APPEAL NO. 001664

On June 23, 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 the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 14th, 15th, and 16th quarters. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. No response was received from the carrier.

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). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work. There is no appeal of the hearing officer's finding that the claimant's unemployment during the relevant qualifying periods was a direct result of his impairment. The SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with his ability to work during the relevant qualifying periods. Section 408.142(a)(4); Rule 130.102(b)(2). The claimant contends that he had no ability to work during the relevant qualifying periods.

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 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) provides in 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 claimant testified that he injured his back and neck at work on _____; that he had lumbar surgery in June 1996; that he had cervical surgery in February 1998; that he takes pain medications; and that he is unable to work because of back and neck pain.

The parties stipulated that on _____, the claimant sustained a compensable injury to his neck and low back; that he has a 25% IR; that he did not commute IIBs; that the 14th quarter was from November 7, 1999, to February 5, 2000, with a qualifying period

of July 26, 1999, to October 24, 1999; that the 15th quarter was from February 6, 2000, to May 6, 2000, with a qualifying period of October 25, 1999, to January 23, 2000; and that the 16th quarter was from May 7, 2000, to August 5, 2000, with a qualifying period of January 24, 2000, to April 23, 2000. The claimant's Applications for SIBs (TWCC-52) for the 14th, 15th, and 16th quarters do not document any job search.

Several reports from Dr. P, the claimant's treating doctor, were in evidence for the period of August 1999 through April 2000 and they reflect that the claimant complained of lumbar and cervical pain. Dr. P wrote in November 1999 that the claimant is under his care for injuries to the claimant's lumbar and cervical spine; that in February 1998 the claimant had a cervical fusion from C5 to C7; that the claimant has continued to be unable to perform any type of gainful employment; that the claimant continues to complain of discomfort; and that due to severe spasticity of muscles due to weakness, the claimant is unable to work and will remain unable to return to any type of gainful employment.

Dr. P referred the claimant for work hardening in November 1998 and the occupational therapist at the work hardening center evaluated the claimant's functional status and reported that the claimant demonstrated "working in a light level of work," but that the claimant would not be able to perform his roofing job which the therapist classified as a medium level of work.

The hearing officer stated in her decision that the evidence did not establish that the claimant had a total inability to work during the relevant qualifying periods and she concluded that the claimant is not entitled to SIBs for the 14th, 15th, and 16th quarters. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer could consider the functional status report from the work hardening center in making her determination regarding the claimant's ability to work. It is clear from the hearing officer's finding regarding Dr. P's report that she was not persuaded that Dr. P had provided a sufficient explanation of how the claimant's injury causes a total inability 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.

Robert W. Potts
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Philip F. O'Neill
Appeals Judge