

APPEAL NO. 011558
FILED AUGUST 21, 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 June 12, 2001. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 11th, 12th, 13th, 14th, 15th, and 16th quarters, and that the respondent (carrier) is relieved of liability for SIBs for the 11th through 16th quarters because of the claimant's failure to timely file an Application for [SIBs] (TWCC-52) for those quarters. In his appeal, the claimant asserts error in each of those determinations and contends that the hearing officer erred in admitting the carrier's exhibits. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the 11th, 12th, 13th, 14th, 15th, and 16th quarters. At the hearing, it was undisputed that the claimant had neither returned to work nor looked for work during the time period in question and that the claimant based his entitlement to SIBs for the quarters in dispute on an assertion of total inability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (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. The hearing officer determined that the claimant did not provide a narrative from a doctor specifically explaining how the injury caused a total inability to work. In addition, the hearing officer noted that the carrier had provided some evidence that the claimant may have been able to work with restrictions in the relevant qualifying periods. Whether or not the claimant supplied a narrative was a question of fact for the hearing officer. The hearing officer's determination that the claimant did not provide a narrative pursuant to Rule 130.102(d)(4), and is therefore not entitled to SIBs for the 11th through 16th quarters is supported by sufficient evidence and it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant also asserts that the hearing officer committed error by admitting carrier exhibits which were not properly exchanged. Rule 142.13(c) requires the parties to exchange documentary evidence no later than 15 days after the benefit review conference (BRC). In the instant case, the record indicates that the carrier's attorney sent the claimant's attorney a letter indicating that the carrier intended to use the same exhibits it had used at a prior hearing relating to entitlement to SIBs and that if the claimant's attorney needed additional copies of

the documents he should request them. The documents were not enclosed with the letter. At the hearing, the claimant objected to the admittance of the carrier's exhibits on the grounds of no timely exchange. The hearing officer overruled the objection and admitted the carrier's exhibits. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

We have previously determined that a party's exchange of evidence in the course of preparing for a hearing regarding eligibility for a prior quarter of SIBs does not satisfy the exchange requirement for a proceeding concerning eligibility for a subsequent quarter of SIBs. Texas Workers' Compensation Commission Appeal No. 981963, decided October 1, 1998; Texas Workers' Compensation Commission Appeal No. 971201, decided August 1, 1997. Thus, the hearing officer abused her discretion in admitting the carrier's exhibits which were not exchanged; however the hearing officer's error in the admission of those exhibits does not rise to the level of reversible error. The hearing officer determined, and we affirmed the determination, that the claimant did not satisfy the requirement of introducing a narrative that complies with Rule 130.102(d)(4). The hearing officer determined that the claimant had not met his burden of proof to establish a total inability to work; thus, the hearing officer's erroneous admission of documents from the carrier that were at most "other records" showing an ability to work was not reasonably calculated to cause and probably did not cause rendition of an improper judgment in that the hearing officer determined that the claimant's evidence was insufficient to constitute a narrative and that determination alone supports the determination that the claimant is not entitled to the SIBs at issue. Thus, the hearing officer's error in the admission of the carrier's exhibits was harmless.

The claimant additionally asserts that the hearing officer erred in determining that the carrier is relieved of liability for SIBs because the claimant failed to timely file a TWCC-52 for the 11th through 16th quarters. There is no question that the claimant's TWCC-52s were not timely filed. The claimant contended that his late filing was excused because the issue of whether he had permanently lost entitlement to SIBs under Section 408.146 and Rule 130.106 had to be overturned in the district court before he was required to file for subsequent quarters of SIBs. The hearing officer determined that the claimant did not sustain his burden of proving that one of the exceptions to the carrier being relieved of liability for a claimant's failure to timely file his application for SIBs recognized in Rule 130.105(a) was satisfied in this case. Our review of the record does not demonstrate that the hearing officer erred in so finding. Thus, no basis exists for us to disturb the determination that the carrier would be relieved of liability for SIBs for the 11th through 16th quarters, if the claimant had been found entitled those benefits.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge