

APPEAL NO. 000234

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 19, 2000. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the first and second quarters. In his appeal, the claimant asserts that the hearing officer's determinations that he did not make a good faith effort to look for work commensurate with his ability to work in the qualifying periods for the first and second quarters of SIBS are against the great weight of the evidence. In its cross-appeal, the respondent/cross-appellant (carrier) contends that the hearing officer erred in determining that the claimant's impairment rating (IR) is 16%, in determining the date of the first and second quarters of SIBS based on the 16% IR, and in determining that the claimant's unemployment during the qualifying period for the second quarter is a direct result of his impairment. The carrier did not appeal the hearing officer's determination that the claimant's unemployment during the "qualifying period" for the first quarter is a direct result of his impairment; thus, that determination has become final pursuant to Section 410.169. In his response to the carrier's cross-appeal, the claimant urges affirmance. The appeals file does not contain a response to the claimant's appeal from the carrier.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_, in the course and scope of his employment as a sandblaster. The claimant testified that his left leg fell through a hole in the platform where he was working, causing injury to his left leg and low back. On November 21, 1997, Dr. S performed surgery on the claimant's left knee. The claimant testified that because of his injury, it is difficult for him to bend, climb stairs, walk, and lift heavy weights. He stated that when he walks, his leg swells to the point that his sock becomes tight. He further testified that he is 58 years old, that he went to school until the sixth grade in (country), and that his work experience has been in sandblasting, janitorial, baking, furniture painting, and heavy machinery operation.

The claimant's treating doctor is Dr. M, a chiropractor. In a "To Whom it May Concern" letter dated August 9, 1999, Dr. M stated, in relevant part:

[Claimant] is currently under my medical care for injuries sustained at place of employment on date mentioned above. Patient sustained injuries to the lumbar region of the spine and left lower extremity. Patient underwent a surgical intervention of the left knee joint with very limited success.

[Claimant] has been unable to work from 1-29-99 to 4-29-99 due to his disability. He continues to be 100% disable [sic] and at present, unable to seek employment services because of pain and discomfort being experienced during the ambulatory process.

The claimant did not look for work in the filing period for the first quarter. During the qualifying period for the second quarter, he listed approximately 30 job applications on his Statement of Employment Status (TWCC-52). The first contact on the TWCC-52 is dated May 5, 1999. Neither the TWCC-52 nor any other documentation provided by the claimant reflect job searches in the period from April 15 to May 4, 1999. The claimant testified that he registered with the Texas Workforce Commission (TWC) and that he goes there regularly to review the job listings on the TWC computer. On cross-examination, the claimant acknowledged that he only contacts one employer on any given day and that he understood that he was to contact two potential employers per week. He explained that he decided what employers to contact by observing the employees in an establishment where he happened to be and by seeking employment in those places where he thought he would be able to do the job. Finally, on cross-examination, the claimant testified that he had not given any thought to the kind of job he can do, noting that someone else is going to have to determine what he can do and prepare him for that work.

Initially, we will consider the carrier's assertion that the hearing officer erred in determining that the claimant's IR is 16% and in establishing the dates of the first and second SIBS quarters based on the 16% IR. At the time of the hearing on the SIBS issue, an appeal of the hearing officer's determination that the claimant's IR is 16% in accordance with an amended report of the designated doctor was pending before the Appeals Panel. The carrier contends that while that appeal was pending, the hearing officer "was without jurisdiction to make further findings concerning the [IR]." We find no merit in the carrier's assertion. Section 410.169 specifically provides that a hearing officer's decision regarding benefits "is binding during the pendency of an appeal to the appeals panel." At the time of this hearing concerning the claimant's entitlement to SIBS for the first and second quarters, the hearing officer had determined that the claimant's IR was 16% in accordance with an amended report of Dr. A, the designated doctor. While that decision was on appeal, the determination that the claimant had a 16% IR was binding under Section 410.169 and, as such, the hearing officer had the authority to proceed with his determination of SIBS entitlement based upon his determination that the claimant had a 16% IR and to calculate the relevant dates of the quarters and filing/qualifying periods based on that 16%. Although the hearing officer was permitted to resolve the SIBS issues in this instance while the appeal of the IR issue was pending, for purposes of clarity we note that in Texas Workers' Compensation Commission Appeal No. 000134, decided March 7, 2000, the Appeals Panel affirmed the hearing officer's determination that the claimant's IR is 16%.

Based on the 16% IR, the claimant's first quarter of SIBS is the period from April 30 to July 29, 1999, and the second quarter of SIBS runs from July 30 to October 28, 1999. In Texas Workers' Compensation Commission Appeal No. 991555, decided September 7,

1999, we determined that the "new" SIBS rules contained at Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.101 to 130.109 (Rules 130.101 to 130.109) apply if the SIBS quarter starts on or after May 15, 1999. Thus, the new rules do not apply to determine the claimant's entitlement to SIBS for the first quarter; however, they do apply to determine the claimant's entitlement to second quarter SIBS. In addition, because the new rules do not apply to the first quarter, it follows that the filing period for the first quarter of SIBS is the period from January 29 to April 29, 1999, and the qualifying period for the second quarter of SIBS is the period from April 15 to July 15, 1999.

As noted above, the claimant contended that he was entitled to SIBS for the first quarter under a no-ability-to-work theory. In Finding of Fact No. 8, the hearing officer stated that "[Dr. M's] report did not explain how the injury causes a total inability to work." In Finding of Fact No. 9, the hearing officer determined that "[d]uring the qualifying period for the first quarter, Claimant had the ability to perform some level of work with restrictions." From the hearing officer's use of the phrase "qualifying period" instead of "filing period" and his statement that Dr. M's report did not sufficiently explain how the injury causes a total inability to work, it is apparent that the hearing officer erroneously applied Rule 130.102(d)<sup>1</sup> to determine SIBS entitlement for the first quarter, a quarter to which that rule was inapplicable. Accordingly, we reverse the hearing officer's determination that the claimant did not make a good faith effort to look for work in the filing period and remand for the hearing officer to reconsider that question, and the claimant's entitlement to first quarter SIBS, under the rules in effect prior to January 31, 1999. As noted above, the carrier did not appeal the hearing officer's determination that the claimant's unemployment in the filing period for the first quarter was a direct result of his impairment, although it appealed the hearing officer's direct result determination relating to the second quarter.

The claimant contends that he made a good faith job search in the qualifying period for the second quarter. Rule 130.102(e) provides in relevant part that "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." In this case, neither the claimant's TWCC-52, nor any other documentation, reflects that the claimant made any job contacts in the period from April 15 to May 4, 1999. In his findings, the hearing officer found that the claimant had made 27 job contacts in the qualifying period for the second quarter of SIBS, that he "did not complete any job applications and he did not prepare or use a job resume," and that the claimant "had no plan to find employment . . . but instead sought to make 2 job contacts per week so that he could apply for [SIBS]." As the fact finder, the hearing officer was free to consider the factors he emphasized in resolving the issue of whether the

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<sup>1</sup>Effective November 28, 1999, the Texas Workers' Compensation Commission (Commission) amended Rule 130.102 to include a subsection concerning vocational rehabilitation provided by a private provider, as opposed to the Texas Rehabilitation Commission. That subsection has become Rule 130.102(d)(3) and the subsection concerning no ability to work has become Subsection 130.102(d)(4).

claimant made a good faith effort to look for work in the relevant qualifying period.<sup>2</sup> A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant's job search efforts rose to the level of a good faith search for employment commensurate with his ability to work and the hearing officer was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165 in so finding. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not make a good faith job search during the qualifying period for the second quarter is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination, or the corresponding determination that the claimant is not entitled to SIBS for the second quarter, on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, we briefly consider the carrier's assertion that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the second quarter was a direct result of his impairment. The claimant's testimony, in conjunction with the medical evidence of the claimant's restrictions, reveal that the claimant cannot reasonably return to the sandblasting work he was doing at the time of his injury. As such, the hearing officer's determination that the claimant's unemployment was a direct result of his impairment finds sufficient evidentiary support in the record. Rule 130.102(c). That determination is not so against the great weight of the evidence as to compel its reversal on appeal. Pool, supra; Cain, supra.

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<sup>2</sup>Indeed those factors are specifically listed as information to be considered in determining good faith job search under Rule 130.102(e).

The hearing officer's determination that the claimant is not entitled to SIBS for the first quarter is reversed and the case is remanded for the hearing officer to reconsider the claimant's entitlement to those benefits and the question of whether the claimant made a good faith effort to look for work in the filing period for the first quarter under the SIBS rules applicable to that quarter, namely the rules in effect prior to January 31, 1999. The hearing officer's determination that the claimant is not entitled to SIBS for the second quarter is affirmed. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge