

APPEAL NO. 000756

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 15, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first quarter. The claimant appeals this determination, contending that it is not supported by the evidence and attaching additional evidence. The respondent (carrier) replies that the additional evidence should not be considered and that the decision of the hearing officer is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable neck injury on _____, for which she underwent fusion surgery in August 1998. She was assigned a 17% impairment rating (IR) and reached maximum medical improvement on August 28, 1998.

Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the impairment income benefits (IIBs) period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)), entitlement to SIBs is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the qualifying period. Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBs quarter and consists of the 13 previous consecutive weeks. The first SIBs quarter was from August 21 to November 19, 1999, and the qualifying period was from May 8 to August 7, 1999.

At issue in this case is whether the claimant made the required good faith job search commensurate with her ability to work. The claimant made no job search efforts and contended that she was unable to work in any capacity during the qualifying period. Rule 130.102(d)(3) in effect at all pertinent times provides that an employee has made the required good faith job search 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 medical evidence submitted by the claimant included an April 1, 1999, report of Dr. C, her treating doctor, in which he released the claimant to light-duty work and noted that her "prognosis for returning for full gainful employment with light duty restrictions should still remain satisfactory at this stage, pending possible further neurosurgical consultation" with her surgeon, Dr. S, "versus repeat trigger point injections" by Dr. E "in the

near future." On August 12, 1999, Dr. C wrote that the claimant was "to continue with her current permanent restrictions in the light duty category." Again, on November 2, 1999, Dr. C wrote that the claimant had undergone extensive medical treatment from April through August 1999 and that her previous release to light duty "does not necessarily mean that it would have been reasonable for her to find employment during that time frame with her additional treatment and testing related to her on-the-job injury."

In a report of July 2, 1999, Dr. P, the designated doctor, found the claimant's complaints "disproportionate to the objective findings" and judged her as showing "symptom magnification." On June 1, 1999, Dr. E wrote that the claimant "is not functioning well at this time." He gave no statement on her inability to work in this or subsequent reports on June 15 and 30, August 3 and 24, and October 6, 1999.

The hearing officer considered this evidence and found, among other things, that the reports of Dr. C and Dr. E "do not provide that Claimant is unable to do any work in any capacity." Finding of Fact No. 5. He further found that the claimant had some ability to work and because she did not make a good faith effort to obtain employment commensurate with this ability during the qualifying period, she was not entitled to first quarter SIBs.

The claimant appeals this determination, contending that the reports of Dr. C and Dr. E constituted narratives specifically explaining how the injury caused a total inability to work. Attached to the appeal was a March 30, 2000, "clarification" letter from Dr. C in which he "wanted to clarify that due to medical treatment, medications, doctor visits, and testing, that the patient could not work during the months of April '99 through August '99." (Emphasis in original.) The claimant filed a second letter with the Appeals Panel within the time limits for an appeal to which she attached an April 3, 2000, letter from Dr. E in which he referred to severe flare-ups of pain from early May to late August 1999 and concluded "after reviewing her medical records," that the claimant "was unable to work during this period because of this severe pain."

In Texas Workers' Compensation Commission Appeal No. 950113, decided March 8, 1995, we wrote:

The review of the Appeals Panel is generally limited to the record developed at the hearing. Section 410.203. In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993.

The two letters attached to the carrier's appeal represent attempts to explain other statements written the year before and neither appear to be based on a reexamination of the claimant. Under these circumstances, we cannot conclude that they met the criteria for requiring a remand and we decline to consider them for the first time on appeal.

Whether the claimant presented the necessary evidence to establish that she was unable to perform any type of work in any capacity during the qualifying period presented a question of fact for the hearing officer to decide. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find that the hearing officer's determination that the claimant had some ability to work was clearly supported by the evidence before him. Because the claimant failed to seek employment commensurate with this ability, she was not entitled to first quarter SIBs.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge