

APPEAL NO. 001971

On August 3, 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 qualifying period for the fifth quarter was from February 10, 2000, through May 12, 2000, and that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. The 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). 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.

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.

There is no appeal of the hearing officer's finding that the claimant's unemployment during the qualifying period for the fifth quarter was a direct result of the claimant's 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 qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2).

The parties stipulated that the claimant sustained a compensable cervical injury in the course and scope of his employment with the employer on _____; that the claimant has an IR of 31%; that the claimant has not commuted IIBs; and that the fifth quarter was from May 24, 2000, through August 22, 2000. It is undisputed on appeal that

the qualifying period for the fifth quarter was from February 10, 2000, through May 12, 2000 (the qualifying period).

The claimant's treating doctor, Dr. O, referred the claimant to Dr. C, who performed three cervical surgeries on the claimant, with the last surgery occurring in September 1998. The claimant testified that Drs. O and C have told him that he is unable to work and that he believes that he is unable to work. The claimant said that he looked for work during the qualifying period because the Texas Workers' Compensation Commission or the carrier ordered him to look for work. The claimant listed 20 job contacts in his Application for SIBs for the fifth quarter.

The claimant was examined by Dr. E at the request of the carrier in April 1999 and Dr. E wrote that, at best, part-time, sedentary work appears feasible for the claimant, but that he would recommend that the claimant undergo a functional capacity evaluation (FCE) and that that information would be helpful for vocational rehabilitation through the Texas Rehabilitation Commission (TRC). The claimant said that Dr. O does not want him to undergo an FCE until he has another MRI and a myelogram.

Dr. O wrote in March 2000 that as a result of the claimant's three surgeries for his workers' compensation injury, the claimant developed cervical myelopathy and cervical disc disease and, therefore, is incapable of employment.

In a letter dated May 30, 2000, a TRC vocational rehabilitation counselor wrote that she had met with the claimant again; that she had reviewed medical reports from Drs. O and C; and that, since Drs. O and C agree that the claimant is unable to perform even sedentary work, it would be unethical for her to try to place the claimant in employment. The TRC counselor noted that she had not seen the report from the doctor that suggested that the claimant could perform part-time sedentary work, but that she understood that that doctor wanted the claimant to have an FCE. The TRC counselor wrote that, until there is credible evidence, including an FCE, that the claimant has the functional capacity to participate in any type of employment, there is nothing that the TRC can offer the claimant.

The claimant underwent a cervical MRI on July 11, 2000, and Dr. CO stated an impression of multiple levels of spinal stenosis and neural foraminal stenosis from the operative procedures and cord deformity and stenosis most severe at C3 and C6. Dr. CO recommended a CT myelography for further evaluation.

The hearing officer found, among other things, that the claimant had the ability to perform some work during the qualifying period and that the claimant did not in good faith attempt to obtain employment commensurate with his ability to work during the qualifying period. The hearing officer concluded that the claimant is not entitled to SIBs for the fifth quarter. The claimant appeals the hearing officer's finding that the claimant had the ability to perform some work during the qualifying period and the hearing officer's decision that he is not entitled to SIBs for the fifth quarter. The claimant states that the conflicting evidence on his job search has no bearing on the case because the great weight and

preponderance of the evidence is that he is totally and permanently disabled from performing any work and thus is not required to perform any good faith job search as a prerequisite to obtaining SIBs.

The hearing officer's decision reflects that he considered Dr. O's report regarding the claimant's inability to work to be conclusory and that he considered that Dr. E's report showed that the claimant had some ability to work. Although Dr. E's examination of the claimant and report of his findings was in April 1999, which was before the qualifying period, the Appeals Panel has held that medical evidence outside the qualifying period, especially that which is relatively close to the qualifying period, may be relevant in a case concerning no ability to work. Texas Workers' Compensation Commission Appeal No. 991298, decided July 29, 1999; Texas Workers' Compensation Commission Appeal No. 992462, decided December 20, 1999. There is conflicting evidence in this case and as the trier of fact, the hearing officer resolves the conflicts in the evidence. The hearing officer is the sole judge of the weight and credibility of 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:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge