APPEAL NO. 001534

On June 5, 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 issues by deciding that appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth and ninth quarters. 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 December 20, 1994, claimant sustained a compensable low back injury; that claimant has an impairment rating of 15% or more; that claimant did not commute impairment income benefits; that the eighth quarter was from October 28, 1999, to January 26, 2000, with a qualifying period from July 17, 1999, to October 14, 1999; and that the ninth quarter was from January 27, 2000, to April 27, 2000, with a qualifying period of October 15, 1999, to January 13, 2000.

There is no appeal of the hearing officer's finding that claimant's unemployment during the relevant qualifying periods was a direct result of his impairment from his compensable injury. The SIBs criterion in dispute is whether claimant attempted in good faith to obtain employment commensurate with his ability to work during the relevant qualifying periods. Section 408.142(a); Rule 130.102(b)(2). Claimant contends that he had no ability to work during the relevant qualifying periods. It is undisputed that during the relevant qualifying periods claimant was not employed and did not look for work.

Claimant, who is 52 years of age, had surgery at L4-5 in December 1997. He had surgery at L4-5 and L5-S1 and a fusion from L4 to S1 in June 1997. He also had a bone stimulator implanted in June 1997. In March 1999, he had surgery to remove the stimulator and the hardware that was placed in his back in June 1997. Claimant said that Dr. W has been his treating doctor for over three years and that Dr. W has told him not to work. Claimant said that he has had back pain ever since his injury, that he takes pain medication daily which makes him drowsy, that he has a ninth grade education, and that his work history is that of heavy labor. The Social Security Administration awarded claimant disability benefits in February 1999.

Dr. W has written on numerous occasions that claimant is unable to work. Dr. W wrote in July 1999 that claimant continued to have pain in his back and lower extremities, that claimant has not been released by him to seek employment, and that claimant will not be capable of returning to work until he is seen by a pain management specialist. Dr. W wrote in August 1999 that claimant continued to have back and leg pain, that carrier had not responded to the request to see a pain management specialist, and that claimant is not

capable of seeking or participating in any type of employment. Dr. W wrote in November 1999 that claimant continues to have pain and weakness in his lower extremity and back pain, and that these symptoms continue to the extent that claimant is rendered incapable of seeking or holding any type of employment including the most sedentary type of work.

Dr. W referred claimant for a functional capacity evaluation (FCE) which was done by KD, a physical therapist, on January 26, 2000. KD's FCE report reflects that claimant's physical demand level was undetermined, that claimant's sitting is limited to 20-minute intervals, that claimant's standing is limited to nine-minute intervals, that claimant can do no lifting from the floor, that claimant can do no squatting or bending, and that claimant is limited to lifting less than 20 pounds from waist to shoulder height. The FCE report states that claimant's return to work status is "no." The FCE report states that claimant is markedly limited in his ability to tolerate functional activities, that his best asset is that the can sit for 20-minute intervals, and that perhaps he could receive training for a job that would allow frequent position changes in a very light physical demand level. KD testified that claimant's physical demand level was undetermined because claimant was not able to complete enough of the tests to determine his physical demand level. KD opined that claimant would not be able to perform sedentary work because he cannot sit for more than 20 minutes at a time. KD also testified that claimant would have an ability to work if the work was modified to allow him to change from a sitting position to another position every 20 minutes. KD said that a sedentary job would require claimant to sit for two-hour intervals and that claimant cannot do that.

Dr. W wrote on January 26, 2000, that he had seen claimant in December 1999 and January 2000, that claimant continued to complain of pain radiating from his hips to his right leg, that claimant had increased symptoms and restricted motion, that claimant was taking pain medication, and that claimant is unable to seek or sustain any type of employment due to the severity of his symptoms.

Claimant underwent an FCE in October 1999 at carrier's request and DD, a physical therapist, reported that the October 1999 FCE results indicated that claimant is able to work at the sedentary physical demand level for an eight-hour day. With regard to sitting, the October FCE noted that "FCE Sitting" was one hour and that claimant was in the "frequent" category of sitting activity. Claimant said that he was on pain medication at the time of the October FCE and KD said that claimant's being on pain medication could have affected the FCE results. KD said that claimant had not taken pain medication when she did claimant's FCE in January 2000.

Claimant's Applications for SIBs (TWCC-52) for the eighth and ninth quarters reflect that during the relevant qualifying periods he was not working, was not enrolled in a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission, and did not look for work.

At the beginning of the qualifying periods for the eighth and ninth quarters, 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. When Rule 130.102 was amended effective November 28, 1999, paragraph (3) of subsection (d) became paragraph (4) of subsection (d). Rule 130.102(e) provides in pertinent part that, except as provided in subsection (d)(1), (2), (3), and (4) 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 or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer found that "[b]etween July 17, 1999 and January 13, 2000, the Claimant had some ability to work with several restrictions, although he could not perform all of the functions of his preinjury job." The hearing officer also found that during the relevant qualifying periods claimant "did not make a good faith effort to find work in line with his ability to work." The hearing officer concluded that claimant is not entitled to SIBs for the eighth and ninth quarters. Claimant contends that the evidence demonstrates that he has no ability to work in any capacity, that the October 1999 FCE was flawed, and that the SIBs provisions should be liberally construed in his favor.

There is conflicting evidence in this case regarding claimant's ability to work during the relevant qualifying periods. The hearing officer could consider that the FCE report of October 1999 showed some ability to work. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence. 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.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge