

APPEAL NO. 000045

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 9, 1999. With regard to the sole issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the third quarter. The appellant (carrier) appeals several findings of fact, urging that the hearing officer erred because she failed to decide whether the claimant had a duty to seek employment commensurate with her ability to work, did not determine that the claimant had some ability to work, and did not determine that the claimant failed to make a good faith effort to find employment commensurate with her ability to work. The claimant replies that sufficient evidence supports the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant has not commuted any portion of the impairment income benefits; that the third SIBS quarter was from May 21, 1999, to August 19, 1999; that the qualifying period for the third SIBS quarter was from February 7, 1999, through May 7, 1999; and that the claimant's earnings during the qualifying period were less than 80% of her average weekly wage. Given the dates of the third quarter, the "new" SIBS rules effective January 31, 1999, apply. See Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). On January 22, 1997, the claimant picked up a basket of cold-rolled steel weighing approximately 100 pounds, twisted, and injured her neck and lower back. The claimant testified that Dr. S, her treating doctor, has diagnosed a herniation in her lower back and a bulged disc in her neck, and has recommended lumbar surgery.

The claimant testified that she had no ability to work during the third quarter qualifying period and was not released to return to work by Dr. S until the first week of May 1999, but was enrolled in Texas Rehabilitation Commission (TRC)-sponsored classes and searched for employment. The hearing officer found that from January 1999 through March 10, 1999, the claimant took classes through the TRC which equated to a full-time status considering class time and computer laboratory time; that in addition to taking classes through the TRC, the claimant looked for work with the counselor and 5 resumes were sent to employers TRC recommended during the qualifying period for the third quarter; and that the claimant also contacted several employers sent to her by the vocational specialist, but some of the jobs sent were not within the claimant's restrictions and/or the employers were not hiring. The claimant testified that she obtained a job with (employer) on April 14, 1999, but, after working seven hours, she was unable to continue the job because of back pain. On May 5, 1999, after being released to return to work, the claimant obtained a job performing office work.

The claimant relied on the medical reports of Dr. S to support her position that she had no ability to work during the qualifying period. Dr. S wrote a narrative report on February 1, 1999, which states:

This patient continues to suffer with severe back and leg pain. She is presently undergoing second opinion in regards to addendum process for lumbar surgery. She is not showing any improvement. She continues to have severe back and leg pain. She continues to require medications in the form of narcotics that have a sedative effect. These medications cause a sedative effect requiring bed rest. Even sitting, standing or walking aggravates her back and leg pain such that she requires increasing amounts of medication. This patient consequently then requires further medications that require bed rest.

The patient cannot perform any type of activity which requires lifting, pushing, pulling, stooping, bending, crawling, squatting or climbing. This patient is not a candidate for gainful employment nor has she been released by her treating physician. This patient is undergoing active medical treatment and is undergoing second opinion for lumbar surgery.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) provides that a good faith effort to obtain employment has been made if the claimant "has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period." Rule 130.102(d)(3), 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), 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 found that the claimant was not able to work in any capacity until early May 1999 based on the medical reports of Dr. S; and that the claimant's good faith job search was satisfied by no search during the majority of the qualifying period for the third quarter, until the first week of May 1999. The hearing officer also made an alternate finding that the claimant sought employment at over 15 potential employers during the qualifying period, and that, if the claimant had a duty to look for work, the job search completed was done in good faith and spanned the qualifying period.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3), the hearing officer had to judge the credibility of the evidence before her. The hearing officer applied Rule 130.102(d)(3) and found that Dr. S's reports sufficiently explained the claimant's injury and why she was unable to work. The carrier argues that the claimant's ability to attend classes full-time indicates some ability to work, but the hearing officer did not find that argument persuasive. Depending on the facts and circumstances presented, an ability to attend vocational rehabilitation could be considered an indication of an ability to work, as could an actual search for employment. In this case, the claimant obtained a job but was unable to continue because of pain, which supports the hearing officer's determination that the claimant had no ability to work until she was released by Dr. S. After being released to return to work by her treating doctor the first week of May 1999, the claimant obtained a job on May 5, 1999, two days prior to the end of the qualifying period. We find the evidence sufficient to support the hearing officer's determination that the claimant made a good faith effort to seek employment commensurate with her ability to work during the qualifying period for the third quarter.

The claimant argues that since it is undisputed that she has been participating in a full time vocational rehabilitation program sponsored by the TRC, she qualifies for SIBS pursuant to Rule 130.102(d)(2) as having made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer found that the claimant participated in such a program from January 1999 through March 10, 1999, but correctly did not rely on Rule 130.102(d)(2) in determining entitlement since the claimant participated only during one month of the qualifying period.

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 find the evidence sufficient to support the hearing officer's determination that the claimant is entitled to SIBS for the third quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge