

APPEAL NO. 012351
FILED NOVEMBER 13, 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 September 10, 2001. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth compensable quarter. The appellant (carrier) urges on appeal that there is no evidence to support this determination and, alternatively, that it is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

An employee is entitled to [SIBs] if on the expiration of the impairment income benefits [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
- (4) has 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)(2) (Rule 130.102(d)(2)) 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 enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying period. Rule 130.101(8) defines the phrase "full time vocational rehabilitation program" as follows:

Any program, provided by the [TRC] . . . , for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan includes, at a minimum, an employment goal, any intermediate goals,

a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan.

The evidence reflects that the claimant was originally scheduled to complete the 1,500-hour, TRC-sponsored barber school in May 2001. However, due to his own illness and the illness of his daughter, he did not actually complete the school until mid-July 2001. The carrier argues that during the qualifying period corresponding to the fifth compensable quarter, the claimant was not "actively participating" in a full-time program sponsored by the TRC and, consequently, is not entitled to SIBs. We disagree. To determine what programs are to be considered full-time vocational rehabilitation programs, we have previously turned to the preamble and comments to Rule 130.102(d)(2). As we noted in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000, the preamble to Rule 130.102(d)(2) states that any program provided by the TRC should be considered a full-time program. In this instance, the evidence, including the Individualized Performance Evaluation, TRC progress reports, and the claimant's testimony, clearly establish that the claimant was enrolled in a vocational rehabilitation program sponsored by the TRC and, based upon the unambiguous language in the preamble, that program was to be considered a full-time program.

We next address the question of whether the claimant satisfactorily participated in the full-time TRC program. That question presents a question of fact for the hearing officer to resolve. However, reference to the preamble is again instructive on how the issue of satisfactory participation is to be resolved. In response to a comment that the phrase "satisfactorily participated in" should be defined, the Texas Workers' Compensation Commission (Commission) noted that the TRC uses a variety of retraining programs, and that each of the programs could have different durations and methods to evaluate satisfactory participation; it concluded that based on those differences, it would be difficult to define the phrase in a way that would apply to each situation. The hearing officer determined that the claimant satisfied the good faith requirement for entitlement to SIBs by his enrollment and satisfactory participation in a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are 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). We are satisfied that the evidence, and, more specifically, the progress reports prepared by the TRC documenting the claimant's satisfactory participation in a TRC-sponsored program during the period in question, sufficiently support the hearing

officer's determination that the claimant satisfied the good faith requirement for entitlement to SIBs.

The carrier points out in its appeal that the documentation supporting the claimant's position that he was satisfactorily participating in a full-time vocational rehabilitation program was not submitted with his Application for [SIBs] (TWCC-52). In Texas Workers' Compensation Commission Appeal No. 010952-S, decided June 20, 2001, we noted that by imposing a requirement that the claimant send supporting documentation along with the TWCC-52 to the carrier, the Commission was aiming to ensure that the carrier would receive the information supporting the application close in time to the date it received the application so that an informed decision of whether to pay the benefits or to dispute could be made. While the better practice would be to submit the supporting documentation to the carrier along with the TWCC-52, the failure to include this information with the TWCC-52 precludes later exchange and consideration of this information. Accordingly, we perceive no reversible error in considering the admitted documents in determining whether the claimant is entitled to SIBs for the fifth quarter.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **TIG PREMIERE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**FRANK A. MONTEMORANO
5205 NORTH O'CONNOR BLVD.
IRVING, TEXAS 75039.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge