

APPEAL NO. 010235

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 January 11, 2001. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first, second, third, fourth, and fifth quarters. The hearing officer also determined that the respondent (carrier) was relieved of liability for SIBs for the second, third, and fourth quarters because of the claimant's failure to timely file a statement of employment status for the second, third, and fourth quarters. An issue concerning whether the claimant permanently lost entitlement to SIBs because she was not entitled to SIBs for 12 consecutive months was withdrawn prior to the hearing. The claimant drafted her own appeal and specifically contests eight findings of fact and one conclusion of law. She does, however, ask that we "turn the decision in her favor," and we will treat this as an appeal of the entire decision on sufficiency of the evidence grounds. The carrier responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

We note first that there are two typographical errors in setting forth dates in the hearing officer's decision. The correct dates were used during the hearing, as shown by the transcript. In Finding of Fact No. 1.L, the second date is reformed to be 3-17-00 versus 3-17-99. In Finding of Fact No. 1.O, the first date is reformed to be 9-16-00, versus 9-16-0000.

The parties stipulated that the claimant sustained a compensable injury resulting in an impairment rating of 15% or more; that the claimant did not commute any portion of her impairment income benefits; that the qualifying period for the first SIBs quarter was from June 6 to September 4, 1999; that the qualifying period for the second SIBs quarter was from September 5 to December 4, 1999; that the qualifying period for the third SIBs quarter was from December 5, 1999, to March 4, 2000; that the qualifying period for the fourth SIBs quarter was from March 5 to June 3, 2000; that the qualifying period for the fifth SIBs quarter was from June 4 to September 2, 2000; that the claimant earned no wages during the qualifying periods for the first through fifth quarters; and that the claimant filed the applications for the second, third, and fourth quarter SIBs on September 11, 2000. The evidence further showed that the claimant was incarcerated from February 11 to August 29, 2000.

The eligibility requirements for SIBs are set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)) and will not be repeated here. The claimant's position is that she is unable to perform work in any capacity. The "new" SIBs rules, Rule 130.100 *et seq.*, effective January 31, 1999, were in effect with regard to the claimant's contention that she has a total inability to work. Rule 130.102(d) addresses the

good faith effort requirement of the 1989 Act and Rule 130.102(d)(3) (the version in effect when this claimant first became eligible for SIBs, and now in effect as 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." The claimant has the burden to prove there is no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. The claimant's application for first quarter SIBs was denied by the Texas Workers' Compensation Commission because the claimant had not made a good faith effort to obtain employment equal to her ability to work (Carrier's Exhibit No. 1). The hearing officer determined that the claimant had some ability to work, that the medical records did not explain how the injury caused a total inability to work, and that the claimant had not satisfied the requirement to attempt in good faith to obtain employment. There is evidence in the record from which the hearing officer could determine that the medical records submitted with the first quarter application do not specifically explain how the injury causes a total inability to work and there are other records which show some ability to work. The claimant has failed to meet her burden of proving entitlement to first quarter SIBs.

The claimant did not file an application for second, third, and fourth quarter SIBs until September 11, 2000. Under Rule 130.105, an injured employee who does not timely file an application shall not receive SIBs for the time between the beginning date of the quarter and the date on which the form is received by the insurance carrier, with exceptions that do not apply to this case. Under that rule, the claimant would be precluded from obtaining SIBs for all of the second and third quarters, and for most of the fourth quarter. She could, if otherwise entitled, receive fourth quarter SIBs for the period from September 11 through September 15, 2000.

In addition to the untimely filing an application for the second quarter SIBs, the hearing officer found that the claimant had some ability to work; that the medical records did not explain how the injury caused a total inability to work; and that the claimant had not satisfied the requirement to attempt in good faith to obtain employment. These findings are likewise fully supported by evidence in the record and the claimant is not entitled to second quarter SIBs.

The hearing officer determined that the claimant had some ability to work during the third, fourth, and fifth quarter qualifying periods, even though there were medical records which specifically explained how the claimant's injuries caused a total inability to work. However, the evidence supports the hearing officer's determination that the claimant had not satisfied the requirement to attempt in good faith to obtain employment. Based on these findings, the claimant is not entitled to third, fourth, or fifth quarter SIBs.

The hearing officer further determined that the claimant's unemployment during the third, fourth, and fifth quarter qualifying periods was a direct result of her incarceration and

not a direct result of her impairment. An excerpt from Texas Workers' Compensation Commission Appeal No. 990555, decided April 27, 1999 (Unpublished), sets forth some of our previous decisions on this issue:

Fairly early on, the Appeals Panel defined the direct result requirement, noting that evidence of a serious injury with lasting effects together with an inability to return to the preinjury job will satisfy the direct result requirement in the "absence of any evidence of an intervening cause for the unemployment, such as . . . incarceration, is sufficient to support a finding of direct result." Texas Workers' Compensation Commission Appeal No. 960873, decided June 8, 1996 [sic, actually decided June 18, 1996]. In Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995, the Appeals Panel held that there was sufficient evidence to support the hearing officer's decision "that it was the incarceration which was the reason for claimant's unemployment [during the filing period]." More recently, in Texas Workers' Compensation Commission Appeal No. 982198, decided October 30, 1998, we noted an affirmation of "a hearing officer's determination that an employee's incarceration during the entirety of a SIBs filing period was evidence that [the employee's] unemployment was not a direct result of the impairment from a compensable injury."

It is undisputed that the claimant in this case was incarcerated for 23 of the 91 days in the qualifying period for the third quarter, throughout all of the qualifying period for the fourth quarter, and for 86 of the 91 days in the qualifying period for the fifth quarter. It is equally clear, as found by the hearing officer, that the reason for the claimant's unemployment during these periods was because she was incarcerated; in short, the claimant's unemployment was due to the incarceration rather than as a direct result of the claimant's impairment. Since her unemployment was not the direct result of her injury, this is an additional basis upon which to conclude that the claimant has not proven her entitlement to third, fourth, and fifth quarter SIBs. The hearing officer's determinations are consistent with this evidence.

Although the claimant's filing was timely under Rule 130.105 as to a five-day period during the fourth quarter, and the hearing officer found that medical records which pertained to that time period showed how the injury caused a total inability to work, the hearing officer further found that the claimant had some ability to work and that the claimant had not satisfied the requirement to attempt in good faith to obtain employment. There is evidence in the record which supports each of these determinations. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's decision is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge