

APPEAL NO. 000690

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 March 22, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the second quarter. In his appeal, the claimant essentially argues that the hearing officer's determinations that he did not make a good faith job search in the qualifying period for the second quarter, that his unemployment is not a direct result of his impairment from the compensable injury, and that he is not entitled to SIBs for the second quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed, as modified.

The parties stipulated that the claimant sustained a compensable injury on _____; that he received an impairment rating of 15% or more for his compensable injury; that he did not elect to commute his impairment income benefits; that the second quarter of SIBs ran from January 26 to April 26, 2000; and that the qualifying period for the second quarter ran from October 13, 1999, to January 11, 2000. In her recitation of the stipulations, the hearing officer listed January 4, 1996, as the date of injury rather than the _____, date stipulated by the parties. As such, Findings of Fact 1.A., 1.B. and 1.D. will be modified to substitute _____, for January 4, 1996.

The claimant testified that he was operating an extruder machine at the time of his injury, which puts plastic on wire that he puts through the machine. The claimant stated that he injured his neck and left shoulder attempting to move a heavy cable that was on a reel. The claimant acknowledged that he did not look for work during the qualifying period, insisting that he was unable to work due to the constant pain in his neck, which radiates into his left arm, because he suffers from severe headaches, and because the medications he is taking prevent him from working.

Dr. G is the claimant's treating doctor. In a "To Whom it May Concern" letter dated December 16, 1999, Dr. G stated "at this time, this patient is totally disabled and is not fit to consider reintegration into the work place." Dr. G noted that the claimant is on prescription pain medication and muscle relaxers, which "have been proven to cause drowsiness and dizziness to a majority of the patients that take these medications." Dr. G's December 16, 1999, letter concluded:

Due to the combination of the ongoing medical treatment, the ongoing disability, and the above mentioned problems with medications, I do not feel that it is practical for this patient at this time to be considered a vocational candidate.

On February 16, 1999, Dr. G referred the claimant for a functional capacity evaluation (FCE). The FCE report stated that the claimant "was not completely cooperative" in the testing and that, as a result, the claimant's true abilities could not be ascertained. Nevertheless, the February 16th FCE concluded that the claimant "is currently testing safely at a medium strength level," which would encompass the job he was performing at the time of his injury.

The carrier had Dr. X examine the claimant for purposes of considering whether the claimant was able to work in the qualifying period for the second quarter of SIBs. In a January 13, 2000, letter Dr. X opined that the claimant is "employable" and that he was capable of performing sedentary and possibly light-duty work; however, Dr. X requested an FCE to permit him to "make a better determination" regarding the claimant's work ability. On January 17, 2000, the claimant underwent a second FCE as Dr. X requested. In a supplemental report of January 28, 2000, Dr. X stated that he had reviewed the January 17th FCE and opined that the claimant "can perform sedentary type work or even office work, light duty. Additionally, I am of the opinion that he should not climb, and over head lifting should be restricted."

The claimant contended that he had no ability to work in the qualifying period for the second quarter. The claimant's entitlement to second quarter SIBs is to be determined under the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) applicable to this case provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work 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." The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the qualifying period for the second quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. The hearing officer was not persuaded that the evidence from Dr. G was sufficient to demonstrate that the claimant had no ability to work in the qualifying period. In that regard, the hearing officer specifically noted that the evidence from Dr. G "failed to explain or establish that Claimant had a total inability to work during the relevant quarter qualifying period as a result of his impairment from the compensable injury." A review of the hearing officer's decision demonstrates that she gave more weight to the evidence from Dr. X and the FCEs and determined that those records "showed" that the claimant had an ability to work in the qualifying period. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence in so evaluating the evidence. Our review of the record does not reveal that the hearing officer's good faith determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The claimant acknowledged that he did not look for work in the qualifying period; therefore, the hearing

officer properly determined that he did not make a good faith job search in light of the fact that he did not sustain his burden of proving no ability to work.

The hearing officer also determined that the claimant's unemployment in the qualifying period for the second quarter was not a direct result of his impairment. The hearing officer noted that the February 1999 FCE demonstrated that the claimant could return to the type of work he was performing at the time of his injury. A review of the record does not reveal that that determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain. Although another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a basis for reversing the hearing officer's direct result determination in this instance. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Lastly, we note that the claimant did not appeal the hearing officer's determination that he failed to cooperate with the Texas Rehabilitation Commission (TRC) during the qualifying period for the second quarter. That determination has, therefore, become final pursuant to Section 410.169. As such, it provides an independent basis to support the hearing officer's determination that the claimant is not entitled to SIBs for the second quarter in accordance with Section 408.150(b)(effective September 1, 1999), which provides that "[a]n employee who refuses services or refuses to cooperate with services provided under this section by the [TRC] or a private provider loses entitlement to [SIBs]."

As modified, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge