

APPEAL NO. 011437
FILED AUGUST 1, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on May 31, 2001, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter and that were she entitled, the respondent (carrier) would be relieved of liability for payment of SIBs for the period from December 30, 2000, through January 14, 2001, due to the claimant's late filing of her application. The claimant has requested our review of the adverse SIBs entitlement determination. The carrier's response urges the sufficiency of the evidence to support the challenged determination.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the third quarter. Section 408.142 provides, among other things, that to be entitled to SIBs, the employee must have attempted in good faith to obtain employment commensurate with the employee's ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an 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 record shows that the injured employee is able to return to work[.]"

The claimant contended that during the third quarter qualifying period, September 17 through December 16, 2000, she had no ability to work; that her doctor had her off work and prescribed medication for her; that she was going through a very lengthy approval process for cervical spine surgery, which was approved on November 14, 2000; and that she underwent the surgery on February 13, 2001. As for the requirements of Rule 130.102(d)(4), the claimant did not identify below any report of her treating doctor or any other doctor which she felt satisfied the requirement for a narrative report specifically explaining how the injury causes a total inability to work. The carrier introduced a functional capacity evaluation (FCE) report of March 3, 2000, reflecting that the claimant could perform work in the "light" category and a June 10, 2000, FCE report stating that the claimant is currently functioning at the medium lifting capacity demand level. The claimant discounted the probative value of these reports because they were written prior to the qualifying period. The claimant's essential contention was that her inability to work during the qualifying period was established by the fact that her surgeon's recommendation for spinal surgery was being processed throughout that period and she relies on Texas Workers' Compensation Commission Appeal No. 982569, decided December 17, 1998. This reliance is misplaced since not only was that case decided under the "old" SIBs rules

but the claimant in that case actually underwent the surgery during the filing period. We regard the decision in Texas Workers' Compensation Commission Appeal No. 000553, decided May 1, 2000, as dispositive of the claimant's contentions concerning pending surgery and meeting the "good faith" requirement as defined in Rule 130.102(d)(4).

We are satisfied that the challenged determination of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge