

APPEAL NO. 000952

On April 4, 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.* The hearing officer resolved the disputed issue by deciding that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter. Appellant (carrier) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. Claimant requests that the hearing officer's decision be affirmed.

DECISION

Reversed and rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case. The parties stipulated that claimant sustained a compensable injury to his lower back on \_\_\_\_\_, and that the qualifying period for the second quarter was from September 21 to December 20, 1999. The second quarter was from January 3 to April 3, 2000. It is undisputed that claimant reached maximum medical improvement on April 26, 1998, with a 25% impairment rating. The SIBs criterion in dispute is whether claimant attempted in good faith to obtain employment commensurate with his ability to work during the qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2). Claimant contended that he had no ability to work during the qualifying period. It is undisputed that during the qualifying period, claimant was not employed, did not look for employment, and was not enrolled in a vocational rehabilitation program sponsored by the Texas Rehabilitation Commission.

Claimant was working as a construction worker on \_\_\_\_\_, when he injured his lower back shoveling. Claimant had an L5-S1 fusion with instrumentation in January 1997. Dr. S started treating claimant in October 1997 and after testing showed a pseudoarthrosis at L5-S1, lumbar instability and radiculopathy, Dr. S performed a fusion with instrumentation from L4 to S1 in December 1998. Claimant underwent a repeat EMG in June 1999 which showed a worsened condition from his previous EMG. On September 9, 1999, Dr. S wrote that an MRI was pending, that claimant would probably require further surgery at L4-5, and that based on studies and clinical examination, he felt that claimant is not able to participate in any gainful employment and that claimant was functioning at a very sedentary level of activity. An MRI done on September 29, 1999, showed, among other things, that the L5-S1 level was not fused. On December 7, 1999, Dr. S wrote that claimant continued to have low back and bilateral leg pain, that he had recommended a discogram, and that claimant is unable to return to any gainful employment from January through March 2000. A discogram and a CT scan were done on December 15, 1999.

Dr. C examined claimant at carrier's request on December 16, 1999, and he reported that claimant can do sedentary work with intermittent sitting and standing for no

more than three to four hours a day to begin with. Claimant underwent a functional capacity evaluation (FCE) on December 20, 1999. Dr. C reviewed the December 1999 discogram and CT scan in January 2000. Dr. C reviewed the December 20, 1999, FCE and in February 2000 wrote that the FCE indicated that claimant tested in the light-to-medium category in certain positions but not in others. Dr. C wrote that claimant can do a light-duty job with restrictions set forth in his report. Claimant had a disc space infection from the discogram for which he has been treated. Dr. S wrote in January 2000 that, with regard to claimant's work status from September 20 to December 19, 1999, based on claimant's physical examination and pathophysiology of his diagnostic studies, he felt that claimant was unable to work. Dr. S wrote in February 2000 that claimant is limited to a position which does not require reading, lifting, sitting, or standing, and that with his current discitis and need for additional surgery, as was determined by the discogram, the prognosis is that claimant will not return to gainful employment for at least one year.

Dr. S testified that claimant needs another lumbar surgery with a fusion from L2 to S1. When Dr. S was asked whether claimant had an ability to return to work during the period of September 21 to December 20, 1999, Dr. S said that considering the findings on the discogram, EMG, and examination, the answer is no. However, Dr. S went on to testify that claimant could have done sedentary work during the qualifying period but not for "more than" four hours a day and that claimant would require an FCE. Dr. S did not think that claimant could have worked five days a week. Dr. S explained that with claimant's increasing pain he does not think claimant could have done anything for a prolonged basis during the qualifying period and that it is possible that claimant could have had an increase in the severity of his problem if he had returned to work. Dr. S explained that the disc space infection from the discogram done on December 15, 1999, has changed things and that, with or without surgery, he would not recommend that claimant return to any significant physical activity that required the use of his back.

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 pertinent 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 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 was unable to perform any work due to his compensable injury and concluded that claimant is entitled to SIBs for the second quarter. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility of the evidence. Section 410.165(a). Section 410.203(b) provides that an appeals panel may affirm the decision of the hearing officer, reverse that decision and render a new decision, or reverse

that decision and remand the case to the hearing officer for further consideration and development of the evidence. The Appeals Panel has held that, when reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. Carrier contends, among other things, that the hearing officer's decision is not supported by the evidence and that it is against the great weight and preponderance of the evidence. Given Dr. S's testimony that claimant could perform sedentary work during the qualifying period, albeit on a part-time basis, and Dr. C's opinion that claimant could perform sedentary or light-duty work with specified restrictions on a part-time basis, we conclude that the hearing officer's finding that claimant was unable to perform any work during the qualifying period is not supported by sufficient evidence and is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Although claimant had a very limited ability to work during the qualifying period, he was still required to look for employment commensurate with his ability to work. Rule 130.102(e). He did not look for any work. We therefore reverse the hearing officer's decision and render a decision that claimant is not entitled to SIBs for the second quarter.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge