

APPEAL NO. 002188

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 August 15, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter of eligibility.

The hearing officer found that the claimant had some ability to work and had not searched for employment commensurate with his ability to work and that his underemployment during the first quarter was not the direct result of his impairment.

The claimant appeals, and argues that he was totally unable to work during the quarter, and did so against doctor's orders. He does not contend that he was employed commensurate with his ability to work. The respondent (carrier) responds that the hearing officer properly applied applicable rules and statutes, and that his fact findings are supported by the record.

DECISION

We affirm.

The claimant testified by telephone and said that he was in another state searching for employment. The claimant had a cervical injury for which he had declined to have surgery and instead undertook a course of conservative treatment. The qualifying period ran from January 26 through April 25, 2000. During that time period, the claimant asserted that he had not been released by his doctor and was therefore seeking to return to work against the doctor's advice. The claimant was, to some extent, self-employed as a photographer, although he said he had no earnings from this business in 1999. He claimed some earnings from this business on his Application for [SIBs] (TWCC-52) for the first quarter, and also said that he had been employed for a week by a newspaper but was unable to continue that job due to neck pain.

A brief letter from the treating doctor, Dr. H, stated simply that the claimant had been unable to perform any kind of work from January 1 through May 18, 2000, when he was released to light duty with a restriction on overhead activities.

The qualifying period fell under the SIBs rules in effect on November 28, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) sets out the requirements of "good faith" as follows:

- (d) 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:

- (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
- (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; or
- (5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

And, under Rule 130.102(e), where a job search is undertaken, certain conditions must be met:

- (e) Except as provided in subsection (d)(1), (2), (3), and (4) of this section, 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.

The hearing officer could in this case have determined that the letter of Dr. H did not constitute the required narrative. The rule as stated precludes consideration of a simple one-line declaration of inability to work as obviating the statutorily imposed search requirement. Furthermore, since the claimant did undertake some amount of job search, he was required to prove that it fulfilled the requirements of Rule 130.102(e). Finally, the hearing officer found, and is supported, that the claimant failed to prove his self-employment was promoted in a manner that would constitute employment for purposes of fulfilling the job search requirement.

We have reviewed the evidence and decision of the hearing officer and cannot agree that his decision is against the great weight and preponderance of the evidence, and accordingly affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge