

APPEAL NO. 002139

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 16, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second and third quarters. Claimant appealed these determinations on sufficiency grounds. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order. The direct result determination in claimant's favor was not appealed.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBs for the second and third quarters. Claimant asserted that he is entitled to SIBs because: (1) he proved that he is entitled to Social Security Disability benefits, and thus also met his burden to prove he is entitled to SIBs; (2) he enrolled in a Texas Rehabilitation Commission (TRC) program on January 20, 2000; and (3) medical records do not state what his ability to work is, so this is unknown.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying periods is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an employee may be in good faith 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[.]

The Appeals Panel's standard of review in this case is also set forth in Appeal No. 000004.

The hearing officer summarized the facts in her decision. Briefly, the evidence indicates that claimant sustained a low back injury while lifting at work and that subsequently he underwent discectomy and fusion surgery. The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant had an impairment rating equal to or greater than 15%; and (3) claimant did not commute any of his impairment income benefits. There was evidence that the qualifying periods for the quarters in question ran from December 2, 1999, through June 13, 2000.

The hearing officer determined that: (1) the evidence did not show that claimant was totally unable to work during the qualifying periods in question; and (2) claimant did

not seek employment or work during the qualifying periods in question. The hearing officer clearly found that claimant did not make a good faith effort to obtain employment commensurate with his ability to work.

Claimant had the burden to prove that he had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. The hearing officer was the sole judge of the credibility of the evidence and she judged the credibility of the medical evidence regarding whether claimant had an ability to work during the qualifying period. The hearing officer determined that claimant did not meet his burden to show he had no ability to work. There was evidence from Dr. E, written in 1999, that claimant was able to work six hours per day with lifting and bending restrictions. Regarding the fact that claimant was eligible for Social Security Disability benefits, we note that the criteria for SIBs are not the same and the fact that claimant is eligible for federal benefits does not automatically mean that he is entitled to SIBs. Regarding participation with the TRC, claimant was not to begin classes sponsored by the TRC until after the qualifying periods ended. Therefore, Rule 130.102(d)(2) does not apply under these facts. Because the hearing officer believed that claimant was able to do some work, and claimant did not look for work every week of the qualifying period, the hearing officer did not err in determining that claimant did not meet his burden of proof regarding the good faith SIBs criterion. The hearing officer's determinations in this regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we will not substitute our judgment for hers. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge