

APPEAL NO. 002368

On August 10 and August 31, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, second, and third quarters. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. The respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(1) 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 returned to work in a position which is relatively equal to the injured employee's ability to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, 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. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on September 28, 1998; that the claimant has a 17% IR; that the claimant did not commute IIBs; that the first quarter was from September 21, 1999, through December 20, 1999, with a qualifying period from June 9, 1999, through September 7, 1999; that the second quarter was from December 21, 1999, through March 20, 2000, with a qualifying period from September 8, 1999, through December 7, 1999; that the third quarter was from March 21, 2000, through June 20, 2000, with a qualifying period from December 8, 1999, through March 7, 2000; and that the claimant's preinjury AWW was \$1,151.30.

The claimant testified that he obtained a bachelor's degree in economics in 1979 and then taught high school without having a teacher certification until he obtained a job

as a process technician in the employer's refinery in 1981. The claimant said that his technician job required him to climb towers, prepare equipment for repairs, disconnect hoses, perform small repairs, carry at least 50 pounds, and sometimes wear 60-pound air packs on his back. The claimant said that on _____, he was attempting to loosen a bolt with a wrench at work when he felt a pop in his right shoulder with pain down his arm. The claimant said that Dr. B examined him and put him on light duty but that a few days later Dr. B put him on full duty and that he continued to have pain in his right arm. The claimant said that he last worked for the employer in November 1997, that Dr. P told him not to work, and that Dr. P performed cervical surgery on him in January and March 1998. The claimant said that after his second surgery he had physical therapy for a month and at the end of that therapy Dr. P told him that it would be a year before he was back to his preinjury condition. The claimant said that Dr. P referred him to Dr. K, who told him that he could not climb towers and that he would need to find a less strenuous job.

The claimant said that Dr. P released him to go back to work in May 1998; that Dr. K gave him work restrictions of no climbing, no lifting, no pulling, and no excessive up and down neck movements; and that Dr. P agreed with Dr. K's restrictions. The claimant said that Dr. P and Dr. K said that he needed to be on light duty. The claimant said that after his therapy following his surgeries, he told his second-line supervisor, KB, that his doctors told him that he needed to be on light duty and that KB told him that the employer did not have any light duty for him and she only offered him his regular job of climbing towers and performing repair work. The claimant said that he resigned from the employer on May 14, 1998, because he could not physically perform his regular job as a technician and no light duty was offered to him. He said that he never received any letter from the employer offering him light duty and that KB never offered him a light-duty job as a console trainee where he could sit at a computer and do no lifting or carrying. He said he had not actually performed work for the employer since November 1997 when he resigned in May 1998. In a note dated May 14, 1998, Dr. P wrote that the claimant would be going to physical therapy and would probably be able to return to work in about a month or so.

Dr. Ke, who apparently was the designated doctor, reported in October 1998 that the claimant had been determined to be at MMI on September 28, 1998, and that the claimant has a 17% IR for the injury to his cervical spine that he sustained at work on _____. Dr. Ke wrote that it would be best that the claimant not return to his former level of duty, that he should consider alternative education and lighter-duty work, and that he would like the claimant to be evaluated by the Texas Rehabilitation Commission (TRC) for education and training.

The claimant said that 10 years ago he met a person who suggested that he work as a counselor but that at that time he wanted to continue with his technician job. He said that he has done volunteer work for entities like the Salvation Army for years. The claimant said that from June to September 1998 he attended college classes for substance abuse counseling. He said that the Texas Commission on Alcohol and Drug Abuse (TCADA) requires 270 classroom hours to be a substance abuse counselor. He said he went to

classes three and one-half hours a day for two to three days a week. He said that he paid for his college classes himself and that the TRC was not involved in that.

The claimant said that in June 1999 he received a letter from the Texas Workers' Compensation Commission stating that he could be qualified to receive assistance from the TRC because of his work injury, that he called the TRC when he got that letter, that he told the TRC that he had already paid for some of his training to be a substance abuse counselor, that he asked the TRC if it would reimburse him for what he had paid for his training, and that the TRC said that it would not. The claimant said that he has continued to seek the help of the TRC to try to get follow-up courses in substance abuse counseling or perhaps a master's degree. He said that the TRC has not helped him. In evidence are nine certificates from the college the claimant attended for drug abuse counseling that are dated from October 21, 1998, to March 6, 1999.

There are various letters from the TRC in evidence. The first is dated January 10, 2000, which noted that the claimant inquired about TRC services. A TRC letter dated February 1, 2000, noted that the claimant met with a TRC counselor but that medical records suggested that the claimant was not ready for vocational rehabilitation services. A June 21, 2000, TRC case note indicated that the claimant is seeking assistance from the TRC to upgrade his substance abuse skills by attending seminars to obtain and maintain his license. A July 25, 2000, TRC case note indicated that the claimant canceled his vocational evaluation because he was unable to get off work.

The claimant was examined by Dr. T at the carrier's request in April 2000, which was after the qualifying period for the third quarter, and Dr. T referred the claimant for a functional capacity evaluation (FCE). The FCE report stated that the claimant's demonstrated ability placed him at the middle of the heavy-work category but that the claimant would benefit from a strengthening program for his neck and right shoulder.

The claimant said that his neck still bothers him and that his right hand still swells, goes numb, and is weak.

The claimant said that he needed to have an internship called a "practicum" in substance abuse counseling as part of his training in that field and that during the qualifying period for the first quarter he tried to obtain a paying job in the counseling field to complete a required 300-hour practicum but that no one was willing to pay him for his practicum. He said that from August 27 to October 22, 1999, he obtained a position where he completed his 300-hour practicum without pay. He said that he needs to perform a certain number of hours of counseling service before he can take a state examination to be licensed as a substance abuse counselor.

The claimant said that after completing his practicum in October 1999, which was during the qualifying period for the second quarter, he looked for work as a counselor and started working as a substance abuse counselor for the Door to Recovery (DTR) on November 21, 1999, for \$19,000.00 a year. The second quarter qualifying period ended

on December 7, 1999. A TCADA practicum student evaluation form indicates that the claimant had field work from August 27, 1999, to October 22, 1999.

The claimant said that he worked as a substance abuse counselor for the DTR throughout the qualifying period for the third quarter. He said that he can make \$20,000.00 to \$25,000.00 a year as a substance abuse counselor.

The claimant said that he did not attend a TRC evaluation that was scheduled in July 2000, and that his evaluation is pending.

The claimant said that he did not list all of his job searches on his Applications for SIBs (TWCC-52) and that the job searches he did not list included teaching, computer work, and training jobs, as well as other counseling jobs. He said he has called other places every day to try to get a better situation than his current job.

KB testified that she was the claimant's second-line supervisor when the claimant was injured in _____; that after his injury the claimant worked several shifts on regular duty and then, based on a doctor's report, was given a light-duty job as a console trainee where he sat and monitored control screens; and that the claimant's doctors then took the claimant off work in November 1997. KB said that she expected that after the claimant had his neck surgeries the claimant would return to work for the employer in the light-duty position as a console trainee and that she told the claimant that light-duty work was available for him but that the claimant resigned from employment in May 1998, and did not say at that time that he was resigning because of his injury. KB said that when the claimant resigned, the light-duty job was still available for him. KB said that based on Dr. T's evaluation of April 2000, the claimant would be able to perform his preinjury process technician job.

In his TWCC-52 for the first quarter, the claimant listed seven job contacts during the qualifying period for that quarter (there are 14 job contacts that are prior to the start of the qualifying period). The jobs applied for are listed as counselor/intern.

In his TWCC-52 for the second quarter, the claimant listed six job contacts during the qualifying period for that quarter (there are 14 job contacts that are prior to the start of the first quarter--the same 14 that are noted to have been listed on the TWCC-52 for the first quarter that were before the start of the qualifying period for the first quarter). The jobs applied for during the qualifying period for the second quarter are listed as counselor/intern and all occurred in November 1999. The November 29, 1999, job contact is with the DTR. The claimant noted on the TWCC-52 for the second quarter that he was a student during the first seven weeks of the qualifying period for that quarter and that he obtained a job for \$19,000.00 a year the last week of November 1999.

In his TWCC-52 for the third quarter, the claimant listed wages earned of \$4,964.43. The claimant provided copies of pay stubs from the DTR for his work there.

The hearing officer determined that the claimant did not make a good faith effort to seek employment during the qualifying periods for the first and second quarters and that the claimant's underemployment during the qualifying period for the third quarter was not a direct result of the impairment from the compensable injury. The hearing officer decided that the claimant is not entitled to SIBs for the first, second, and third quarters. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge