APPEAL NO. 011349
FILED AUGUST 01, 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 May 29, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 17th and 18th quarters. The claimant appealed and the respondent (carrier) responded.

DECISION

As reformed herein, 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 17th and 18th quarters. 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). The SIBs criterion in dispute is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the 17th and 18th quarters. The parties stipulated that the qualifying period for the 17th quarter began on August 3, 2000, and ended on November 1, 2000, and that the qualifying period for the 18th quarter began on November 2, 2000, and ended on January 31, 2001. The hearing officer's Finding of Fact No. 1(I), regarding the parties' stipulation on the qualifying period for the 18th quarter, incorrectly states that the qualifying period for the 18th quarter ended on January 31, 2000, which we believe to be a typographical error, and that finding is hereby reformed to reflect that the qualifying period for the 18th quarter ended on January 31, 2001, which is what was stipulated to by the parties.

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 first week of the 13-week qualifying period begins on the first day of the qualifying period. Texas Workers' Compensation Commission Appeal No. 002163-S, decided November 1, 2000.

The claimant contended that he had no ability to work during the qualifying period for the 17th quarter. The claimant's treating doctor has reported that the claimant is totally disabled due to the compensable injury to his knees; however, during the qualifying period for the 17th quarter the claimant was examined by a doctor at the carrier's request and that doctor reported that the claimant is able to perform sedentary work, and a physical therapist who

performed a functional capacity evaluation on the claimant during the qualifying period for the 17th quarter concluded that the claimant qualifies for the light-work category. The hearing officer's finding that during the qualifying periods for the 17th and 18th quarters the claimant had a sedentary ability to work 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 claimant testified that during the qualifying period for the 17th quarter he did not look for any work. He said that during that qualifying period he attended a college computer course but dropped out of the course after a few weeks because of knee pain. He said that he enrolled in that course on his own without any sponsorship from the Texas Rehabilitation Commission (TRC), and there was no evidence that the course was a full-time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services. The claimant mentions the college course in his appeal. We conclude that Rule 130.102(d)(2) and (d)(3), regarding full-time vocational rehabilitation programs sponsored by the TRC and provided by a private provider, respectively, do not apply to the circumstances of this case.

The claimant correctly notes in his appeal that the qualifying period for the 17th quarter was misstated on the Application for SIBs (TWCC-52) for the 17th quarter, with the beginning and ending dates noted thereon being earlier than what was stipulated to at the CCH. However, because the claimant claimed a total inability to work during the qualifying period for the 17th quarter and did not actually begin looking for work until November 16, 2000, which was well into the qualifying period for the 18th quarter, the claimant has not shown that the mistaken dates on the TWCC-52 for the 17th quarter present a basis for reversal. *Compare* Texas Workers' Compensation Commission Appeal No. 010617-S, decided May 15, 2001, where a mistake by a carrier in noting the qualifying period on a TWCC-52 did make a difference because the injured employee was looking for work during the qualifying period and a determination regarding a weekly job search had to be made.

The correct dates of the qualifying period for the 18th quarter are noted on the TWCC-52 for the 18th quarter. The claimant's TWCC-52 for the 18th quarter fails to document a job search in five weeks of the 13-week qualifying period. The claimant states that he was not told he had to look for work until he attended a benefit review conference on November 15, 2000, and that he was unaware of any report regarding sedentary-work ability until after the qualifying period for the 17th quarter. In response to comments regarding the proposed SIBs rules, the Texas Workers' Compensation Commission noted, with regard to the good faith, no-ability-to-work provision that became effective January 31, 1999 (formerly Rule 130.102(d)(3), renumbered Rule 130.102(d)(4) effective November 28, 1999), that nothing in the proposed rules addresses notice to an injured employee regarding a release to return to work; that the ability to work is something that can exist with or without medical records and is ultimately a decision of the finder of fact in the event of a dispute; and that the language of the provision is tied to the ability to work and not to any "notice" requirement. 24 Tex. Reg. 406 (1999).

The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with his ability to work during the qualifying periods for the 17th and 18th quarters and concluded that the claimant is not entitled to SIBs for the 17th and 18th quarters. 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, as reformed herein, are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge