

APPEAL NO. 002040

Following a contested case hearing held on July 5, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that, because during the qualifying period for the sixth quarter the appellant (claimant) did not make a good faith attempt to obtain employment and because his underemployment was not a direct result of his impairment from the compensable injury, he is not entitled to supplemental income benefits (SIBs) for the sixth quarter; and that, because he has been found not entitled to SIBs for the third, fourth, fifth, and sixth quarters, he is not entitled to SIBs for the seventh quarter and has permanently lost entitlement to additional income benefits. The claimant appeals these determinations, asserting that the evidence established that he did make a good faith attempt to obtain employment during the qualifying period for the sixth quarter and thus is entitled to SIBs for that quarter. The claimant further contends that the hearing officer erroneously applied the "four quarters rule" because he is seeking judicial review of the Texas Workers' Compensation Commission's (Commission) adverse determinations of his entitlement to SIBs for the third through fifth quarters. The respondent (carrier) urges in response that the findings disputed by the claimant are sufficiently supported by the evidence and that the Appeals Panel decisions affirming the claimant's nonentitlement to SIBs for the third through the fifth quarters are binding during the pendency of an appeal.

DECISION

Affirmed.

The parties stipulated that the sixth quarter qualifying period was from August 20 through November 18, 1999, and that the seventh quarter qualifying period was from November 19, 1999, through February 17, 2000. The parties further stipulated that the Appeals Panel has decided that the claimant was found not entitled to SIBs for the third, fourth, and fifth quarters and currently no decision has been rendered.

The basic facts concerning the claimant's injury, treatment, post-injury employment, and decision to return to college to change career fields from oil field work to the computer technology or biomedical technology career fields have been set out in our decisions in Texas Workers' Compensation Commission Appeal No. 992095, decided November 8, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 991483, decided August 25, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 000086, decided February 25, 2000. These decisions affirmed hearing officer decisions determining that the claimant is not entitled to SIBs for the third, fourth, and fifth quarters, respectively.

With regard to the sixth quarter qualifying period, the claimant testified that he commenced taking four courses (12 hours) at (college) in late August or early September 1999; that his fall semester course work ended on or about December 2, 1999; and that he withdrew from the algebra class at the end of the semester so as not to risk a failing

grade. A May 9, 2000, letter from the college registrar states that the claimant was registered and enrolled as a full-time student from August 29 to December 2, 1999. The claimant also testified that although he had earlier undergone certain testing by the Texas Rehabilitation Commission (TRC) and has periodically talked to a TRC counselor about his studies and plans, the source of funding for his education expenses have been his veteran's educational benefits, Hazelwood Act loans, and a Pell grant. He indicated that the TRC would pay for his education should he decide at some time to switch to that source of funding.

The claimant further testified that the college's job placement officer assisted him with faxing his resume to the 15 employers listed on his Application for [SIBs] (TWCC-52) for the sixth quarter which he selected from lists maintained by that office. According to the TWCC-52, the resumes were forwarded at the rate of approximately one per week except for one week noted by the hearing officer. However, according to the May 8, 2000, letter of Ms. H, the job placement office counselor whom the claimant called as a witness, the claimant visited her office on August 12, August 16, and October 25, 1999, and selected four to five job openings at each visit and her office then sent his resumes to these employers. Also, one of the positions listed on the TWCC-52 was for an unpaid student representative position on the college campus committee. The claimant said he was looking for part-time employment of an administrative nature with perhaps some type of computer work also, and that he did not obtain employment. The claimant's TWCC-52 also reflected that he earned \$150.00 on August 20, 1999, for some painting he said he did at his father's house and that he also earned a total of \$183.00 for serving five subpoenas for his attorney on August 31 and September 12, 1999.

The claimant further stated that his low back pain and left lower extremity tingling and numbness increased to the extent that on December 15, 1999, his treating doctor, Dr. M, gave him permission to continue with school and to undertake simple activities but not to work "in any organized form or fashion" prior to surgery. This testimony is corroborated by Dr. M's December 15, 1999, letter. Dr. M wrote on October 1, 1999, that the claimant is going to school and "trying to work part-time"; that at this time his only restriction is a 20-pound lifting restriction; that aside from this restriction the claimant "can go about and carry on fairly normal activities on a daily basis"; and that whether he will require additional lumbar spine surgery depends on how he continues to do. The claimant said that in March 2000, he underwent a revision of his previous lumbar spine fusion.

Our prior decisions on the claimant's entitlement to SIBs have set forth the statutory criteria as well as certain applicable portions of the "new" SIBs rules. The claimant's appeal challenges the stipulated finding of fact that the Appeals Panel has decided that the claimant was found not entitled to SIBs for the third, fourth, and fifth quarters and that currently no decision has been rendered. The claimant also disputes findings that during the sixth quarter qualifying period, he did not establish that he was enrolled in a full-time retraining program sponsored by the TRC and that his efforts did not constitute a good faith job search commensurate with his ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact,

resolves the conflicts and inconsistencies in the evidence and determines what facts have been proven (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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 hearing officer could conclude from the evidence that the claimant was not enrolled in a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period. As for the claimant's job search efforts, the hearing officer could consider the relative sufficiency of the claimant's documentation of his job search efforts. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.102(d)(5) and (e) (Rules 130.102(d)(5) and (e)).

With regard to the seventh quarter, the claimant challenges the finding that he has been found not entitled to SIBs for a 12-month consecutive period that ran through the third, fourth, fifth, and sixth quarters, and the conclusion that he has lost permanent entitlement to income benefits. Although the claimant contended that he was seeking judicial review of the Appeals Panel decisions affirming his nonentitlement to SIBs for the third through fifth quarters, he put on no evidence whatsoever concerning his court filings and status. Section 408.146(c) provides that an employee who is not entitled to SIBs for 12 consecutive months ceases to be entitled to additional income benefits. In Texas Workers' Compensation Commission Appeal No. 992177, decided November 19, 1999, the employee contended that the Appeals Panel should not decide the issue of permanent loss of entitlement to additional income benefits until there has been a final adjudication of the issues in the court system. Our opinion noted Section 410.205(b) providing that the decisions of the Appeals Panel regarding benefits are binding during the pendency of an appeal and noted Section 410.207 which provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim the Commission retains jurisdiction of all other issues related to the claim. That decision concluded that "we may properly address the issue of permanent loss of SIBs entitled under Section 408.146(c) regardless of whether there has been an appeal of any decision regarding prior SIBS quarters." Accordingly, we find no merit in this assignment of error.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Thomas A. Knapp
Appeals Judge