

APPEAL NO. 000868

On March 24, 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 issues by deciding that appellant (claimant) has an impairment rating (IR) of 16% and that claimant is not entitled to supplemental income benefits (SIBs) for the first quarter. Claimant requests that the hearing officer's decision that he is not entitled to SIBs for the first quarter be reversed and that a decision be rendered in his favor on that issue. Respondent (carrier) requests that the hearing officer's decision be affirmed. There is no appeal of the hearing officer's decision on the IR issue.

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 Sec. 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case. Claimant sustained a compensable injury on _____ when he fell off a drilling rig. The parties stipulated that on _____ claimant sustained a compensable injury that included his neck and low back; that he reached maximum medical improvement (MMI) on January 14, 1999; that he did not commute impairment income benefits; and that the qualifying period for the first quarter was from September 2 to December 2, 1999. There is no appeal of the hearing officer's finding that during the qualifying period claimant did not return to work as a direct result of the impairment from his compensable injury. There is no appeal of the hearing officer's decision that claimant has a 16% IR as certified by Dr. M, the designated doctor. The 16% IR assigned to claimant by Dr. M was for impairment of claimant's lumbar and cervical spine. Claimant has not had surgery for his compensable injury. Claimant testified that he has not worked since his compensable injury and that his treating doctor, Dr. P, has told him that he has no ability to work because of his back pain. Claimant also testified that during the qualifying period there were some days that he could not get out of bed because he could not walk; that most days he had back and neck pain; that he did not look for work; and that the Texas Rehabilitation Commission told him that it could not help him until he is completely rehabilitated. Claimant said that during the qualifying period he was able to accompany his wife to the grocery store, he could drive a little, and he could walk slowly for about a half an hour at a time.

An April 1997 MRI of claimant's cervical spine showed spondylosis and bulging discs with stenosis and an April 1997 MRI of claimant's right shoulder showed arthritic changes. Dr. O examined claimant at carrier's request in May 1997 and wrote that he could not return claimant to work unless cervical/lumbar MRIs are done. An August 1997 MRI of claimant's brain showed an arachnoid cyst and Dr. T wrote in August 1997 that there is no need for surgical treatment of the cyst. Dr. O reexamined claimant in March 1998 and

wrote that claimant is unable to return to work until further diagnostic testing of his neck, back, and head is done. An April 1998 brain MRI again showed the arachnoid cyst. Dr. T wrote again in November 1998 that there is no need for surgical treatment of the cyst. Numerous Specific and Subsequent Medical Reports (TWCC-64) from Dr. P were in evidence. In a March 1998 TWCC-64, Dr. P diagnosed cervical disc syndrome and noted that claimant could return to a limited type of work but not to full-time work. In TWCC-64s from May 1998 through October 1999, Dr. P noted that claimant could not return to limited or full-time work.

In December 1998, carrier accepted claimant's lower back as part of the compensable injury. In January 1999, Dr. P recommended a lumbar MRI and in February 1999, Dr. P added a diagnosis of thoracic/lumbosacral syndrome. Dr. P wrote in an attachment to his September 1999 TWCC-64 that claimant has lumbar pain with complaints of radiculopathy and neurological deficits, that claimant has severe lumbar and cervical spasms that limit his range of motion, and that claimant's cervical pain produces tension headaches. Dr. P wrote in an attachment to his October 1999 TWCC-64 that claimant continues to have pain in his lumbar spine with radiculopathy and that findings were compatible with nerve root compression of the lumbar spine. Dr. P continued to recommend a lumbar MRI. Dr. P reiterated the need for a lumbar MRI in November 1999 to rule out any significant pathology. Claimant indicated that carrier has not approved a lumbar MRI, but a utilization review letter of November 8, 1999, indicated that the lumbar MRI was approved on that day.

During the qualifying period, Rule 130.102(d)(3) provided 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. Rule 130.102(e) provided, in part, that, except as provided in subsections (d)(1), (2), and (3) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer found that during the qualifying period, claimant had some ability to work, made no effort to seek employment, and 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 first quarter. Claimant contends that the evidence proves that he had no ability to work during the qualifying period and that the hearing officer's decision is against the great weight and preponderance of the evidence. Whether claimant had some ability to work during the qualifying period was a fact determination to be made by the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). 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. Hearing officers should make findings of fact on all elements of the new SIBs rule on no ability to work.

Claimant contends that the hearing officer committed reversible error in admitting a January 1999 investigation report into evidence over his objections as to relevancy, lack of authentication, and hearsay within hearsay. The report is signed by a manager of the investigation company. The investigation report states that several of claimant's neighbors, who are named in the report, told the investigator that claimant had been doing construction work before and at the time of the interviews in December 1998 and January 1999. Claimant testified that he has not worked since his injury and that he does not talk to the neighbors who gave interviews. Section 410.165(a) provides, in part, that conformity to legal rules of evidence is not necessary. We conclude that claimant has not shown reversible error in the admittance of the investigation report.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge