APPEAL NO. 000086

On December 15, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The hearing officer resolved the disputed issue by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth quarter. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. Respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

Eligibility criteria for SIBS entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The "new" SIBS rules effective January 31, 1999, apply to this case.

The parties stipulated that claimant sustained a compensable back injury on _____; that he has not commuted impairment income benefits; that he reached maximum medical improvement with an impairment rating of 15% or greater; that his earnings during the qualifying period were less than 80% of his average weekly wage; and that the fifth quarter was from September 2, 1999, to December 1, 1999, with a qualifying period of May 21, 1999, to August 19, 1999. There is no appeal of the hearing officer's finding that during the qualifying period claimant had an ability to work light/medium duty and that his underemployment was a direct result of the impairment from the compensable injury.

Claimant injured his back while working on an oil platform on _____, and he had lower back surgery in June 1996 and December 1997. Claimant said that in October 1998 he began working at a grocery store seven hours a day for three to four days a week for $6.50 an hour. Dr. M, claimant's treating doctor, wrote in April 1999 that claimant had been working light duty at the grocery store for 4 to 6 hours a day until March 4, 1999, and that after March 4, 1999, his work schedule increased to 6 to 7 hours a day for 30 to 35 hours per week. Claimant underwent a functional capacity evaluation (FCE) on June 1, 1999, at Dr. M's request and the physical therapist evaluator reported that claimant demonstrated the ability to perform work at a medium level. Dr. M wrote in July 1999 that claimant had been having recurrent back and leg pain and that claimant should have physical therapy. Dr. G, who apparently saw claimant at carrier's request, reported in July 1999 that claimant had undergone an FCE in May 1999 in conjunction with his examination of claimant that month, that the FCE placed claimant at the lower end of the medium-level work category, that the FCE was consistent with his examination of claimant, and that claimant could gradually increase his work hours with lifting restrictions set out in the FCE. Dr. M wrote on August 23, 1999, that claimant had begun physical therapy the week before

and that claimant had symptoms of increased back and leg pain. Claimant said he went to two weeks of physical therapy, three days the first week and two days the second week. Dr. M wrote in October that claimant's only restriction is a 20-pound lifting restriction and that whether claimant will require another back surgery depends on how he continues to do. Claimant said that Dr. M and another doctor have told him that he will need another back surgery.

Claimant said that, after receiving a notice from the Texas Workers' Compensation Commission that it may be possible for him to receive assistance from the Texas Rehabilitation Commission (TRC), he went to the TRC in March 1999 and talked to a Ms. R, a TRC counselor, about returning to college and that he became a client of TRC. Claimant had some college credits from the 1970s and 1980s. Claimant said that Ms. R told him that TRC would pay for him to attend community college but that he decided to use his veterans benefits under the Hazelwood Act to obtain an associate's degree at the community college. He said that Ms. R told him that TRC will be willing to pay for his third and fourth years of college when he has earned his associate's degree. Claimant said that he took a leave of absence from the grocery store beginning May 1, 1999, to prepare to attend community college. Claimant said that he attended the community college's first summer session, which was from June 3, 1999, to July 10, 1999; that tuition for the first summer session was paid for under the Hazelwood Act; that he was a full-time student during the first summer session taking two three-credit hour classes; that during the first summer session he spent 20 hours per week in class; that he also had to study for classes; and that he completed the first summer session and did well in his classes. Claimant said that during the qualifying period he earned money serving subpoenas on a part-time basis and that he was paid by his father to fix his brother's car and his father's car and to do some repair work on his father's house. Claimant said that he did not attend the community college's second summer session because of back pain and that after the first summer session and during the qualifying period he searched for jobs at the community college's job placement center and mailed or faxed job applications with an attached resume to the employers listed on his Application for SIBS (TWCC-52) for the fifth quarter. Claimant said that the employers he applied to did not hire him. Claimant said that he completed the community college's fall semester the day before the CCH and that that semester started August 28, 1999. Claimant indicated that a job at the grocery store is still available to him but that he would be unable to work and go to school. He said that he continues to discuss his schooling with Ms. R and that Ms. R is interested in his grades.

Claimant checked on his TWCC-52 for the fifth quarter that he is enrolled in, and satisfactorily participating in, a full-time rehabilitation program sponsored by the TRC. The TWCC-52 requests that documentation be attached to it to show his participation and progress in the program. Claimant listed on his TWCC-52 seven job contacts between July 12 and August 18, 1999. Another job contact of August 24, 1999, was after the qualifying period. Claimant also listed on his TWCC-52 wages earned of $910.00, and attached to his TWCC-52 his invoices for serving subpoenas, fixing the two vehicles, and working on the house; the job descriptions of the jobs he applied for; his admission status determination

and tuition statement for the first summer session; and his tuition statement for the fall semester.

Claimant had the burden to prove his entitlement to SIBS. The hearing officer found that claimant did not establish that he made a good faith effort to seek employment during the qualifying period and concluded that claimant is not entitled to SIBS for the fifth quarter. Claimant contends that during the qualifying period he was a full-time student and applied for many jobs, and that TRC had sufficient involvement with his schooling so as to allow him to be entitled to SIBS, apparently under Rule 130.102(d)(2). While the hearing officer found that claimant had been working with Ms. R at TRC in his return to work activities, she indicates in her decision that there was insufficient evidence that claimant's schooling was through a TRC vocational rehabilitation program. Claimant did not present any letter or document from the TRC to show that during the qualifying period he had been enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge