

APPEAL NO. 000648

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 March 10, 2000. The issues at the CCH were: (1) whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the fourth, fifth, and sixth quarters; and (2) whether the respondent (carrier) is relieved of liability for fifth quarter SIBs because of claimant's failure to timely file an Application for [SIBs] (TWCC-52) for the fifth quarter. The hearing officer determined that the claimant is not entitled to SIBs for the fourth, fifth, and sixth quarters; and that if claimant were otherwise entitled to SIBs for the fifth quarter, carrier would not be liable for payment for the period from October 14, 1999, through December 13, 1999, because of claimant's failure to timely file her TWCC-52. Claimant appeals, contending that she is entitled to SIBs because she had no ability to work during the filing periods in question. Claimant also asserts that carrier should not be partially relieved of any liability for fifth quarter SIBs because it did not send her a TWCC-52 until December 1999. Carrier responds, urging affirmance.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that she is not entitled to SIBs for the fourth, fifth, and sixth quarters. Claimant asserted that the medical evidence established that she had no ability to work during the filing periods in question, that her doctors had no released her to return to work, and that her testimony shows she had no ability to work.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant had an impairment rating of 18%; (3) claimant did not commute any of her impairment income benefits; (4) the filing period for the fourth quarter was from April 2, 1999, to July 1, 1999; (5) the filing period for the fifth quarter was from July 2, 1999, to September 30, 1999; and (6) the filing period for the sixth quarter was from October 1, 1999, to December 30, 1999.

The hearing officer determined that: (1) claimant had some ability to work during each of the filing periods in question; (2) claimant did not meet the good faith requirements since she did not look for work; and (3) claimant is not entitled to SIBs.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the filing period is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. The Appeals Panel's standard of review in this case is also set forth in Appeal No. 000004.

Claimant bases her entitlement to SIBs for the fourth through sixth quarters on the basis of no ability to work. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) then in effect provided that an employee may be in good faith if the employee:

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[.]

Claimant had the burden to prove that she had no ability to work. Texas Workers= Compensation Commission Appeal No. 950582, decided May 25, 1995. The hearing officer was the sole judge of the credibility of the evidence and she judged the credibility of the medical evidence regarding whether claimant had an ability to work during the filing period. The hearing officer specifically found that claimant had some ability to work. There was evidence from claimant's treating doctor that claimant could not do even sedentary work. However, the hearing officer was the sole judge of the credibility of this evidence. The hearing officer could consider the April 1999 functional capacity evaluation report and the report from Dr. P as records Ashowing@ that claimant was able to work. The hearing officer made her determinations regarding claimant's ability to work based on the evidence before her. Because the hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we will not substitute our judgment for hers. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant next contends the hearing officer erred in determining that carrier was not liable for part of fifth quarter SIBs. It was undisputed that claimant filed her TWCC-52 for the fifth quarter late, but claimant said this happened because carrier failed to send her a TWCC-52 timely. This issue is moot because we have affirmed the determination that claimant is not entitled to fifth quarter SIBs. In any case, the record reflects that the hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge