APPEAL NO. 011144
FILED JULY 03, 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. With regard to the issues before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the eighth quarter and that the appellant (carrier) is relieved of liability for SIBs for a certain period of time (11 days) because of the claimant's failure to timely file his SIBs application. The latter issue has not been appealed and has become final pursuant to Section 410.169.

The carrier appeals the entitlement to SIBs determination principally on the ground that the claimant had failed to offer into evidence his vocational rehabilitation plan (VRP) and therefore had failed in his burden of proof. The file does not contain a response from the claimant.

DECISION

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.

The parties stipulated that the claimant had a injury, that the claimant has a 22% IR, that IIBs have not been commuted, and that the qualifying period for the eighth quarter was from October 7, 2000, through January 5, 2001. The hearing officer's determination that the claimant has not returned to work as a direct result of his impairment has not been challenged and will not be addressed further. At issue in this case 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)(4); Rule 130.102(b)(2).

Rule 130.102(d)(2) 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 enrolled in, and satisfactorily participated in, a full-time VRP sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying period. Rule 130.101(8) defines the phrase “full time vocational rehabilitation program” as follows:

> Any program, provided by the [TRC] . . . , for the provision of vocational rehabilitation services designed to assist the injured employee to return to

> work that includes a [VRP]. A [VRP] includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.

In evidence in this case is a Statement of Enrollment dated October 19, 2000, from the college the claimant is attending certifying that the claimant was enrolled full time during the semester of the qualifying period, a letter dated March 9, 2001, from the claimant's TRC vocational rehabilitation counselor regarding efforts to enroll the claimant at the college, and a TRC letter of verification dated March 9, 2001, stating that the claimant has an active case with TRC and is pursuing college training toward gainful employment and that the claimant has "worked with TRC during Fall 2000[;] also in college."

The hearing officer, in the Statement of the Evidence, comments:

> The Carrier did not provide any Appeal Panel decisions to support his [sic, its] contention that Claimant was required to introduce a "plan" from the TRC into evidence in order to meet the requirements of Rule 130.101(8), and no decisions have been found by this hearing officer after diligent inquiry. It was clear that the TRC was paying for Claimant's college classes in connection with a [VRP] although the evidence on that issue was, admittedly, fairly limited. To believe that the TRC would pay for Claimant's tuition, fees, and books at a college without TRC having some internal plan, objectives, or goals is not a reasonable assumption.

In Texas Workers' Compensation Commission Appeal No. 010483-S, decided April 20, 2001, we noted that the preamble to Rule 130.102(d)(2) states that any program provided by the TRC should be considered a full-time program. We further quoted from public comment on how satisfactory participation should be interpreted stating:

> If the injured employee wishes to show that this provision applies, the injured employee can secure information from his or her counselor with the [TRC] to supply to the carrier. If the insurance carrier believes the information provided is not sufficient to meet the requirement of this provision, the insurance carrier can dispute entitlement. The decision of whether or not the injured employee has satisfactorily participated in a TRC sponsored program will be made by the finder of fact during the dispute resolution process.

In this case, the claimant supplied information from the college regarding his enrollment and information from the TRC counselor regarding the claimant's enrollment in the VRP. As suggested in the comment quoted above, if the carrier does not believe that the information the claimant has supplied is sufficient to meet the requirement of Rule 130.102(d)(2) the carrier can dispute the entitlement, which the carrier has done in this case. The decision then of whether the claimant has satisfactorily participated in a full time

VRP "will be made by the finder of fact [the hearing officer] during the dispute resolution process." The hearing officer has done so and has explained his rationale in so finding. Parenthetically, we would note that this is a matter that should be resolved prior to the CCH and this information should have been requested or obtained at the benefit review conference.

The hearing officer's decision is supported by the evidence and is not incorrect as a matter of law. Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur in the decision and write separately to point out that in Texas Workers' Compensation Commission Appeal No. 010952-S, decided June 20, 2001, the majority affirmed a hearing officer's determination of entitlement to supplemental income benefits (SIBs) under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) for full-time participation in a vocational rehabilitation program (VRP) sponsored by the Texas Rehabilitation Commission (TRC). In Appeal No. 010952-S, the evidence of TRC sponsorship came from the claimant's testimony and the majority determined that this testimony provided minimally sufficient support for the determination that the claimant satisfied the good faith requirement under Rule 130.102(d)(2). While Appeal No. 010952-S cautioned against overreading the decision, the significance thereof in this instance, is that it determined that documentary evidence of TRC sponsorship was not absolutely required and it necessarily follows from that determination that, contrary to the carrier's assertions here, the claimant is not required to introduce the VRP in evidence in order to establish SIBs entitlement.

Elaine M. Chaney
Appeals Judge