

APPEAL NO. 001492
FILED AUGUST 14, 2000

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 June 6, 2000. [The hearing officer] determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 16th compensable quarter. The appellant (carrier) appeals, contending that the claimant failed to prove that he had no ability to work during the qualifying period. The claimant urges in response the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

The parties stipulated that the 16th compensable quarter began on April 19, 2000, and ended on July 18, 2000; that the qualifying period began on January 6, 2000, and ended on April 5, 2000; and that the claimant made no effort to obtain employment during the qualifying period.

It was undisputed that the claimant sustained a compensable low back injury on _____. He testified that since the injury he has had five "major" operations on his low back, the latest being on May 13, 1999; that during the qualifying period he had an operation on January 10, 2000, to implant a "trial" spinal cord stimulator (SCS) and, on March 6, 2000, another operation to implant a permanent SCS; and that on May 12, 2000, he had a "revision" surgical procedure on the SCS to fix the electrodes. The claimant further testified that during the qualifying period he was taking Oxycontin, Baclofen, Soma, Hydrocodone, and Amytriptaline for pain and relief of muscle spasm; that he takes medication three times a day; that the SCS has provided some relief from the "massive muscle spasms" which run from his left hip area down to his left foot; that he is in constant pain; and that he cannot go more than one hour without engaging the SCS. He also stated that he can dress and feed himself, that he sometimes helps his wife put on meals, that he can drive a short distance but has no car; and that he had no contact with the Texas Rehabilitation Commission during the qualifying period because that agency had previously informed him that he could not be assisted until his medical condition was stable.

According to the 2000 records of (Dr. O), who is board certified in pain management and the claimant's treating doctor, the claimant has low back pain and left leg pain, failed back syndrome, chronic intractable pain syndrome, and L5-S1 neuropathic pain, and is status post multiple back surgeries. Dr. O wrote on April 12, 2000, that the claimant has nerve damage on the left side of the foot causing weakness and constant severe pain. Dr. O's April 27, 2000, report states that the claimant continues to be unable to work at any job at this time; that he needs a long-acting

narcotic for pain control as well as medications for muscle spasm, medication side effects, and depression due to chronic pain, that he needs an SCS revision so that the device can be an effective for controlling his pain; and that he continues to be unable to work in any capacity. Dr. O wrote on May 1, 2000, that the claimant has been unable to work from January 2000 to April 6, 2000, due to surgery consisting of an SCS implant that was performed on March 6, 2000, and also because of severe back and leg pain. Dr. O wrote on May 23, 2000, that the claimant has had multiple back surgeries and continues to have problems; that he is completely disabled because of his severe low back pain, severe leg pain, and severe leg spasm which limits his ability to function, even bending, twisting, or driving a car; that he has difficulty controlling his left leg; that he has nerve damage from the injury and the surgeries; and that he has to use multiple medications including opiates and muscle relaxants which may interfere with his functions. Dr. O stated his opinion that the claimant "is basically completely disabled and unable to do any kind of work."

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating 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. The only criterion is dispute on appeal is the "good faith attempt" criterion.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee (4) 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 record shows that the injured employee is able to return to work.

The hearing officer's findings reflect that he found that the claimant's medical narratives showed a total inability to work and thus that the claimant did make a good faith effort to obtain employment commensurate with his ability to work. The carrier contended below and maintains on appeal that Dr. O's narrative reports are conclusory and were not made within the qualifying period. However, the content of Dr. O's reports and the date they were made relative to the qualifying period go to the weight to be assigned them and that is solely a matter for the hearing officer as the trier of fact. The hearing officer is the sole judge of the weight and credibility of the evidence including the medical evidence (Section 410.165(a)) *and see Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge