

APPEAL NO. 010601

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 19 and December 13, 2000, a contested case hearing was held. The appellant/cross-respondent (claimant) appeals the hearing officer's decision that the claimant is not entitled to supplemental income benefits (SIBs) for the second quarter. The respondent/cross-appellant (carrier) appeals the hearing officer's decision that the carrier is not relieved of liability for health care provided by, or at the direction of, Dr. R because the claimant did not fail to comply with the rules of the Texas Workers' Compensation Commission (Commission) regarding change of treating doctors, and that the Commission did not abuse its discretion in approving the change of treating doctors to Dr. R. The carrier received the hearing officer's decision on March 8, 2001, and did not mail its request for appeal to the Commission until April 9, 2001; thus, the carrier's request for appeal was not filed within the 15-day time period for filing an appeal. Section 410.202(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3). The hearing officer's decision on the disputed issues regarding compliance with Commission rules on change of treating doctors and approval of Dr. R as an alternate doctor have become final under Section 410.169.

DECISION

The hearing officer's decision is affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and 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.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement with a 45% IR; that she did not commute IIBs; that she made no job searches and earned no wages during the qualifying period for the second quarter; that the second quarter was from January 8, 2000, to April 7, 2000; and that the qualifying period for the second quarter was from September

27, 1999, to December 26, 1999. There is no appeal of the hearing officer's finding that the claimant's unemployment during the qualifying period for the second quarter was a direct result of her impairment from her compensable injury. The SIBs criterion in dispute is whether the claimant attempted in good faith to obtain employment commensurate with her ability to work during the qualifying period. Section 408.142(a)(4); Rule 130.102(b)(2).

The claimant claimed that she had no ability to work during the qualifying period for the second quarter. There was conflicting evidence presented to the hearing officer on that issue. 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 the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer found that the claimant had some ability to work during the qualifying period for the second quarter and that the claimant did not make a good faith effort to seek employment commensurate with her ability to work during that qualifying period. The claimant contends that the hearing officer must find in her favor for the second quarter of SIBs because the hearing officer found in her favor for the first quarter of SIBs. We disagree. The qualifying period for the second quarter was a different time period than the qualifying period for the first quarter and additional evidence was presented at the hearing on the second quarter. In particular, in ruling for the claimant for the first quarter, the hearing officer relied on the reports of Dr. RO; however, evidence presented at the hearing on the second quarter, including the claimant's testimony, revealed that Dr. RO has never examined the claimant, which had a negative effect on the hearing officer's assessment of the credibility of those reports in determining the issue of SIBs entitlement for the second quarter. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge