

APPEAL NO. 001268

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 May 11, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth, fifth, sixth, and seventh quarters based on a failure to make a good faith effort to seek employment; and that the claimant has permanently lost entitlement to SIBs because he was not entitled to them for 12 consecutive months. The claimant appealed, contending that he has no ability to work and that he has not been released to work by the doctors. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

The claimant was a construction worker and fell down some stairs at a construction site, sustaining a low back injury (and other injuries). Although there are no stipulations or findings on various jurisdictional matters, the parties appear to agree that the claimant sustained a low back injury on _____; that he has a 24% impairment rating (IR); and that impairment income benefits (IIBs) have not been commuted. The parties stipulated that the filing period for the fourth quarter began on February 7 and ended on May 8, 1999, and that the "old" SIBs rules (those in effect before January 31, 1999) were in effect for this quarter. The qualifying periods for the fifth through seventh quarters were stipulated to be from April 26, 1999, through January 23, 2000. The claimant testified through a translator. The medical records indicated that the claimant had spinal surgery (in the form of a "bilateral laminectomy with posterior lumbar interbody fusion at L5-S1 with discectomy") on September 4, 1997, and subsequently had removal of a "dysfunctional bone growth stimulator" on December 7, 1998. The claimant testified that there is very little he can do and that he has not been released to return to work by any of the doctors.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding on the direct result requirement has not been appealed and will not be addressed further.

The claimant was in full-time work hardening and received SIBs for the third compensable quarter, not at issue here. For the fourth through sixth compensable quarters, the claimant proceeded on a total inability to work in any capacity theory. The standard of what constitutes a good faith effort to obtain employment was specifically

defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(3), the version then in effect. That rule provides that the good faith element is met when the injured employee is (1) unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." For the fourth compensable quarter, prior to Rule 130.102(d)(3), the Appeals Panel has generally required medical evidence of a total inability to work.

In September 1997 and March 1998, clinic notes by Dr. S only say that the claimant "is unable to work" without explanation. A functional capacity evaluation performed by Dr. S on December 1, 1998, indicates that the claimant has a restricted ability to do light work and an unrestricted ability to do sedentary work. After the claimant completed his work hardening, the claimant made no effort to seek employment until the seventh quarter qualifying period. The claimant simply relies on the fact that no doctor has released him to return to work. The claimant has been counseled on the good faith requirements at benefit review conferences for prior quarters and the carrier's vocational rehabilitation counselor has forwarded job leads to the claimant in correspondence dated June 23, July 20, August 19, and September 15, 1999, all of which the claimant failed to follow up. The hearing officer commented:

Under both the old and new Rules the Claimant must provide medical evidence which specifically explains why the Claimant is totally unable to work in any capacity, even part time. Claimant's evidence fell far short of this requirement. Consequently, Claimant had some ability to work during all four qualifying periods.

We hold that the hearing officer's findings that the claimant had some ability to work during all the quarters, that Dr. S's reports do not meet the required narrative of Rule 130.102(d)(3), and the inferential finding that other records show the claimant is able to work to be supported by the evidence and we affirm the hearing officer's decision for the fourth through sixth quarters.

The good faith requirement may also be met by complying with Rule 130.102(e), which provides, in pertinent part, that 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. Rule 130.102(e) goes on to list some of the factors which may be considered in the job search, such as the number of jobs applied for throughout the qualifying period, applications or resumes which document the efforts, cooperation with vocational rehabilitation services, the amount of time spent in looking for employment, and any job search plan by the injured employee. The claimant's Application for [SIBs] (TWCC-52) lists 19 job contacts between December 8, 1999, and January 12, 2000. The

qualifying period for the seventh quarter was October 25, 1999, through January 23, 2000. The carrier points out that the claimant documented no searches for the weeks of October 25, 1999; November 1, 8, and 27, 1999; December 19 and 26, 1999; and January 16 and 23, 2000. The carrier argues that the requirement of Rule 130.102(e) has not been met as a matter of law. We find that the hearing officer's decision regarding non-entitlement for the seventh compensable quarter is supported by the evidence and that the claimant has not complied with the requirements of Rule 130.102(e).

Although strictly not appealed, we do note that Section 408.146(c) provides that an employee who is not entitled to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. Having affirmed findings of non-entitlement to four quarters of SIBs, we find no error in the hearing officer's further determination that the claimant has permanently lost entitlement to SIBs.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge