

APPEAL NO. 010979
FILED JUNE 18, 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 was held on April 16, 2001. The hearing officer determined that the appellant (claimant) was not entitled to fourth and fifth quarter supplemental income benefits (SIBs), and that the claimant permanently lost entitlement to SIBs because she was not entitled to SIBs for 12 consecutive months. The claimant has appealed these adverse determinations, taking the position that she had no ability to work during the qualifying periods. The respondent (self-insured) urges that the hearing officer's determinations should be upheld.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant has the burden of proving entitlement to SIBs for any quarter claimed. The eligibility requirements for SIBs are set out in Sections 408.142 and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)) and will not be repeated here. On the question of whether the claimant satisfied the requirements of Rule 130.102(d) for making a good faith effort to obtain employment commensurate with her ability to work, the claimant had not returned to work, had not been enrolled in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission or a private provider, and had not looked for work. The claimant's position was that she did not have an ability to work in any capacity during the qualifying period for the fourth or fifth quarters, which extended, respectively, from April 13 to July 12, 2000, and from July 13 to October 11, 2000. There were reports from Dr. S, the claimant's treating doctor, and Dr. B, her pain management doctor, to the effect that the claimant was permanently disabled and unable to perform any gainful employment. In addition to the reports from those doctors, there was a report from the required medical examination doctor, Dr. M, dated December 8, 2000, which concluded that the claimant was capable of returning to light active work which does not require the claimant to use her hands repetitively. Also in evidence were three functional capacity evaluations performed during the year 2000 (dated March 29, May 30, and September 12), which found that the claimant could work at a sedentary level. There was ample evidence in the record from which the hearing officer could determine that there were other records which "show that the injured employee is able to return to work." We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

In reference to the issue of whether the claimant has permanently lost entitlement to SIBs because of nonentitlement to SIBs for 12 consecutive months, the hearing officer made Finding of Fact No. 2, as follows:

2. As there were no SIBS applications filed for the second and third quarters, the claimant is not entitled to SIBS for the second and third quarters.

Additionally, he made Conclusions of Law Nos. 3 and 6, as follows:

3. The claimant did not apply for [SIBs] during the second and third quarters and, thus, is not entitled to [SIBs] for the second and third quarters.
6. The claimant has personally lost entitlement to [SIBs] because she was not entitled for 12 consecutive months.

Based upon our previous decisions, the hearing officer has misapplied the law to this case. As we held in Texas Workers' Compensation Commission Appeal No. 981429, decided July 29, 1998, evidence that a claimant failed to file an Application for [SIBs] (TWCC-52) does not establish nonentitlement to SIBs per se. We referred to Texas Workers' Compensation Commission Appeal No. 950723, decided June 23, 1995, where we stated:

[T]he Appeals Panel noted that while Section 408.143(c) provides that a failure to file a TWCC-52 statement relieves the carrier of liability for SIBS for the period during which a statement is not filed, that section does not provide that failure to file a TWCC-52 statement causes one to lose entitlement to benefits and that it is the cessation of entitlement to SIBS, not the failure to receive benefits, that triggers Section 408.146(c).

While there was evidence in the record from which the hearing officer could possibly have concluded that the claimant in this case was working at her preinjury wage throughout the qualifying periods for the first, second, and third SIBs quarters, and, thus, was not entitled to receive SIBs during those quarters, those issues were not properly before the hearing officer for determination. There has never been an actual determination of nonentitlement for the first, second, and third quarters. We have no recourse but to reverse Finding of Fact No. 2 and Conclusions of Law Nos. 3 and 6, and so much of the decision as provides that "[t]he claimant has personally lost entitlement to [SIBs] because she was not entitled for 12 consecutive months." We render a new decision on this issue as stated in our final paragraph.

The decision and order of the hearing officer that the claimant is not entitled to fourth and fifth quarter SIBs is affirmed. We reverse the decision and order as it pertains to permanent loss of entitlement to SIBs and render a decision that "[t]he claimant has not

permanently lost entitlement to [SIBs] in accordance with Section 408.146(c) because there has been no determination that she has not been entitled to [SIBs] for 12 consecutive months.”

Michael B. McShane
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge