APPEAL NO. 002310

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 September 6, 2000, in (city 1), Texas. The issues at the hearing were the respondent's (claimant) impairment rating (IR), whether the claimant was entitled to the second quarter of supplemental income benefits (SIBs) and whether the appellant (carrier) had waived the right to contest the claimant's entitlement to the second quarter of SIBs by failing to timely request a benefit review conference (BRC) pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(d) (Rule 130.108(d)).

The hearing officer determined that the claimant reached maximum medical improvement (MMI) on April 22, 1999, with an IR of 16%; that the claimant was entitled to the second quarter of SIBs; and that the carrier had waived its right to contest the claimant's entitlement to the second quarter of SIBs by failing to timely request a BRC. The carrier appealed the adverse determinations, specifically Findings of Fact Nos. 11, 17 and 18 and Conclusions of Law Nos. 2, 3, 4 and 5, contending that the claimant's IR was improperly calculated by the designated doctor and that the proper IR should be 12% or that the matter should be remanded with instructions to the designated doctor to reevaluate the claimant's erectile dysfunction caused by surgery for the compensable injury; that the claimant failed to sustain his burden of proving entitlement to the second quarter of SIBs; and that it timely disputed the claimant's entitlement to the second quarter of SIBs.

The claimant replied that Finding of Fact No. 18 contained a typographical error and should be corrected to properly reflect that the claimant's unemployment was a direct result of "his compensable injury" rather than from "his employment." The claimant asserted that the hearing officer's determinations, including Finding of Fact No. 18, if corrected, were sufficiently supported by the evidence and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified at the CCH that he sustained an injury to his lower back on _____, which subsequently required surgery. He asserted that as a result of the surgery he became impotent and has continued to have this problem. The claimant stated his treating doctor released him to work on March 10, 2000, at a sedentary capacity with restrictions as to bending, twisting and no lifting over 10 pounds due to his continuing back problems. He contended that he had no ability to work prior to March 10, 2000, and that after this date, on March 13, 2000, he began looking for cashier and sales work every week consistent with the information supplied on his Application for [SIBs] (TWCC-52) asserting that he did have the ability to work at the 60 jobs so listed.

Most of the findings determined by the hearing officer were not appealed and have become final by operation of law. Section 410.169. Included as unappealed findings, the

hearing officer found that on April 22, 1999, Dr. B, the claimant's treating doctor, concluded that the claimant reached MMI on April 22, 1999, with a 15% IR; that by report dated June 7, 1999, Dr. H, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, determined the claimant had a 16% whole body IR; that the claimant's TWCC-52 for the second quarter was filed with the carrier on June 21, 2000; that the carrier disputed the claimant's entitlement to SIBs for the second quarter by filing a Request for [BRC] (TWCC-45) with the (city 2) field office on June 30, 2000; and that the (city 1) field office, the field office managing the claimant's claim, did not receive written communication from the carrier disputing the claimant's entitlement to SIBs for the second quarter.

At the outset of the CCH, the hearing officer acknowledged the problem of attempting to determine entitlement to SIBs for the second quarter when the issue of MMI and IR had not yet been settled, alluding to Rule 130.102(g), effective November 28, 1999, which provides in relevant part that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter, the date of MMI and the IR shall be final and binding. In response to his inquiry, the parties asserted that there was a dispute over the date of MMI and IR pending during the first quarter and therefore the rule was not applicable. Nonetheless, both parties orally agreed at the CCH that the claimant's date of MMI was April 22, 1999, as certified by the claimant's treating doctor, Dr. B. This agreement was not contained in stipulation form in the decision and order but was found as part of the decision portion of the hearing officer's decision and order. Neither party appealed this finding and it is therefore final.

The carrier on appeal contends that Dr. H's IR should not be entitled to presumptive weight because Dr. H included a 5% impairment for the claimant's erectile dysfunction. The carrier asserts that the additional rating was not based upon objective clinical or laboratory findings and should not be included because the condition is not "permanent." The carrier did not contest the 12% impairment assigned by Dr. H for a specific disorder of the lumbar spine under Table 49 (IV)(B) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides).

In his report of June 7, 1999, Dr. H discussed the claimant's impotence and the medical records he reviewed. Dr. H noted that the claimant had been prescribed Viagra by Dr. L which provided good results. Dr. H also noted that an EMG/nerve conduction study suggested a motor peripheral neuropathy in both legs and that the claimant had been referred to Dr. P, who did not feel that the claimant had a vascular problem causing the impotence. Dr. P opined that the claimant had adequate perineal sensation. Dr. H observed that hormone studies had been performed but were not available for his review.

Section 408.125(e) provides, in part, that if an IR is disputed the report of the designated doctor chosen by the Commission has presumptive weight and the Commission shall base the IR on this report unless the great weight of the other medical evidence is to the contrary. An IR means "the percentage of permanent impairment of the

whole body resulting from a compensable injury" and "impairment" means "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Sections 401.011(24) and 401.011(23). In Chapter 2 of the AMA Guides, the topic of consistency in clinical findings is discussed and it concludes with "[w]hen the medical condition has become static or stabilized, the findings should be replicable in repeated examinations. If this is not the case, then the stability of the medical condition is in question, and there is no basis upon which to rate permanent impairment."

There is no dispute by the carrier that the claimant's erectile dysfunction is compensable. Dr. H indicated in his report that his decision to assess a 5% impairment for the claimant's erectile dysfunction was based upon Subchapter 11.4a of the AMA Guides. Chapter 11 provides criteria for evaluating the effects that permanent impairment of the reproductive system has on the ability of the individual to perform the activities of daily living. Subchapter 11.4a includes criteria for evaluating the permanent impairment of the penis in relation to impairment for both sexual and urinary functions. Dr. H wrote that the claimant suffered a class 1 degree of impairment of sexual function which includes varying degrees of difficulty in erection, ejaculation and/or sensation. His report included a list of the varying urology reports which he reviewed from various physicians who had examined the claimant and had concluded that his impotence was caused by the back surgery. These opinions were based upon the doctors' clinical observations and testing of the claimant and could be used by Dr. H in making his report. As such Dr. H properly assigned an impairment under Chapter 11 of the AMA Guides. The hearing officer did not err in according presumptive weight to Dr. H's report assigning the claimant a 16% IR which included 5% for the erectile dysfunction.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (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 hearing officer found that the second quarter of SIBs began on June 23, 2000, and continued through September 21, 2000. The finding was not appealed and has become final. The qualifying period for the second quarter ended on the 14th day before the beginning date of the quarter (June 23, 2000), and consisted of the 13 previous consecutive weeks. Rule 130.101(4). Therefore, the qualifying period began on March 11, 2000, and ended on June 9, 2000.

The hearing officer found that the claimant was released to sedentary work on March 11, 1999, with a restriction of no lifting over 10 pounds. This finding was not appealed and is final. We believe the correct date is March 11, 2000, rather than March 11, 1999, and is merely a typographical error because the 2000 date conforms with the work-release slip signed by Dr. B and is also discussed by the hearing officer in his Statement of the Evidence. We reform this finding to include the March 11, 2000, date.

The hearing officer found that during the qualifying period the claimant made 60 job searches; looked for work each week and documented the search; was registered with the Texas Workforce Commission (TWC), and made a plan consisting of checking in the newspaper, contacting friends for job leads and working with the TWC. These findings were also not appealed and are final. The carrier contested the finding by the hearing officer that the claimant attempted in good faith to find employment commensurate with his ability to work and that the claimant's unemployment was a direct result of his "employment." The claimant points out in his response that the use of the word "employment" was probably another typographical error and we agree. We therefore reform this finding to include the word "impairment" instead of "employment."

The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). The claimant asserted that he met the criterion of Rule 130.102(d)(5) which 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 provided sufficient documentation to show that he has made a good faith effort to obtain employment. Whether the claimant did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. In considering all the evidence in the record, we cannot agree that the finding of good faith by the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

In reviewing the carrier's assertion that the claimant did not meet his burden of proof regarding the direct result criterion, we note that direct result is also a fact issue for the hearing officer. The Appeals Panel has on numerous occasions commented on the phrase "as a direct result of the employee's impairment" in Sections 408.142 and 408.143 and stated that the unemployment need only be a direct and not the direct result. Upon review of the record submitted, we find no reversible error and the evidence sufficient to affirm the determination of the hearing officer that the claimant's unemployment was a direct result of his impairment from the compensable injury.

The carrier's final assertion of error is in reference to the legal conclusion reached by the hearing officer in determining that the carrier waived the right to contest the claimant's entitlement to the second quarter of SIBs because it filed the TWCC-45 in the field office on June 30, 2000, after receipt of the claimant's TWCC-52 on June 21, 2000, rather than in the (city 1) field office where the claim was being managed. Rule 102.5(c), which became effective August 29, 1999, states that "[u]nless otherwise specified by rule, written communications required to be filed with the Commission should be sent to the local Commission field office managing the claim, however, written communications shall also be accepted at any Commission office." Rule 130.108(d), which is recited by the hearing officer, requires that the carrier's dispute be received by the Commission within 10 days after the date the carrier received the TWCC-52 from the claimant. Rule 141.1(b)(3) requires that a request for a BRC "be sent to the commission."

Neither Rule 130.108(d) nor Rule 141.1(b)(3) restrict the filing of a request for a BRC to the Commission field office managing the claim. Appeals Panel decisions which required the TWCC-45 to be filed in the field office managing the claim were issued prior to the amendment of Rule 102.5(c) which allows a document to be filed at any Commission office unless specifically addressed by another rule. As it is clear the hearing officer did not take into consideration the provisions of Rule 102.5(c), we find that he erred in rendering his determination that the carrier waived the right to contest the claimant's entitlement to the second quarter of SIBs because it failed to timely request a BRC pursuant to Rule 130.108(d).

We affirm the hearing officer's determination that the claimant's IR is 16% and that the claimant is entitled to SIBs for the second quarter. We reverse and render a decision that the carrier did not waive the right to contest the claimant's entitlement to the second quarter of SIBs because it timely filed a request for a BRC with the Commission pursuant to Rule 130.108(d).

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge