

APPEAL NO. 002797

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 November 6, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the second compensable quarter on the basis of a total inability to work.

The respondent (carrier) appeals, contending that a report from Dr. L is a record which shows the claimant "capable of performing at least sedentary type of labor" and that the treating doctor's report is not adequate to support the hearing officer's decision. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

This is a total inability to work SIBs case. The claimant sustained a compensable low back injury on _____, and has had five spinal surgeries with the most recent being June 16, 1999. The parties stipulated to the basic statutory requirements to SIBs and that the qualifying period for the second quarter was from August 31, 1999, to November 29, 1999. Dr. S is the treating doctor.

Sections 408.142(a) and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provide the statutory and regulatory requirements for entitlements to SIBs. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(3), the version then in effect, provides that the statutory good faith requirement may be met if the employee:

- (3) 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[.]

Although the hearing officer does not specifically reference Rule 130.102(d)(3) she makes clear through her discussion and findings that the elements of the rule were considered. The hearing officer commented that based on the "totality of the evidence, Claimant established that he had a total inability to work." The hearing officer summarizes various reports and testimony to support that statement, which meets the first element of Rule 130.102(d)(3).

In evidence is a report dated October 15, 1999, from Dr. S which recites the claimant's June 16, 1999, surgery, the effects of that surgery, the claimant's continued treatment and restrictions, and concludes that the work activities "would severely aggravate [claimant's] lumbar condition such that he would require increasing amounts of medication and require further surgery, as it would cause his fusion to not heal." We are satisfied that the hearing officer found this report meets the second element of Rule 130.102(d)(3).

The carrier submits a report dated January 17, 2000 (some six weeks after the end of the qualifying period at issue), as a record showing that the claimant could perform at least sedentary work. We would note that the report and accompanying Report of Medical Evaluation (TWCC-69) seem more focused on establishing January 17, 2000, as the maximum medical improvement date and assessing a 25% impairment rating than an evaluation of the claimant's ability to work. The report does, however, have a statement in the discussion which says "[claimant] is able to perform sedentary work not lifting more than 10 pounds." The hearing officer specifically found that "[t]here was no indication that the ability to work sedentary reflected Claimant's condition during the qualifying period." We do not find the hearing officer's determination to be against the great weight and preponderance of the evidence.

Accordingly, the hearing officer's Decision and Order is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge