

APPEAL NO. 000095

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 13, 1999, a contested case hearing was held. At issue was the entitlement of the respondent, who is the claimant, to his 14th compensable quarter of supplemental income benefits (SIBS).

The hearing officer found that the claimant had the inability to work during the qualifying period for the 14th quarter, and that he was thus entitled to SIBS.

The appellant (carrier) has appealed, arguing that the evidence shows that the claimant's inability to work is a result of his noncompensable hepatitis C. The claimant responds that he has the inability to work primarily due to his impairment and is entitled to SIBS.

DECISION

Reversed and rendered.

Given that the claimant's contention, and the hearing officer's finding, was that the claimant was unable to work at all, it is worth reciting the version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d) (Rule 130.102(d)) that was in effect at the time of the qualifying period for the 14th quarter. This rule indicates the desire of the Texas Workers' Compensation Commission (Commission) to greatly limit the situations where a total inability to work will preclude making a good faith search for employment:

- (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
 - (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
 - (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission [TRC] during the qualifying period;
 - (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; or
 - (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The qualifying period for the 14th quarter ran from June 11 through September 9, 1999. The claimant said he had not looked for work for this period. The claimant was awaiting a hip joint replacement, which he said he could not have right away because it was found that he had hepatitis C. This disease was not part of the compensable injury.

The claimant had worked in the oil field most of his life, and there was no dispute he could not return to his preinjury job. He injured his back on _____, and had surgery in August 1993. The claimant described how severely the injury and surgery had limited his various activities. He testified that he had gotten worse over the past year. He said he could not drive, and spent much of his day laying around. He said he could sit for an hour, and stand for about three minutes, with no bending or stooping. He spent his days watching television and trying to do as much as he could, which was limited. He said his inability to work was due both to his back and hepatitis, although he felt he could work with hepatitis if he did not also have the back injury.

Medical records indicated he had developed necrosis in his hips necessitating replacement surgery. The claimant had earlier been enrolled in college under the auspices of TRC but said he had failed his math class and therefore could not be maintained in this program. He denied his treating doctor, Dr. Z, had ever released him. The claimant was hospitalized twice during the qualifying period, due to hepatitis and related liver problems. He said that one hospitalization lasted 11 days, the other three days. He said he had no side effects from his medication.

Dr. Z's notes for the qualifying period indicate that claimant had moderate lumbar pain with radiation into the lower right extremity on June 18th. He noted that claimant walked with a cane. On November 23, 1999, Dr. Z wrote that he did not believe claimant was capable of work. Dr. Z wrote that claimant was quite jaundiced, and that he should not work for fear of spreading hepatitis. In fact, Dr. Z noted that claimant's most likely chance for employment would be as a vector for hepatitis, and expressed his doubt that there was such a job.

A functional capacity evaluation conducted in November 1998 noted that claimant did not display inappropriate illness behavior, and that he could not return to work. Additional therapy was not recommended because of the need to clear "any alcohol dependency problems" first. The evaluator stated that the strong smell of alcohol was detectible during each of the two testing sessions, although claimant denied having any alcohol in the previous 24 hours. Claimant's heart rate was elevated with even light activity. The doctor who considered this report, Dr. E, offered his own conclusion that the claimant could return to work with restrictions on walking and standing, and no bending, stooping, or lifting.

On January 18, 1999, Dr. Z's notes indicate that he was asked by the Commission to respond to Dr. E's recommendations. Dr. Z said that while claimant could not return to his previous oil field roughneck occupation, there was some occupation at which he could work. The carrier also put into evidence an earlier sedentary work release signed by Dr. Z on July 20, 1998.

The claimant testified that he was paid the 13th quarter of SIBS, based essentially upon the same medical evidence.

While there are documents that precede the qualifying period by as much as a year, we believe that evidence concerning inability to work that is most proximate to the qualifying period is entitled to greater weight. In this regard, when assessing whether claimant has proven that he meets the requirements of Rule 130.102(d)(3), it is evidence within the qualifying period that must be reviewed to see if there is indeed "a narrative" which "specifically explains" how the injury precludes work. Nearly all of the findings of fact about claimant's abilities come from his testimony. Although the hearing officer found that claimant's inability to work was due to a combination of hepatitis C and his impairment, he found that the impairment was the greatest obstacle to obtaining employment. However, this finding is against the great weight and preponderance of the evidence for the qualifying period; Dr. Z indicates to the contrary, that it is the hepatitis C which weighs against searching for employment.

As the hearing officer pointed out in his decision, claimant is about at the end of his 401-week period of entitlement to income benefits. This makes it especially important to undertake the job search that the legislature has required as a condition of entitlement. The job that must be sought need not be a full-time job if the claimant's restrictions point toward a part-time position.

We reverse the decision that claimant is entitled to SIBS for the 14th quarter, and render a decision that he failed to search for employment commensurate with his ability to work and, consequently, is not entitled to SIBS.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge