, 2000. Regarding carrier's complaint that claimant participated in a "degree program," during the filing period, we can find no basis for determining that claimant cannot meet the good faith presumption by participating in a TRC-sponsored educational program simply because it involves completion of a college degree. We must interpret the SIBS rules as written and Rule 130.102(d)(2) provides that an employee has made a good faith effort to obtain employment commensurate with his ability to work if he "has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period." In this case, there was evidence that the TRC planned claimant's vocational rehabilitation and that the plan included college courses. The hearing officer's determination regarding good faith and claimant's full-time participation in the TRC-sponsored educational program at the college is 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).¹

We generally observe that the legislature amended Section 408.150, regarding vocational rehabilitation, to be effective September 1, 1999. The Commission adopted

¹We note that in the decision and order, the hearing officer set forth Rule 130.102, as amended, effective November 28, 1999.

amended SIBS rules in this regard that were effective November 28, 1999, and would concern filing periods beginning after the effective date. Rules 130.101 and 130.102 were amended and are not “new” rules. New paragraph 8 of Rule 130.101 does define “full time vocational rehabilitation program” and states as follows:

(8) Full time vocational rehabilitation program. Any program, provided by the [TRC] or a private provider of vocational rehabilitation services that is included in the Registry of Private Providers of Vocational Rehabilitation Services, for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.

The preamble to the amended rules that were effective November 28, 1999, which included this definition, stated as follows:

Based on the fact that an injured employee must cooperate with an offer of vocational rehabilitation services by the TRC . . . or lose entitlement to SIBS, any vocational rehabilitation program provided by the TRC . . . should be considered a full-time program. . . .

Reference was then made to the definition in Rule 130.101(8).

Carrier next contends that the hearing officer erred in determining that claimant made a sufficient number of job contacts to constitute good faith. We have already affirmed the hearing officer's good faith determination based on the determination regarding participation in the TRC vocational rehabilitation program. Therefore, we need not address good faith regarding a job search.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge