

APPEAL NO. 011185
FILED JULY 16, 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 May 9, 2001. With regard to the issue before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the sixth compensable quarter. The hearing officer's determination that the claimant's unemployment during the qualifying periods for the sixth SIBs quarter was a direct result of the claimant's impairment from the compensable injury has not been appealed and has become final. The claimant appeals the determination that she is not entitled to SIBs, contending that the hearing officer erred in application of the law and challenges the sufficiency of the evidence. The respondent (carrier) responds urging affirmance.

DECISION

Affirmed.

The parties stipulated that the carrier paid SIBs for the five previous quarters. The hearing officer determined that the qualifying period for the sixth quarter began on October 19, 2000, and ended on January 17, 2001. The sixth quarter in this case is subject to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). The claimant proceeded on a total inability to work in any capacity theory.

Sections 408.142(a) and 408.143, and Rule 130.102 provide the statutory and regulatory requirements for entitlement to SIBs. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

- (4) 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[.]

At issue here is whether other records show that the injured employee is able to return to work. Although the claimant testified to what she could or could not do, in her opinion she was unable to do any work. Her treating physician, Dr. M, coupled with the records of other doctors he referred her to for medical treatment, substantiated her inability to work. The carrier disputed the claimant's entitlement to SIBs based on the medical report produced by its doctor, Dr. B. The hearing officer determined that there were other records from Dr. B showing the claimant did have an ability to work. The hearing officer states "Such a record overcomes the records provided by other doctors which state with

specificity that the injured worker cannot work, due to the impairment resulting from his or her compensable injury." The hearing officer further stated "Moreover, the Hearing Officer has little discretion in reaching a Decision."

Whether Dr. B's report constitutes a record showing that claimant has an ability to work is a fact question for the hearing officer to resolve.

We would note the hearing officer does have some discretion in making this fact determination. "The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

However, in the present case, the hearing officer found that Dr. B's records did show the claimant had an ability to work. We would only set aside such a factual determination of the hearing officer if we found it so against the great weight and preponderance of the evidence as to clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We do not find that to be the case here.

Accordingly, the hearing officer's decision and order are affirmed.

Gary A. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Panel

Susan M. Kelley
Appeals Judge