

## APPEAL NO. 000627

On February 29, 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 (claimant) is not entitled to supplemental income benefits (SIBs) for the 19th quarter. Claimant requests that the hearing officer=s decision be reversed and that a decision be rendered in his favor. Respondent (carrier) requests that the hearing officer=s decision be affirmed.

### 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. The new SIBs rules effective January 31, 1999, apply to this case.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable back injury; that he reached maximum medical improvement on September 14, 1994, with a 15% impairment rating; that he did not commute impairment income benefits; that the 19th quarter was from January 6 to April 13, 2000; and that the qualifying period for the 19th quarter was from September 23 to December 22, 1999 (the qualifying period). It is undisputed that claimant did not look for work during the qualifying period. He noted on his Application for SIBs (TWCC-52) for the 19th quarter that he is unable to work in any capacity, that he is not enrolled in a Texas Rehabilitation Commission (TRC) vocational rehabilitation program, that he earned no wages during the qualifying period, and that he made no job search efforts during the qualifying period. There is no appeal of the hearing officer=s finding that claimant has not returned to work as a direct result of his impairment. The SIBs criterion in issue is whether claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period.

Claimant testified that he is 62 years of age; that he injured his back on \_\_\_\_\_, while working as an electrician=s helper; that he had lumbar surgery for his injury in October 1993; that he is in pain all day and takes pain medications; that he wears a back brace; that his treating doctor, Dr. G, has told him that he cannot do any kind of work; that the TRC told him there is nothing that agency can do for him; that he is unable to work; that he uses a cane; and that his wife assists him with many activities of daily living. Claimant=s wife testified that claimant is in pain and takes pain medications and that she assists him in various activities of daily living. Claimant was evaluated by Dr. C at carrier=s request in July 1999 and Dr. C reported that claimant=s condition is compatible with a release to work at a sedentary- to light-duty level with restrictions on lifting. Dr. C noted that claimant=s lumbar surgery in October 1993 involved the L2 through L5 levels. Claimant underwent a functional capacity evaluation at Dr. G=s request in November 1999 and the physical therapist reported that claimant=s efforts indicated a sedentary physical demand level and that test results did not suggest a reliable

effort. Dr. G wrote in January 2000 that claimant cannot work at any type of job, that he is completely disabled from doing any type of work, and that he is still symptomatic with chronic lower back pain. Dr. G listed diagnoses of abnormalities from T12 to S1, including spondylolysis, osteophytes, disc bulges, disc protrusions, and stenosis. A TRC counselor wrote in January 2000 that, taking into consideration the severity of claimant's disability and his work history, transferable skills, educational level, and the fact that he lives in a rural area, the TRC is unable to assist him. The TRC counselor noted that according to Dr. G's reports, claimant is 100% disabled from seeking or holding any type of gainful employment. The TRC counselor stated that claimant had made a good faith effort in seeking TRC services but that the counselor had determined that claimant would not be able to become gainfully employed.

The hearing officer found that Dr. G had provided a conclusory report regarding claimant's ability to work, that other records show that claimant is able to work, that claimant had a sedentary ability to work during the qualifying period, and that claimant did not attempt in good faith to obtain employment commensurate with his ability to work. The hearing officer concluded that claimant is not entitled to SIBs for the 19th quarter. Claimant contends that the evidence shows that he is unemployable. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence. As an appellate level tribunal, the Appeals Panel is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers= Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is 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:

Tommy W. Lueders  
Appeals Judge

Judy L. Stephens

Appeals Judge