

APPEAL NO. 000497

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 15, 2000. With regard to the issue before him, the hearing officer determined that respondent (claimant) was enrolled in and satisfactorily participated in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC), thereby meeting the supplemental income benefits (SIBS) good faith effort requirement; that claimant had an 18% impairment rating (IR); and that claimant was entitled to SIBS for the first quarter. The appellant (carrier) appeals, contending that claimant's 18% IR was on appeal and that the Texas Workers' Compensation Commission (Commission) rule cited by the hearing officer was not in effect during the qualifying period citing several total inability to work cases. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed by a communications company when on _____, he fell from a telephone pole about 10 or 15 feet to the ground, sustaining a severe injury to his left knee. Claimant underwent several surgeries which ultimately resulted in a total knee arthroplasty on September 14, 1998. Carrier disputed the IR which resulted in a CCH on May 19, 1999, where the hearing officer found claimant to have an 18% IR based on the designated doctor's report. That decision was appealed to the Appeals Panel which affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 991171, decided July 9, 1999.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The parties stipulated that claimant sustained a compensable left knee injury on _____; that claimant reached maximum medical improvement on November 18, 1998; that IIBS were not commuted; and that the qualifying period for the first compensable quarter was from August 20 through November 18, 1999. Claimant claims entitlement to SIBS on the basis of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) effective January 31, 1999. That rule provides that an injured employee has made a good faith effort to obtain employment commensurate with his ability to work if the employee:

- (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period[.]

The parties stipulated that the fall semester at the community college claimant was attending started August 30, 1999, and ended on or about December 8, 1999. Claimant testified, and offered documentation in the form of a grade report, that he had attended the fall term at the community college, taking 21 hours (17 credit hours) and having a cumulative 3.86 grade point average (he got one "B"). Claimant testified that his attendance at the community college "was sponsored or paid for" by the TRC.

The hearing officer made unappealed findings on direct result and disputed findings that claimant's enrollment in, and satisfactory participation in, the community college program satisfied the requirement in Rule 130.102(d)(2) of enrollment and satisfactory participation in "a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period."

Carrier's first point on appeal is that claimant's IR of 18% "is currently on appeal to the district court and has not reached a final determination." The Appeals Panel affirmed the 18% IR in Appeal No. 991171, *supra*. The fact that the IR has been appealed to a district court is irrelevant to this proceeding. Section 410.205(b) provides that during the pendency of an appeal to the district court a benefits decision of the Appeals Panel is binding. See Texas Workers' Compensation Commission Appeal No. 961553, decided September 20, 1996, and cases cited therein. To accept carrier's argument that we should render against claimant on the SIBS issue would in effect read Section 410.205(b) out of existence and we decline to do so. Carrier's appeal on this point is without merit.

Carrier's second point is that claimant "contends he was relieved of any such requirement [to seek or obtain employment] pursuant to Rule 130.102(d)(3) regarding full time enrollment in a [TRC] sponsored program" and that the "rule upon which Claimant relies was not effective until November 28, 1999." Claimant and the hearing officer relied on Rule 130.102(d)(2), effective January 31, 1999, not Rule 130.102(d)(3) as alleged by carrier. See page 15, line 24 of the transcript. The provision of both rules are the same except that the January 1999 Rule 130.102(d) was amended effective November 28, 1999, by the insertion of an additional subsection which resulted in a renumbering of Rule 130.102(d)(2) to 130.102(d)(3). Carrier's contention on this point is without merit.

Carrier also cites some earlier Appeals Panel decisions regarding the total inability to work and cases where the Appeals Panel has held that full-time schooling under the auspices of TRC may still require some good faith effort to find employment. Those cases have largely been superceded by the Commission implementation of Rule 130.102 which fairly specifically enumerates the requirements of a good faith effort to obtain employment. Cases that carrier cites that deal with a total inability to work are not applicable here because claimant is not contending that he has a total inability to work, rather it is

claimant's position that the good faith effort requirements of Sections 408.142 and 408.143 are met by his compliance with Rule 130.102(d)(2). The hearing officer so found and we agree with the hearing officer's interpretation of Rule 130.102(d)(2).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge