

APPEAL NO. 000750

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 20, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) had not made Aa good faith job search commensurate with his ability to work@ and, therefore, was not entitled to supplemental income benefits (SIBs) for the ninth quarter from November 15, 1999, through February 14, 2000. The claimant appeals, contending that he had a total inability to work, which met the required good faith element, and further that he was enrolled and Awas participating with Texas Rehabilitation Commission [TRC].@ Claimant requests that we reverse the hearing officer=s decision and render a decision in his favor. Respondent (carrier) responds, citing medical records which show an ability to work, and asserts claimant did not participate in the TRC program. Carrier urges affirmation.

DECISION

Affirmed.

Claimant had been employed as a construction worker on _____, when he was on a scaffold when his glove got caught and he fell some 10 feet. Claimant sustained an injury to his left upper extremity including the thumb, hand, arm, and elbow. Claimant had various surgeries in 1993, 1994, and 1995. Claimant said his most recent surgery was in 1996. The parties stipulated that claimant sustained a compensable injury; that claimant had an impairment rating (IR) of 15% or greater (46%); that impairment income benefits (IIBs) were not commuted; and that the qualifying period was from August 1, 1999, through November 1, 1999. Claimant did not seek any employment during the qualifying period and asserts entitlement to SIBs on two grounds: (1) a total inability to work and (2) enrollment and satisfactory participation in a full-time vocational rehabilitation program sponsored by the TRC.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the 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 her ability to work.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) (the version then in effect) requires the employee (claimant) to prove three elements, namely (1) that she is unable to perform any type of work in any capacity; (2) that a narrative from a doctor

specifically explains how the injury causes a total inability to work; and (3) that no other records show that the injured employee is able to return to work. The hearing officer found that claimant had an ability to work in a sedentary/light duty capacity pursuant to a functional capacity evaluation [FCE] dated August 3, 1999. An earlier FCE dated January 26, 1999, showed that claimant had little use of his left hand and that it would be unsafe for claimant to perform activities with the left hand. That FCE concluded that claimant could do no type of activity which was stressful in any way, on the basis of his general medical condition, *i.e.*, heart and high blood pressure [which were conditions unrelated to the compensable injury]. In a note dated June 22, 1999, Dr. D, claimant's treating doctor, was of the opinion that claimant should undergo counseling/rehabilitation with the TRC and that claimant should stay off work until the evaluation is complete. The hearing officer found that report did not constitute a narrative justifying a total inability to work. The FCE dated August 3, 1999, two days into the applicable filing period noted submaximal effort and an ability to perform in a light-level work category. Dr. S, who ordered the FCE, in a report dated August 11, 1999, concluded:

It is my opinion that [claimant] is malingering. I see absolutely no reason to continue his therapy. I see no reason why he cannot return to work at full duty.

We find the hearing officer's decision on claimant's ability to work to be supported by the evidence.

Regarding claimant's contentions regarding enrollment in a retraining program, Rule 130.102(d)(2) provides that a good faith effort to obtain employment has been made if the claimant has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period. The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She found that:

FINDING OF FACT

7. Although Claimant was preparing to go through a retraining program through the [TRC], during the 9th quarter qualifying period, Claimant was not participating in a full time program during the relevant time period.

That finding is supported by claimant's own testimony. Various correspondence from TRC only shows that claimant has applied for TRC services, has been determined to be eligible for services, and is registered to participate in a finish carpentry program to start in January 2000; and that claimant is expected to complete training by 07-2000. Claimant, at best, was only enrolled in the TRC program during the qualifying period and had

not actually started retraining. We cannot say that the hearing officer's finding that claimant was not participating in a full-time program during the relevant time period is against the great weight and preponderance of the evidence.

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:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge