APPEAL NO. 000450

On February 4, 2000, 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/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the second quarter. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. Respondent/cross-appellant (self-insured) requests that the hearing officer's decision that claimant is not entitled to SIBS for the second quarter be affirmed, but also requests that certain factual findings be reversed.

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.

Claimant, who is 63 years of age, testified that he injured his back while working as a helicopter painter for self-insured on _____; that he has been treated conservatively for his injury by Dr. B, D.C.; and that he takes pain pills prescribed by a referral doctor. The parties stipulated that on _____, claimant sustained a compensable injury; that he reached maximum medical improvement (MMI) on August 20, 1998, with a 16% impairment rating (IR); that he did not commute impairment income benefits; that the second quarter for SIBS was from October 22, 1999, to January 20, 2000; that the qualifying period for the second quarter was from July 9, 1999, to October 7, 1999 (the qualifying period); and that during the qualifying period claimant had no earnings.

A lumbar MRI done on April 30, 1997, showed a severe compression fracture at T12 and abnormal signals at L3 and L4, most likely representing bone contusions. A lumbar myelogram done in May 1997 showed a compression fracture at T12 and extradural defects at L2-3, L3-4, and L4-5. A CT scan done in May 1997 showed a healed compression fracture at T12 and disc bulges at L3-4 and L4-5. Claimant said that he was taken off work when he first went to Dr. B on May 13, 1997, and that he returned to work with self-insured on September 2, 1997, and worked until he retired on January 29, 1999. He had worked for self-insured for 36 years. Claimant said that from September 2, 1997, until he retired, he worked in the paint shop but that he did very little work and did no stooping, bending, climbing, or lifting over five pounds. He said he worked eight hours a day but did not perform his preinjury painter job. He said he did not know if Dr. B issued work restrictions. Claimant said that his condition from his injury continued to worsen to the point where he could no longer work and that Dr. B told him to stop working. Claimant said that he was unable to work during the qualifying period because of his pain in his back and right leg and because of his inability to stand, walk, bend, and stoop, but that in August

1999 he was told by a representative of self-insured that he had to look for work and that that person sent him three job leads on September 8, 1999, including the Texas Workforce Commission (TWC). Claimant said that he then went to the TWC several times and filled out job applications and also contacted the two employers listed on his Application for SIBS (TWCC-52) for the second quarter. Claimant said that after an evaluation, the Texas Rehabilitation Commission (TRC) told him that they were unable to assist him.

JR, self-insured's workers' compensation coordinator, testified that she found no work restrictions in claimant's employment file and that the file indicated that a full-duty release was given to claimant; that claimant's supervisor told her that claimant had no work restrictions and was doing his preinjury full-duty job prior to retirement; that if Dr. BL's restrictions of July 1999 had been provided to self-insured prior to claimant's retirement in January 1999, self-insured would have tried to find a position for claimant within those restrictions; and that claimant never mentioned working light duty in conversations with her prior to retirement.

Dr. BR, the designated doctor, noted in his December 1997 report that claimant was not at MMI at that time and that he was working a modified work schedule at self-insured's. Dr. BR reported in October 1998 that claimant reached MMI on August 20, 1998, with a 16% IR and that claimant was working on a modified work schedule at self-insured's.

Dr. F, D.C., who practices with Dr. B, noted in November 1998 that claimant had been working full duty for some time and again mentioned that claimant was working full duty on January 6, 1999. Dr. B wrote on January 21, 1999, that claimant was then currently performing his normal duties, that claimant continued to complain of pain from his injury, and that claimant should seek medical retirement because he may be a hazard to himself and others at work due to his pain and weakness. Dr. B wrote that, in his opinion, claimant should medically retire from self-insured as a result of his _____, spinal injury at work. As noted, claimant retired from self-insured on January 29, 1999. In May 1999, Dr. B wrote that he had recommended that claimant retire from self-insured or any other form of work due to his medical condition and that his medical retirement is due to his _____, work injury. Dr. B also wrote that work in any capacity will aggravate claimant's condition.

In July 1999, Dr. BL performed a functional capacity evaluation (FCE) on claimant at self-insured's request and reported that claimant demonstrated performance within the light-work category. Dr. BL noted that there did not appear to be any medical reason that would preclude claimant from performing appropriate tasks and duties and listed various restrictions. Dr. BL also wrote that it is highly unlikely that claimant will return to any gainful employment, noting that claimant had settled into a retired mind-set with no intention to return back to his previous position at self-insured.

The TRC referred claimant for a vocational evaluation the first week of November 1999 and the evaluator wrote that it does not appear that claimant is competitively employable, that he is unable to be retrained because of his limitations, and that it does not

appear that he is gainfully employable. In October 1999, Dr. B wrote that he had recommended that claimant be on permanent medical retirement from any form of work due to his medical condition from his work-related injury of _____. A November 1999 letter from the TRC states that, based on medical records, an FCE, and a vocational evaluation, it does not appear that claimant will ever be gainfully employable at the competitive level and that claimant is not eligible for vocational rehabilitation services because of the severity of his disability. Dr. B wrote again in January 2000 that he had recommended that claimant be on permanent medical retirement from any form of work due to his medical condition from his work-related injury.

Claimant checked on his TWCC-52 for the second quarter that he is not able to work in any capacity and that his doctor had documented that. Claimant did not list any employment contacts on his TWCC-52 for that portion of the qualifying period from July 9, 1999, to September 8, 1999. Claimant listed seven employment contacts during that portion of the qualifying period from September 9, 1999, to October 5, 1999, five with the TWC and two others.

In the Statement of the Evidence portion of his decision, the hearing officer wrote that during the qualifying period, claimant had the ability to engage in light-duty employment and that his unemployment was a direct result of his impairment. The hearing officer found that claimant retired from self-insured in January 1999; that, after his retirement, claimant was unable to continue in employment requiring the same or similar physical demands as his preinjury employment; that claimant's unemployment during the qualifying period for the second quarter was a direct result of his impairment; that claimant made no effort to seek employment from July 9, 1999, through September 8, 1999; that during the final weeks of the qualifying period, claimant made seven job contacts, five of which were with the TWC; and that claimant did not make a good faith effort to seek employment commensurate with his ability to work during each week of the qualifying period. The hearing officer concluded that claimant is not entitled to SIBS for the second quarter. Self-insured appeals the hearing officer's finding in favor of claimant on the direct result criterion for SIBS. Claimant appeals the hearing officer's findings adverse to him on the criterion of having to make a good faith effort to obtain employment commensurate with the employee's ability to work and his conclusion that claimant is not entitled to SIBS for the second quarter. An injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. Rule 130.102(c). Except as provided in subsections (d)(1), (2), (3), and (4) in Rule 130.102, 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 ability to work every week of the qualifying period and document his job search efforts. Rule 130.102(e). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the, hearing officer resolves conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's findings, conclusion, and decision are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Dorian E. Ramirez
Appeals Judge