

APPEAL NO. 013069
FILED JANUARY 28, 2002

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 November 5, 2001, with the record closing on November 8, 2001. The hearing officer resolved the disputed issues by concluding that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 10th, 11th, and 12th quarters. The claimant appealed and requested reversal, essentially arguing that the evidence presented at the CCH established that he had no ability to work. In its response, the respondent (carrier) replied that the determinations of the hearing officer were supported by sufficient evidence and were not contrary to the great weight and preponderance of the evidence and should be affirmed.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the 10th, 11th, and 12th quarters. 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 benefit [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an impairment rating [IR] 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)(4) (Rule 130.102(d)(4)) states that the "good faith" criterion will be met 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[.]

It was undisputed that the claimant sustained a compensable injury on _____; that his IR was greater than 15%; and that he did not elect to commute any portion of his impairment benefits. The claimant contends that he had no ability to work during the qualifying periods of the 10th, 11th, and 12th quarters. The claimant testified that he did not search for employment during the qualifying periods for the 10th and 12th quarters. The evidence revealed that he performed a limited job search during the qualifying period for the 11th quarter; however, he did not look for employment every week of the qualifying period as required. Rule 130.102(e).

The claimant testified that, during the qualifying periods at issue, he could not sit for long periods of time and that if he did sit and work for part of the day he "may be wiped out for 3 to 5 days." The hearing officer did not make a specific finding regarding a narrative; however, there was a finding that the designated doctor found that the claimant could work. In a medical record dated May 15, 2001, the designated doctor, Dr. O, stated that "as far as sedentary work [claimant] is unable to do this on an eight hour per day basis, he would have to change positions routinely and possibly even have to lie down." Dr. O further clarified in a report dated September 18, 2001, that "[claimant] could return to some type of employment at home where he could routinely change positions and even possibly lie down." Further, Dr. W, the physician who performed the required medical examination, in a record dated November 14, 2000, gave the opinion that the claimant should perform completely sedentary work and that he could perform such tasks as typing, inputting information into the computer, and doing paperwork, but that the claimant should not do any excessive standing, stooping, kneeling, or bending nor should he lift in excess of 10 pounds.

The hearing officer found that during the relevant qualifying periods the claimant had an ability to work and that he did not in good faith seek any employment during the relevant qualifying periods. The hearing officer concluded that the claimant is not entitled to SIBs for the 10th, 11th, and 12th quarters. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established.

The claimant also appeals the finding that he failed to cooperate with a private vocational rehabilitation specialist retained by the carrier. The claimant contends that his treating doctor told him that he could not return to work; he argues that Dr. O concurred and, therefore, he was not required to make job searches. In evidence were several job leads provided to the claimant by the private vocational rehabilitation specialist. Correspondence from the private vocational rehabilitation specialist, dated February 23, 2001, reflects that the claimant took the position that he was not able to look for work because of his physical abilities.

In his appeal, the claimant also contends that his financial recovery for wrongful termination against his employer, a component of which was future wages, would not

represent a double recovery. While the hearing officer discussed this matter, she did not make a specific finding regarding this issue. The ability to work is determinative of the result, and the issue of double recovery need not be addressed.

Finally, the claimant argues that the hearing officer exhibited bias against him and in favor of the carrier. Our review of the record does not reveal any bias against the claimant or in favor of the carrier. A hearing officer's weighing of the evidence so as to rule in favor of one party and against another is not, in and of itself, evidence of bias. Texas Workers' Compensation Commission Appeal No. 941105, decided September 29, 1994. We do not perceive error on the part of the hearing officer, and we reject the claimant's argument regarding bias.

The hearing officer's decision is supported by sufficient evidence and 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 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge