

APPEAL NO. 001814

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 6, 2000. The hearing officer determined that the appellant's (claimant) compensable left wrist/hand injury does extend to the left knee and low back and that the claimant is not entitled to supplemental income benefits (SIBs) for the second quarter. The claimant appealed the adverse determinations regarding whether he searched for work in good faith commensurate with his ability to work on the grounds of sufficiency of the evidence. The respondent (carrier) replied that the evidence was sufficient to support the determinations of the hearing officer and urged that the Decision and Order be affirmed. The parties did not appeal the determination that the compensable injury extended to include the left knee and low back and that the claimant's unemployment was a direct result of his impairment from the compensable injury and they have become final by operation of law. Section 410.169.

DECISION

Affirmed.

The claimant testified that he sustained an injury to his left wrist, hand and left shoulder on _____, while in furtherance of the affairs of the employer. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant elected not to commute any portion of his impairment income benefits; that the claimant reached maximum medical improvement with an impairment rating of 15 percent or greater; and that the qualifying period for the second quarter of SIBs was from January 28, 2000, through April 27, 2000.

The claimant testified that he received physical therapy for his hand/wrist injury and during the therapy program was walking around the building when he stepped in a hole injuring his back and left knee. The claimant asserted that during the qualifying period for the second quarter of SIBs he could not work, had not returned to work and did not look for any work. He contended that he felt bad, had pain, was depressed and took medicine that made him sleepy. The claimant stated he was no longer in a work hardening program. However, he admitted that he attended school Monday through Thursday from 8:00 a.m. to 1:00 p.m. to learn English, went with his wife to do the laundry and drove a standard/manual transmission automobile.

A letter dated January 5, 2000, was offered from Dr. H, who indicated in his letter that he had reviewed the extensive medical history of the claimant and opined that the claimant would not ever return to work in a full-duty capacity. Based on his examination and a prior Functional Capacity Evaluation (FCE) he believed that the claimant was a candidate only for sedentary work and that it likely was a permanent restriction. He also stated that he didn't believe there was any substantial chance that the claimant would ever return to work from a combination of physical and psychological reasons.

Medical records were offered by the parties from Dr. J beginning on February 2, 1999, reflecting that the claimant was receiving conservative physical therapy for his injury from a chiropractor who apparently worked with Dr. J. Dr. J issued a letter dated January 18, 1999, discussing the claimant's complaints of back, left knee, left wrist, hand, arm and shoulder pain. The letter noted that "he is unable to work at this time."

By letter dated March 14, 2000, Dr. J wrote that the claimant was complaining of left shoulder, left wrist, left knee and lower back pain, and that he had been treated for carpal tunnel syndrome and had developed severe reflex sympathetic dystrophy in the left upper extremity which had left him without the use of his left hand. Dr. J noted that the claimant needed an FCE to establish his status for returning to work. Dr. Jain opined that the claimant was unable to work, secondary to the pain in his left upper extremity and pain medication which impaired his alertness. She also wrote in the same paragraph that the claimant could work at a sedentary level with only the use of his right hand in an environment that would not endanger him while he was under the effect of medication. Dr. J wrote a letter dated April 28, 2000, that the claimant was still having left shoulder pain and swelling in his left hand which left him unable to work. The claimant offered another letter dated May 4, 2000, from Dr. J that the claimant had continued to have difficulty with his lower back and weakness of his left knee.

The claimant offered letters from the (School) dated February 22, March 15, and April 27, 2000, reflecting that the claimant had been attending classes since October 4, 1999, from 8:00 a.m. to 1:00 p.m. Monday through Thursday.

An FCE was performed on April 10, 2000, by Dr. K, in which he indicated that the claimant had the ability to work in a light duty capacity. Dr. K noted that the claimant had atrophy of the left forearm and that the claimant had reported occasional pain radiating down his left lateral/posterior lower extremity. He also noted the claimant put forth suboptimal effort and demonstrated inconsistencies during testing. Dr. K found the claimant capable of completing repetitive arm and hand movements, had good dominant fine motor skills and was capable of simple grasping activities. He wrote that the claimant was able to use his left hand for fine motor tasks, despite it being slower than the right and that he had slight balance deficits.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999, and amended November 28, 1999, defines good faith in relevant part as follows:

Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

* * * *

- (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;
- (3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;
- (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 records show that the injured employee is able to return to work.

It is worth noting that a good faith job search will not mean, in every case, a search for full-time employment. Rather, the search must be commensurate with the claimant's ability to work. Section 408.143(a)(3). Accordingly, "no" search can only meet the requirements of a good faith search if there is the complete inability to perform any type of work as provided in Rule 130.102(d)(4), or if the employee is enrolled in and has satisfactorily completed a full-time vocational rehabilitation program during the qualifying period as provided in Rule 130.102(d)(2) and (3).

Rule 130.102(d)(4) precludes a simple weighing of the conflicting medical evidence and all three elements must be applied in order to meet the requirements of "no ability to work." Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. The hearing officer apparently believed that the claimant failed to establish that he was enrolled in a full-time vocational rehabilitation program and that he had no ability to work.

The hearing officer's determination that the claimant did not make a good faith job search during the qualifying period for the second quarter of SIBs is not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse these determination on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge