

APPEAL NO. 002422

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 September 21, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 17th quarter. A second issue regarding timely filing of an Application for [SIBs] (TWCC-52) was not addressed by the hearing officer in the decision and order, but this was not appealed by the parties. Appellant (carrier) appealed the determination regarding SIBs entitlement on sufficiency grounds, contending that claimant did not prove he had no ability to work. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant had no ability to work during the qualifying period for the 17th quarter and that he is entitled to SIBs. Carrier asserts that the medical evidence does not show that claimant had no ability to work and that Dr. O did not specifically explain how the injury caused an inability to work.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding our standard of review, 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. 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[.]

In medical reports dated in 2000, Dr. O stated that claimant had multiple back surgeries after his 1993 compensable injury and that he has "failed back syndrome." It is undisputed that the qualifying period for the 17th quarter was from April 6, 2000, to July 5, 2000, and that claimant did not search for work during the qualifying period. In an April 2000 report, Dr. O explained that he believes that an implanted spinal column stimulator (SCS) has a "lead" that has probably slipped. He stated that "a six week period of very minimum activity is needed for scarring to secure" a lead in place and that an SCS revision is needed. In a May 23, 2000, report, written during the qualifying period, Dr. O stated that:

Despite all of these back surgeries, claimant continues to have [problems.]
This makes him completely disabled because of severe low back pain,

severe leg pain, and severe leg spasm that limits his ability to function, even bending, twisting, or driving a car. He is also having difficulty controlling his left leg. The patient has severe nerve damage

In his medical reports, Dr. O stated that claimant underwent two SCS revision surgeries during the qualifying period; one on May 12, 2000, and one on June 26, 2000. In an August 2000 report, Dr. O discussed claimant's pain and severe lumbar spasm and stated that claimant "will need [a] left lumbar sympathectomy" and Botox injections to his vertebral muscles to treat his reflex sympathetic dystrophy and spasticity.

The direct result determination in claimant's favor was not appealed. The hearing officer determined that: (1) claimant had limited physical capacity during the qualifying period; (2) claimant is on medications which make him drowsy and affects his ability to function; (3) claimant's medical narrative shows a total inability to work due to muscle spasm and consumption of narcotic pain medications which led to implantation surgery for a spinal stimulator; and (4) claimant's treating doctor issued a medical narrative dated May 23, 2000, which sets out in detail why claimant has no ability to work. The record does not contain a record from another doctor stating that claimant is able to do some work. The hearing officer determined that "carrier offered no medical records showing claimant has an ability to work."

Claimant had the burden to prove that he had no ability to work. Texas Workers' Compensation Commission Appeal No. 001737, decided September 13, 2000. The hearing officer was the sole judge of the credibility of the evidence and he judged the credibility of the medical evidence regarding whether claimant had an ability to work during the qualifying period. The discussion portion of the decision and order contains some ambiguous statements from the hearing officer regarding whether claimant looks well enough to work and his chances of being hired. However, given the hearing officer's discussion of and reliance on the medical evidence in making his determinations, we perceive no error. It appears that the hearing officer applied the correct standard in making his determinations. Carrier asserted that claimant needed only six weeks to recover from his SCS revision surgeries, so he could work after that. Given the dates of the SCS surgeries, this would indicate, however, that claimant would not be able to work from May 12, 2000, through the end of the qualifying period. Regarding the period from April 6, 2000, through May 12, 2000, there was evidence that claimant had no ability to work during that period, also. The hearing officer's determinations 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 his. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer did not address the issue regarding whether claimant was late in filing his TWCC-52. The parties do not complain of this on appeal, so we will not address it. We note that claimant's attorney acknowledged at the hearing that claimant was "a few days late" in filing his TWCC-52.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge