

APPEAL NO. 001039

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 April 7, 2000. With respect to the issues before her, the hearing officer determined that the respondent/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth, sixth, eighth, ninth, and tenth quarters; and that claimant has permanently lost entitlement to SIBs under Section 408.146 because she was found not entitled to them for 12 consecutive months. In her appeal, the claimant contends that the hearing officer's determinations that she had some ability to work in the filing periods for the fifth and sixth quarters of SIBs and the qualifying periods for the eighth and tenth quarters of SIBs are against the great weight of the evidence. Thus, the claimant further argues that the hearing officer erred in determining that she was not entitled to SIBs for those quarters and that the hearing officer also erred in determining that she had permanently lost entitlement to SIBs under Section 408.146. In its response to the claimant's appeal, the appellant/cross-respondent (carrier) urges affirmance. In its cross-appeal, the carrier appeals the hearing officer's factual findings that the claimant proved that she had no ability to work in the qualifying period for the ninth quarter and that she satisfied the good faith requirement and would be entitled to ninth quarter SIBs had she not permanently lost entitlement to SIBs. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she was assigned an impairment rating of 15% or greater; that she did not commute her impairment income benefits; that the fifth quarter of SIBs ran from October 27, 1998, to January 25, 1999, with a corresponding filing period of July 28 to October 26, 1998; that the sixth quarter of SIBs ran from January 26 to April 26, 1999, with a corresponding filing period of October 27, 1998, to January 25, 1999; that the eighth quarter of SIBs ran from July 27 to October 25, 1999, with a corresponding qualifying period of April 14 to July 13, 1999; that the ninth quarter of SIBs ran from October 26, 1999, to January 24, 2000, with a corresponding filing period of July 14 to October 12, 1999; that the tenth quarter of SIBs ran from January 25 to April 24, 2000, with a corresponding qualifying period of October 13, 1999, to January 11, 2000; and that on April 29, 1999, the parties executed a Benefit Dispute Agreement (TWCC-24) in which they agreed that the claimant was entitled to SIBs for the fourth quarter and was not entitled to SIBs for the seventh quarter. The parties also agreed at the hearing that the claimant's entitlement to SIBs for the fifth and sixth quarters are to be determined under the old SIBs rules, while her entitlement to SIBs for the eighth, ninth, and tenth quarters are to be determined under the new/current SIBs rules.

The claimant contends that she was entitled to SIBs for the quarters at issue because she had no ability to work in the relevant filing periods and qualifying periods. In support of her claim of no ability to work, the claimant submitted several reports from Dr. C, her treating doctor. In a report dated November 19, 1998, Dr. C checked the box stating that the claimant was unable to work until "undetermined." Dr. C stated that the claimant had developed left radiculopathy and that he was going to seek approval to return the claimant to Dr. W, who performed the claimant's spinal surgery in 1996. On February 11, 1999, Dr. C stated that the claimant "is disabled and unable to be gainfully employed." On July 12, 1999, Dr. C completed a form entitled "Medical Assessment of Ability to Do Work-Related Activities." In that form, Dr. C opined that the claimant "is disabled for gainful work," noting that she could stand/walk for a total of 10 to 15 minutes and sit for a total of 30 minutes in an eight-hour day, and that the claimant can never climb, balance, stoop, crouch, kneel, or crawl. Finally, in a "To Whom it May Concern" letter dated October 11, 1999, Dr. C stated:

[Claimant] is physically unable to do work because of pain in the back, loss of range of motion in the back, pain in the left leg, weakness in lower left leg, secondary to left sciatic nerve neuropathy and due to an abnormal gait when she walks. She cannot stand, sit, or walk comfortably and then only for short periods of time. She even has discomfort when she lies in one position too long. In addition, the patient suffers from severe depression and anxiety, secondary to her physical and financial condition.

It may well be that this patient is permanently disabled for even sedentary type work because of the problems she has.

The carrier had Dr. D examine the claimant on three occasions. In a May 7, 1998, report, Dr. D opined that the claimant "should be able to return to work with restrictions in excessive repetitive lifting of more than 20 pounds, excessive twisting, stopping or bending. She would be most appropriately suited in a sedentary type position." In his February 5, 1999, report, Dr. D stated that the claimant "may be able to return to work orthopedically with no excessive repetitive lifting or excessive twisting, stooping or bending. She may be able to be retrained for a sedentary type position." Finally, in a November 29, 1999, report, Dr. D stated "I continue to be of the opinion that the examinee is orthopedically capable of returning to a sedentary type position, which again may require re-training."

The hearing officer determined that the claimant failed to establish that she had a total inability to work in the filing periods for the fifth and sixth quarters of SIBs and in the qualifying period for the eighth quarter of SIBs. A review of the hearing officer's decision demonstrates that she was not persuaded that the evidence from Dr. C prior to the October 11, 1999, letter established that the claimant had no ability to work. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence in so finding. Nothing in our review of the hearing officer's determinations that the claimant did not satisfy the good faith requirement for the fifth, sixth, and eighth quarters and that she is not entitled to SIBs in those quarters are so contrary to the great

weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The parties stipulated that the claimant was not entitled to SIBs for the seventh quarter. Given our affirmance of the hearing officer's determination that the claimant was not entitled to SIBs for the fifth, sixth and eighth quarters, we likewise affirm the hearing officer's determination that the claimant has permanently lost entitlement to SIBs because she was not found to be entitled to those benefits for 12 consecutive months. As a result, the hearing officer properly determined that the claimant is not entitled to SIBs for the ninth and tenth quarters, despite her determination that the claimant satisfied the good faith requirement in the qualifying period for the ninth quarter. As noted above, the carrier appealed the hearing officer's factual findings in favor of the claimant on the good faith question. However, the carrier is not aggrieved by those findings because the claimant has permanently lost entitlement to SIBs under Section 408.146 and it is not liable for benefits. As a result, we will not further address the carrier's assertions of error relative to the hearing officer's factual findings.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge