

APPEAL NO. 012219
FILED OCTOBER 30, 2001

Following a contested case hearing held in San Antonio, Texas, on August 15, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant's (claimant) compensable injury of _____, does not extend to include diabetes, an aggravation of preexisting diabetes, or a low back injury; that the claimant is not entitled to 8th and 9th quarter supplemental income benefits (SIBs); and that the respondent (carrier) is not relieved of liability for any portion of the 8th quarter SIBs because of a failure of the claimant to timely file an Application for [SIBs] (TWCC-52) for the 8th quarter. The claimant appeals the injury and SIBs determinations on evidentiary sufficiency grounds. The carrier's response urges the sufficiency of the evidence to support the challenged factual determinations.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable left lower extremity injury; reached maximum medical improvement on January 6, 1998, with an impairment rating of 19%; and did not commute any impairment income benefits. The parties further stipulated that the qualifying periods for the 8th and 9th quarters commenced on July 27, 2000, and ended on January 24, 2001. The claimant testified that she did not have the onset of diabetes until 1998, notwithstanding medical reports reflecting that she had been a diabetic since 1996; that her diabetes increased from the pain she experienced in the pain management program which she could not complete; that she had several operations on her left ankle fracture and has pain in her left leg which goes up into her lower back; that she has been treated with a spinal cord stimulator and injections, as well as a variety of medications for her pain, depression, high blood pressure, and diabetes; that the medications make her drowsy; and that she cannot drive very far. She indicated that she did make the job search contacts listed on the TWCC-52 forms she filed for the 8th and 9th quarters. With respect to the 8th quarter qualifying period, the claimant stated that she could not commence a job search before October 5, 2000, because she was sick from diabetes; that she attempted to work for about one week during the 8th quarter qualifying period but had to quit because of her frequent urination from diabetes; that she made 27 contacts during the 9th quarter qualifying period; and that she "worked with" a Texas Rehabilitation Commission counselor but had no release to work from her doctor. Her theory of entitlement to SIBs for the 8th quarter was that for the first part of the qualifying period she had no ability to work, albeit from her diabetes, and that she made a sufficient search for jobs for the remainder of that qualifying period. As for the qualifying period for the 9th quarter, she contended that she made a sufficient number of job search contacts.

The carrier's job specialist, Mr. S, testified to the efforts he made to verify the job search contacts listed on the claimant's TWCC-52 forms. He said that, in his opinion, 11 of 24 claimed contacts were not made and that a number of the jobs the claimant said she applied for were not within her sedentary work restrictions. He also stated that the claimant was not a client of the Texas Workforce Commission. His report on his investigation was also in evidence.

The claimant had the burden to prove by a preponderance of the evidence that her compensable left lower extremity injury extended to her diabetes and low back condition. Obviously, expert medical evidence would be required to meet this burden of proof. Given the state of the evidence and the hearing officer's role as the trier of fact and the sole judge of the weight and credibility of the evidence, we are satisfied that his findings on the extent-of-injury issues are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The requirements for entitlement to SIBs are found in Sections 408.142 and 408.143 of the 1989 Act and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b)-(d) (Rule 130.102(b)-(d)) and include the requirement that during the qualifying periods the claimant have made a good faith attempt to obtain employment. Again, we are satisfied that the hearing officer did not err in finding that the claimant failed to establish that during both qualifying periods she made the requisite good faith attempt to obtain employment commensurate with her ability to work.

The claimant asks that we consider the copy of her TWCC-52 for the 9th quarter attached to her appeal because, unlike the copy she introduced at the hearing, the pages of her list of job contacts are fully copied in the attachment. She urges that we should accept the new exhibit and remand the case because in his discussion of the evidence the hearing officer indicates that had the missing evidence been before him he would have found that the claimant did make a good faith attempt to obtain employment commensurate with her ability to work during the 9th quarter qualifying period. We decline to remand this case for the hearing officer to consider this new evidence. It is clear that it is due to the claimant's lack of diligence that a complete copy of the TWCC-52 was not introduced below. See, generally, Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92459, decided October 12, 1992.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE 1
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge