

APPEAL NO. 002459

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 21, 2000, a hearing was held. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter. The claimant appealed. The respondent (carrier) responded.

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 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)(4) 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 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. 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.

There is no appeal of the hearing officer's finding that the claimant's unemployment was a direct result of his impairment. The SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with his ability to work during the qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2). The claimant contends that he had no ability to work during the qualifying period.

According to medical records, the claimant sustained a back injury at work on _____. He apparently underwent lumbar surgery in 1996. The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant has a 19% IR; that the claimant did not commute IIBs; that the eighth quarter was from June 30, 2000, to September 28, 2000; that the qualifying period for the eighth quarter was from March 18, 2000, to June 16, 2000; that the claimant was unemployed during the qualifying period; and that the claimant underwent a lumbar surgical procedure on August 16, 2000, which was about two months after the qualifying period ended. It is undisputed that the

claimant did not look for work during the qualifying period and that he was not enrolled in a full-time vocational rehabilitation program.

The claimant was initially treated by Dr. O, who referred the claimant to Dr. M. The Texas Workers' Compensation Commission approved the claimant's request to change treating doctors to Dr. M on June 23, 2000. Dr. M wrote that the claimant has severe symptoms which limit his physical activities and that he cannot return to work. In response to a written question as to whether the claimant was able to perform any type of work during the qualifying period, Dr. M wrote that the claimant is not able to do any type of physical work that would include walking, sitting, or standing for prolonged periods.

The hearing officer was not persuaded that the claimant had shown that he was unable to perform any type of work in any capacity during the qualifying period and found that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the qualifying period. The hearing officer decided that the claimant is not entitled to SIBs for the eighth quarter. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We do not find reversible error in the hearing officer's ruling excluding two of Dr. M's reports on the basis of untimely exchange of those reports with the carrier. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge