

APPEAL NO. 001000

On April 7, 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 appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 14th quarter. Claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. Respondent (carrier) requests that the hearing officer's decision be affirmed.

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 § 130.102 (Rule 130.102). The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury; that he has a 16% impairment rating, that he did not commute impairment income benefits; that the 14th quarter was from November 30, 1999, to February 28, 2000; and that the qualifying period for the 14th quarter was from August 18 to November 16, 1999. There is no appeal of the hearing officer's finding that claimant's unemployment during the qualifying period was a direct result of his impairment. 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 contends that he had no ability to work during the qualifying period. It is undisputed that during the qualifying period claimant was not employed and was not enrolled in a vocational rehabilitation program sponsored by the Texas Rehabilitation Commission.

Claimant testified that he injured his back on \_\_\_\_\_, while working as a salesman when he unloaded cases of merchandise from a truck; that Dr. K has been his treating doctor since his injury; that he has not worked since his injury; that he has not had surgery for his back injury; that Dr. K told him that he could not work during the qualifying period; that during the qualifying period he had pain and limitations on sitting, standing, and walking; that he takes medication that makes him drowsy; that he does not feel that he can go back to work; and that if an employer had offered him a part-time, light-duty job that allowed him to alternate between sitting and standing during the qualifying period he did not see why he could not do that type of job. Claimant noted nine job contacts in attachments to his Application for [SIBs] for the 14th quarter, with the first contact occurring on October 14, 1999, which was about two months after the qualifying period began. It appears that claimant responded by mail to newspaper help wanted advertisements.

Dr. K has reported that claimant has a large herniated disc at L4-5 with sciatica and radiculopathy down the right leg and that claimant does not want to undergo surgery, although eventually claimant will have to consider surgery. Dr. F examined claimant in March 1995 and reported that claimant could probably do a few hours of light duty daily

with restrictions. Dr. K wrote in May 1996 that he was recommending that claimant can perform light duty; however, in October 1996 Dr. K wrote that claimant was not released to light duty in May 1996 and that he had not cleared claimant for work. Dr. K noted in January 1998 that claimant remained incapacitated and that he agreed with another doctor's recommendation that claimant needed a back conditioning program and, in April 1998, Dr. K wrote that claimant had completed all sorts of work conditioning and work hardening. In June 1999, Dr. K wrote that claimant has periodic episodes of low back pain with radiation into the right leg and that claimant is not capable of working. In September 1999, Dr. K wrote that claimant's disc herniation has made him incapable of working and that claimant continues to have low back discomfort with moderate muscle spasms.

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 claimant was able to work during the qualifying period, that he did not seek work every week of the qualifying period, and that he did not make a good faith effort to seek employment commensurate with his ability to work during the qualifying period. The hearing officer concluded that claimant is not entitled to SIBs for the 14th quarter. Claimant contends that the hearing officer's decision is not supported by sufficient evidence and is against the great weight and preponderance of the evidence. Claimant contends that the medical evidence proves that claimant is unable to work and that the hearing officer should not take into consideration claimant's testimony concerning his ability to perform a hypothetical part-time, light-duty job. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer did not find Dr. K's reports of no ability to work persuasive. We decline to hold that the hearing officer should have disregarded claimant's testimony, which carrier characterizes as a statement against interest, considering claimant's contention that he had no ability to work. 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.

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge