APPEAL NO. 010896
FILED JUNE 4, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 16, 2001. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. The claimant appealed and the respondent (carrier) responded.

DECISION

The hearing officer's decision is 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.

The claimant testified that he was working on a vehicle on _____, when he slipped in grease and fell, injuring his right knee and lower back. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on August 16, 1999, with a 17% IR; that the claimant did not commute IIBs; that the third quarter was from February 6 to May 7, 2001; and that during the qualifying period for the third quarter, which was from October 25, 2000, through January 23, 2001, the claimant earned no wages. There is no appeal of the hearing officer's finding that the claimant's unemployment during the qualifying period 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); Rule 130.102(b)(2). The claimant contended that he had no ability to work during the qualifying period but that he looked for work anyway.

The claimant has had five operations on his right knee: two in 1997, one each in 1998 and 1999, and the last one on October 19, 2000, which was one week prior to the beginning of the qualifying period, and which consisted of an arthroscopic surgery for a torn medial meniscus and chonromalacia of the patella. A lumbar MRI done on January 25, 2001, showed a disc bulge at L3-4 and a herniated disc at L5-S1.

The claimant testified that during the qualifying period he had no ability to work; that no doctor has released him to return to work; that he started physical therapy for his right knee one week after his October 19, 2000, surgery; that he went to physical therapy three times a week for eight weeks and thereafter, beginning in December 2000, for five times a week through the date of the CCH (the claimant did not say how long each session of physical therapy lasted); and that during the qualifying period he took pain medication, anti-inflammatory medication, and had injections in his lower back.

Dr. X examined the claimant at the carrier's request in July 2000 and reported that the claimant would need arthroscopic knee surgery for a tear of the medial meniscus but that the claimant can work at a sedentary job. The claimant said that Dr. X "looked" at him, but did not perform any tests.

The claimant's treating doctor, Dr. H, a chiropractor, reported on October 18, 2000, that the claimant would have the knee surgery and that postoperative rehabilitation therapy is indicated. The claimant had the arthroscopic surgery on October 19, 2000, and the surgeon, Dr. D, wrote on that day after the surgery that "patient not able to work at the present time. Additional treatment is indicated." Dr. D completed a TWCC-73 Work Status Report in which he noted that the claimant's workers' compensation injury prevents the claimant from returning to work as of October 18, 2000, and that that status is expected to continue through April 2001. Dr. D wrote on December 21, 2000, that "Patient totally disabled and not able to work. Additional treatment indicated," and recommended additional therapy for the right knee. On February 22, 2001, Dr. D aspirated fluid from the claimant's right knee and noted that additional diagnostic tests are indicated and that the claimant is "not able to work."

In a (TWCC-73) dated November 15, 2000, Dr. H noted that the claimant's workers' compensation injury prevented the claimant from returning to work as of August 16, 1997, and that that status is expected to continue until "unknown." On December 20, 2000, Dr. H wrote that, due to persistent symptoms in the claimant's low back, a lumbar MRI is indicated; that the claimant would continue postoperative rehabilitation therapy to the right knee three times a week for six weeks; and that:

> Follow up in one month to assess progress and call if there are any problems. The patient is not capable of working at this time. The patient is recovering from right knee surgery. Also, appropriate work up of the lumbar spine is indicated. This was previously delayed by the insurance carrier.

On January 24, 2001, Dr. H reported that the claimant had undergone lumbar facet injections the day before and that further rehabilitation therapy is indicated for the right knee for three times a week for four weeks. In February 2001, Dr. H signed a TWCC-73 in which he noted that the claimant has been restricted from all work as of _____, and that that status is expected to continue until October 2001. Dr. H stated on that form that the claimant "needs further treatment."

On the Application for SIBs (TWCC-52) for the third quarter, the claimant listed 28 employment contacts during the qualifying period, one of which was with the Texas Rehabilitation Commission (TRC), and the rest of which were for jobs as a front desk clerk for motels and hotels. The claimant indicated on the TWCC-52 that none of the employers he contacted were hiring and that he did not file any job applications. A TRC counselor wrote on November 29, 2000, that the claimant had shown interest in a training program and that he would be considered for such a program when he is medically ready. The claimant said that between his back and knee, he is not ready to go back to work, and that he looked for work to try and make everybody happy.

The hearing officer found that the claimant did not have an ability to work; that the claimant failed to provide a narrative report from a doctor which specifically explained how the injury caused a total inability to work; that no other records showed that the claimant was able to return to work following his October 2000 surgery or during the qualifying period; that the claimant failed to satisfy all the requirements of Rule 130.102(d)(4); that the claimant made approximately 27 job contacts which resulted in no interview or job offers; that the claimant limited his job search to the motel/hotel industry; that the claimant did conduct and document a job search effort every week during the qualifying period; that the claimant did not conduct a well-structured job search plan; that the claimant's efforts to find work lacked the objective manifestation of good faith with respect to timing, forethought, and diligence in his efforts to obtain employment; 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 third quarter.

The claimant asserts that it is reasonable to determine that the hearing officer intended to find in his favor because of her findings that he had no ability to work and that no other record showed that he was able to return to work during the qualifying period, and that, she would have done so had it not been for the "technicality" that he had to have a narrative report from a doctor which specifically explained how the injury caused a total inability to work. The claimant requests that we find that he had no ability to work during the qualifying period and that he satisfied the good faith requirement because he was unable to perform any type of work in any capacity.

First, we agree with the hearing officer's finding that the claimant failed to provide a narrative report from a doctor which specifically explained how the injury caused a total inability to work. Why the claimant would not have been able to perform even a part-time, sedentary job sitting down after several weeks of therapy following his October 19, 2000, surgery is not explained. In Texas Workers' Compensation Commission Appeal No.

001984, decided September 25, 2000, the Appeals Panel stated "the 'narrative' required by Rule 130.102(d)(4) must include a detailed analysis of a claimant's ability to work at any job in relation to the physical restrictions and limitations from the compensable injury." In Texas Workers' Compensation Commission Appeal No. 010533, decided April 16, 2001, the Appeals Panel noted that "A simple 'off work' letter may be ambiguous in that the doctor/author may intend it to stand as evidence that the employee cannot return to his former job (with no analysis of whether the employee can return to any job.) The required narrative should resolve such ambiguity."

Second, we disagree with the claimant's characterization of the provision requiring a narrative report from a doctor which specifically explains how the injury causes a total inability to work as a "technicality." The rule specifically requires the narrative report. Having found that the claimant failed to provide a narrative report from a doctor which specifically explained how the injury caused a total inability to work, the hearing officer's finding that the claimant did not have an ability to work is untenable. The hearing officer was correct, however, in finding that the claimant failed to satisfy all the requirements of Rule 130.102(d)(4).

The hearing officer's decision that the claimant is not entitled to SIBs for the third quarter is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge