APPEAL NO. 002174

Following a contested case hearing held on August 28, 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 the respondent (carrier) timely requested a benefit review conference to dispute the appellant's (claimant) Application for Supplemental Income Benefits (TWCC-52) for the third quarter and that the claimant is not entitled to supplemental income benefits (SIBs) for that quarter. The claimant has appealed the SIBs entitlement determination, asserting that his evidence established that during the qualifying period he had no ability to work, as provided for in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), the version then in effect, and thus that he did make a good faith effort to obtain employment commensurate with his ability to work and is entitled to SIBs. The carrier sets out in its response the evidence it contends supports the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on October 17, 1996, with an impairment rating (IR) of 46%; that he did not commute any portion of the impairment income benefits (IIBs); that the qualifying period for the third quarter was from August 27 through November 25, 1999; and that during that period the claimant had no earnings and made no job search.

The hearing officer's Decision and Order contains a summary of the evidence with which neither party takes issue. Accordingly, we will only set out so much of the evidence as is essential to support our decision.

The claimant testified that on _____, he fell approximately 25 feet from a bridge crane to a concrete floor while at work and broke both wrists and legs; that his left ankle joint was fused with screws; that he developed a bone infection in that joint; that his left leg was amputated below the knee in 1996; and that he has been fitted with a prosthesis which allows him to walk. He further stated that he has restricted range of motion (ROM) in his wrists and cannot pick up a lot of weight with them; that he does not play golf anymore; and that he uses a cane fishing pole more than a casting rod when fishing because of his loss of wrist ROM. The claimant also said that his right ankle is painful and swells when he stands and sits for more than approximately 20 minutes and that he has to elevate it and sometimes take pain pills after much activity. He indicated that he has declined a suggestion to undergo a right ankle fusion operation which was felt would reduce his pain because he fears a bone infection in that joint similar to the infection in the left ankle joint which led to the amputation. In evidence is Texas Workers' Compensation Commission Appeal No. 990639, decided May 7, 1999 (Unpublished), in which the Appeals Panel affirmed the decision of a hearing officer that the claimant is not entitled to lifetime income benefits because he has not permanently lost the use or substantial utility of his right lower extremity.

The claimant further testified that he maintains a current license as a master electrician; that his wife formed the electric company for which he worked when injured; and that he has supervised and taught persons the electrical trade. He also stated that he maintains 11 head of cattle, 2 horses, and 2 mules on the 137-acre rural residence he acquired after his compensable injury, and that the grass for his livestock is grown on his acreage and is harvested by a man who gives him 30 bales after each cutting. He said he can drive his pickup truck but does so infrequently and only for short distances, such as a 10-mile round-trip to the store and a 40-mile round-trip to take his daughter to school before she obtained her own vehicle; that he did not think he had driven his daughter to school during the qualifying period; that his wife and daughter have their own vehicles; and that he maintains a current driver's license. The claimant further stated that he also has a four-wheel vehicle which he drives around his acreage to check on his livestock, retrieve the mail, fish at the stock tanks, pick up fallen tree branches, and so on. The claimant also testified that he occasionally feeds his livestock by shoveling feed from a barrel into troughs and by throwing hay from the trailer behind his pickup using a pitchfork. He indicated that his wife usually leaves to work her normal 14- to 16-hour day before he arises and that he tends to his own hygiene, albeit with some difficulty, and prepares his morning and noontime meals using a microwave oven.

The April 15, 1998, report of Dr. FW who performed an independent medical examination for the carrier states that a test revealed that the claimant perceives himself as being severely disabled; that the claimant could possibly fit into the sedentary work capacity level if there were some way he could get to and from a place of employment; and that he has pressure problems with the prosthesis and cannot tolerate unrestricted weight bearing on the right lower extremity. Dr. FW concluded that, for practical purposes the claimant has a total loss of use of both lower extremities.

The November 2, 1999, report of Dr. G, an orthopedic surgeon, to the carrier stated that he examined the claimant on that date; that the claimant cannot heel and toe walk nor hop nor squat because of right ankle pain; that the right ankle is tender and there is some swelling; that the claimant is ambulating using a cane to support the leg with the prosthesis and is not favoring the right foot; that the right foot joint ROM appears normal; and that the diagnosis is right foot traumatic arthritis and post-operative below-the-knee amputation on the left with a better-fitting prosthesis. Dr. G further reported that the claimant stated that he is able to sit for two hours at a time; that he can drive a pickup truck but does not do so often; and that he drives a four-wheel vehicle fairly often. He further stated that the claimant related that he is able to walk about one-fourth mile around the Wal-Mart store when his wife goes there to shop. Dr. G further reported that in reasonable medical probability, the claimant could be retrained to do work where he is not on his feet more than 10 minutes and not lifting more than five pounds; and that while the claimant has arthritis in his wrists, they should hold up under a sedentary-type job.

Dr. JW wrote on October 7, 1999, that in his opinion, the claimant has essentially lost the use of both lower extremities, could not procure or maintain any type of employment, and could not pass an employment physical which required the use of his feet on a persistent basis. Dr. JW concluded that the claimant is, in his opinion,

permanently and totally disabled from performing "any gainful employment." Dr. JW wrote on November 22, 1999, that he continues to see the claimant on a regular basis and that there are no plans to operate on the right ankle which is shattered and very painful and swollen such that he cannot be up on it much at all. Dr. JW further stated that the claimant "is still disable[d] and unable to work"; that "[h]e is disabled for the foreseeable future"; and that "he remains totally, permanently disabled from his old electrical/fall injury."

On November 22, 1999, Dr. C, who apparently examined the claimant for the Texas Rehabilitation Commission (TRC), stated that in his opinion the claimant is permanently disabled due to the number of joints and extremities involved; that he has difficulty coping with transfers and uses a wheelchair on occasion; and that he has post-traumatic arthritis in the right ankle joint and uses a prosthesis on the left lower extremity. Dr. C further stated that the claimant is left with impairments in both wrists and lower extremities, which are permanent.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. The first two criteria were stipulated to and the hearing officer's finding that the claimant's unemployment during the third quarter qualifying period was a direct result of his impairment has not been appealed.

The version of Rule 130.102(d), in effect at the outset of the qualifying period at issue, provides that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) 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 hearing officer found that although the claimant's treating doctor has explained why he believes the claimant has no ability to work using his feet, neither he nor other doctors state that the claimant has a total inability to work at any job but rather simply opine on the claimant's ability to work in occupations requiring the use of one or both feet or being on his feet for more than a few minutes at a time; that Dr. FW stated on April 15, 1998, that the claimant could possibly engage in sedentary work if he could get to and from a place of employment; that Dr. FW's report is a record which shows that the claimant has some ability to work; and that during the qualifying period, the claimant had some ability to work and thus did not make a good faith effort to seek employment commensurate with his ability to work.

The claimant contends that Dr. JW's report of November 22, 1999, and office note of January 17, 2000, and the report of Dr. C to the TRC meet the narrative report requirement of Rule 130.102(d)(3); that there is no "other record" in evidence which shows an ability to return to work; and that the medical evidence establishes that the claimant had

no ability to work in any capacity during the qualifying period. The claimant does not mention the report of Dr. G, perhaps because the hearing officer did not mention it either.

The claimant had the burden to prove within a preponderance of the evidence that he was entitled to SIBs for the third quarter. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge