

APPEAL NO. 021942
FILED SEPTEMBER 16, 2002

Following a contested case hearing held in Fort Worth, Texas, on July 16, 2002, 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 (claimant) is not entitled to supplemental income benefits (SIBs) for the 18th, 19th and 20th quarters. The claimant has appealed these adverse determinations on evidentiary sufficiency grounds and further asserts error in the hearing officer's subsuming as an issue and making findings on the timeliness of the claimant's filings of his applications for SIBs. The respondent (carrier) has filed a response urging the sufficiency of the evidence to support the challenged determinations and the absence of legal error.

DECISION

Affirmed as reformed.

The requirements for eligibility for SIBs are set out in Sections 408.142 and 408.143 of the 1989 Act and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102 (Rule 130.102)). The hearing officer did not error in finding that, during the qualifying periods at issue, the claimant failed to make a good faith attempt to obtain employment commensurate with his ability to work and that his underemployment was not a direct result of his impairment from the compensable injury. The claimant contended that he had no ability to work during the three qualifying periods at issue because the medical evidence of his inability to work during those periods was unchanged from the medical evidence which supported the earlier determinations that he had no ability to work during the qualifying periods for the 16th and 17th quarters. However, the record reflects that the claimant, who did not appear for the hearing and whose attorney testified, had been ordered by the Texas Workers' Compensation Commission (Commission) to undergo certain medical testing in order to ascertain whether there had been any changes in the medical conditions which supported his entitlement to SIBs for the 16th and 17th quarters and that he refused to submit to the testing. The hearing officer determined, in essence, that the claimant's refusal to undergo the Commission-ordered medical testing to determine his ability to work during the qualifying periods at issue was tantamount to bad faith and compelled a finding that the claimant failed to make a good faith attempt to obtain employment commensurate with his ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the hearing officer's factual determinations related to the claimant's entitlement to SIBs are sufficient to support the conclusion of law that the claimant is not entitled to SIBs for the 18th, 19th, and 20th quarters and that they are not so against the great weight and preponderance of the evidence as to be clearly

wrong or manifestly unjust and they are affirmed. 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).

No disputed issue concerning the timeliness of the filing of the claimant's SIBs applications for the quarters at issue was properly before the hearing officer. See Rule 142.7. Accordingly, we reform the hearing officer's decision to strike Findings of Fact Nos. 8, 9, and 10.

The decision and order of the hearing officer, as reformed, is affirmed.

The official name of the carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I would reverse the decision of the hearing officer and render a decision that the claimant is entitled to SIBs for the 18th, 19th, and 20th quarters. This would be consistent with our decision in Texas Workers' Compensation Commission Appeal No. 020302, decided March 26, 2002, where on the same medical evidence as in the present case we reversed a hearing officer who denied SIBs and rendered a decision that the claimant was entitled to SIBs for the 16th and 17th quarters. I find nothing in

the 1989 Act or in the Commission's rules which authorize a hearing officer to deny SIBs based upon a claimant's failure to undergo medical testing, even Commission-ordered medical testing. Thus, I believe the hearing officer's denial of SIBs on this basis exceeded his legal authority.

Gary L. Kilgore
Appeals Judge