

APPEAL NO. 000155

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 30, 1999, a contested case hearing (CCH) was held. At issue was the entitlement of the respondent, who is the claimant, to his sixth compensable quarter of supplemental income benefits (SIBS). There was a second issue concerning whether the appellant (carrier) had timely requested a benefit review conference (BRC) to dispute entitlement to this quarter.

The hearing officer found that the claimant had the inability to work during the qualifying period for the sixth quarter. The hearing officer further found that the carrier did not request a BRC by the 10th day after it received the Statement of Employment Status (TWCC-52) forwarded by the claimant. Due to both of these findings, he was thus entitled to SIBS.

The carrier has appealed, arguing that the evidence shows that the claimant had some ability to work and that his depression was not related to his compensable injury. The carrier further argues that the evidence "shows" that the carrier received the TWCC-52 the day it requested the BRC and thus it was timely. The claimant responds that the evidence proved inability to work. The claimant points out that the carrier was proven to have received the claimant's TWCC-52 on October 7th and did not make a request for a BRC within 10 days of that date.

DECISION

Affirmed as reformed.

The hearing officer has recited pertinent facts and we incorporate those in this decision. We will summarize certain facts for ease of reading the decision. The claimant injured his neck and his back on _____, while lifting a heavy piece of metal to feed into the machine he was operating, while employed by (employer), where he had worked about 10 years. He has also developed some depression as a result of chronic pain. The claimant denied he had preexisting depression and said he was in perfect health prior to his injury. The claimant had left carpal tunnel release and ulnar release surgeries on two occasions in 1995. The period of time under consideration for SIBS (the qualifying period) ran from July 9 through October 5, 1999. The claimant did not look for work during that time and said he had excruciating pain which was only somewhat relieved through medication, which, in turn, affected his mental alertness. The claimant testified that he had not taken the medication before the CCH in order to be ready for it.

On September 30, 1999, the claimant's treating doctor, Dr. M, wrote that during the qualifying period the claimant had constant and unrelenting cervical and lumbar pain, radiating into his hands, with numbness in the left extremities. He said the inability to work had caused the claimant depression. On December 2, 1999, Dr. M wrote a letter

describing that the claimant was unable to work for a greater period of time that included the period under review. He described the reasons why claimant was unable to work and they included the fact that the claimant's radiating pain and numbness into his arms caused an inability to lift, pull, push, sit, or stoop for extended periods of time; that he had major depression with suicidal thoughts as a result of his chronic pain; and that treatment of anxiety was necessary to treat his pain. Dr. M said that the claimant's depression was the direct result of his chronic pain. The claimant testified as to some ability to do personal care tasks around the home and to walk.

The carrier presented a July 3, 1999, report from Dr. L. Dr. L noted the absence of tenderness in the cervical area and greatly restricted range of motion which did not cross-validate. Dr. L concluded that the claimant had numerous subjective pain complaints that did not correlate to objective physical conditions. The claimant also had a flat affect and significant symptom magnification. Dr. L stated that she believed he could return to full duty; however, this was qualified as not encompassing psychiatric issues. She agreed that he could not operate heavy machinery while taking Lortab.

A psycho-social examination performed on November 13, 1998, found major depression with post-traumatic stress disorder. The claimant had inpatient hospitalization for a week beginning on December 1, 1998. The claimant's psychiatrist, Dr. P, stated on December 1, 1999, that the claimant took three medications that would make him drowsy, with psychomotor retardation that would contraindicate driving or working. The claimant testified that he did not drive.

A copy of the TWCC-52 for this quarter was in evidence along with copies of receipts of mailing and a certified green card. The green card showed it was received by the carrier's office on October 7, 1999. The copy of the TWCC-52 put into evidence by the carrier showed that it was date-stamped by the Texas Workers' Compensation Commission (Commission) (upon being hand delivered) and the carrier's attorney on October 21, 1999. The request for the BRC is dated that same day.

The hearing officer's determination that the carrier did not timely request a BRC is dispositive of SIBS entitlement in this case. Section 408.147(b) provides that if a BRC is not requested within 10 days after the receipt of the employee's statement, the insurance carrier waives the right to contest entitlement for that period. The claimant sent his TWCC-52 certified mail to the carrier; the green card shows that it was received by the carrier on October 7, 1999. Plainly, the October 21st date-stamp referred to by the carrier in its appeal is that of its attorney's office, not the carrier itself. By the time the carrier's attorney had received the forwarded documents, it was already too late to request a BRC. The hearing officer's determination that the carrier received the TWCC-52 on October 7, 1999, but did not request a BRC until October 21, 1999, and that this waived the right to dispute entitlement to SIBS, is fully supported by the record. We will reform the hearing officer's Conclusion of Law No. 4 to add "and consequently the carrier waived the right to dispute entitlement to SIBS."

The hearing officer has also made findings concerning the claimant's job search. Although it is effectively surplusage in light of the waiver, there is sufficient support for the hearing officer's fact findings.

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) that was in effect at the time of the qualifying period for the 14th quarter. This rule indicates the desire of the 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.

Given that income benefits end utterly 401 weeks after the date of injury, it is desirable that an injured worker consult with his doctors to undertake some assessment of whether even part-time work can be performed. For the period of time under consideration, Dr. M assessed why claimant could not work at all. These rules allow the trier of fact to evaluate whether the detailed medical evidence pertinent to the quarter under consideration proves that there is not even a part-time capability to work. We cannot agree that the hearing officer's evaluation of the evidence and application of this rule to that evidence is against the great weight and preponderance of the evidence.

We note that a previous hearing decision and an Appeals Panel decision in evidence show that claimant's depression has been treated as an aspect of his injury for several quarters. The hearing officer's treatment of depression in this decision as part of the injury is supported. We affirm the decision, subject to the clarification added above to the effect that the carrier's failure to timely file a request for a BRC constituted a waiver of the dispute to entitlement to SIBS in the sixth quarter.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCUR IN RESULT:

Stark O. Sanders, Jr.
Chief Appeals Judge