

APPEAL NO. 011525
FILED AUGUST 9, 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 June 7, 2001. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first, second, and third quarters.

The claimant appeals, contending that she "had no ability to work" based on her treating doctor's reports, and that a subsequent injury (on the first day of the first quarter qualifying period) aggravated her original compensable injury of _____, to the extent that she had no ability to work "at any level." The respondent (carrier) responds, urging affirmance and arguing that the claimant's unemployment was not a direct result of impairment from the compensable injury (a comment which was untimely as an appeal).

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 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 hearing officer's finding that the claimant's unemployment during the applicable quarter was a direct result of the impairment from the compensable injury was not timely appealed.

The parties stipulated that the claimant sustained a compensable (left elbow, cervical spine, and lumbar spine) injury on _____; that IIBs were not commuted; and that the qualifying period for the first quarter began on April 7, 2000, with the qualifying period for the third quarter ending on January 4, 2001. The claimant has not had any surgery and proceeds on a total inability to work basis. The claimant has been treating with Dr. R, a chiropractor, since her injury and, as the hearing officer notes, "her condition is worse at the present time." The claimant was released to return to light duty on March 29, 2000 (nine days before the first quarter filing period).

What makes this case somewhat unusual is that the claimant returned to work in a light-duty position and sustained another injury to essentially the same body parts on _____ (the first day of the first quarter qualifying period). In evidence are a number of reports from Dr. R stating that while the claimant had "some lower back pain before [the _____] accident" the symptomatology "is much worse now." The claimant pursued the _____,

injury as a new injury with disability, and at a CCH held on April 4, 2001, another hearing officer determined that the claimant had not sustained a compensable injury and that she had an ordinary disease of life in the form of degenerative disc disease. That decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 010899, decided May 30, 2001. The claimant presently contends that her _____, injury aggravated her compensable _____, injury to the extent that she had a total inability to work, and that she is entitled to SIBs.

Neither party, nor the hearing officer, references Rule 130.102(d)(4), which provides that an injured employee has made a good faith effort to obtain employment commensurate with his or her ability to work if (1) the employee has been unable to perform any type of work in any capacity; (2) the employee has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work; and (3) no other records show that the injured employee is able to return to work.

The hearing officer found that the claimant "had some ability to work during the respective qualifying periods," and in his Statement of the Evidence references a letter dated January 8, 2001, from Dr. R. In her appeal, the claimant references a report dated November 8, 2000, from Dr. R, which states:

Yes, she has had a previous injury to the lumbar spine. However, she was able to return to work after the previous injury. Since the injury to the lumbar area on _____, [claimant's] condition has been deteriorating (increased muscle spasms, and tenderness of the lumbar spine and the paraspinal musculature with left leg weakness and burning pain in the feet) and she has not been able to return to work at any level.

We would note that many of Dr. R's narratives use the same or similar language, and the hearing officer could find that that language was not a narrative "which specifically explains how the [compensable] injury causes a total inability to work."

There was conflicting evidence presented at the hearing on the issues. The hearing officer weighed the credibility and inconsistencies in the evidence, and the hearing officer's determinations on the issues are 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).

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge