

APPEAL NO. 010835

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 April 3, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter but that the claimant is entitled to SIBs for the second and third quarters. The claimant appealed the hearing officer's decision that he is not entitled to SIBs for the first quarter and the respondent (carrier) responded, requesting affirmance. There is no appeal of the hearing officer's decision that the claimant is entitled to SIBs for the second and third quarters.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the first quarter. 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 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 during the qualifying period for the first quarter was a direct result of the impairment from his compensable injury. 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 for the first quarter. Section 408.142(a)(4); Rule 130.102(b)(2). The claimant contended that he had no ability to work during the qualifying period for the first quarter.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on June 11, 1999, with a 20% IR; that he did not commute IIBs; that the first quarter was from August 5 to

November 3, 2000; that the qualifying period for the first quarter was from April 23 to July 22, 2000; and that the claimant earned no wages and did not seek employment during the qualifying period for the first quarter. The claimant testified that he injured his back, neck, head, and legs in his work-related injury. The claimant had right knee surgery in December 1997 and back surgery in October 1998. He had a second back surgery on December 26, 2000, which was during the qualifying period for the third quarter.

Dr. S, the claimant's treating doctor, wrote towards the end of the qualifying period for the first quarter that the claimant has severe back and leg pain, that the claimant is contemplating undergoing another back surgery, and that the claimant is unable to engage in any gainful employment. The claimant underwent a functional capacity evaluation on May 22, 2000, and the physical therapist concluded that the claimant is able to perform functional tasks at the sedentary to light physical demand level. Dr. X examined the claimant at the carrier's request on May 24, 2000, and Dr. X concluded that the claimant could do desk work, a sit-down job, and, possibly, light office filing.

The hearing officer determined that during the qualifying period for the first quarter, the claimant was able to perform at the sedentary to light level and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The hearing officer concluded that the claimant is not entitled to SIBs for the first quarter. The hearing officer was presented with conflicting evidence. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge