

APPEAL NO. 030521
FILED APRIL 4, 2003

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 January 31, 2003. The hearing officer determined that the appellant/cross-respondent's (claimant) impairment rating (IR) is 15% and that he is not entitled to supplemental income benefits (SIBs) for the 1st compensable quarter. The claimant appeals the SIBs determination. The respondent/cross-appellant (carrier) appeals the IR determination and responds to the claimants appeal, urging affirmance of the SIBs determination.

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 benefit [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.

The hearing officer explained that although the claimant was underemployed during the qualifying period in question, there was no indication that, as a result of the compensable injury, he was restricted in the number of hours he could work. The hearing officer concluded that the claimant, who did not look for work during the qualifying period, had not satisfied the good faith requirement for SIBs entitlement. Whether the claimant satisfied the good faith requirement for SIBs entitlement was a factual question for the hearing officer to determine. Nothing in our review of the record indicates that the hearing officer's decision is 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).

The hearing officer did not err in determining that the claimant's IR is 15%, in accordance with the designated doctor's certification and his subsequent clarification. The carrier asserts that it was improper for the designated doctor to rate the claimant under DRE Cervicothoracic Category III of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (Guides) because there were no objective clinical findings supporting a permanent radiculopathy and there was no indication that radiculopathy was present at the time of the certifying exam. Page 3-104 of the Guides provides:

DRE Cervicothoracic category III: Radiculopathy

Description and verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, 4, Table 71, p. 109).

The designated doctor stated in his initial report that based upon his examination of the claimant and his review of the medical records, which included results from an EMG performed on June 28, 2001, there was evidence of radiculopathy present and that "the patient fits a DRE Cervicothoracic Category III." In his subsequent letter of clarification, the designated doctor confirmed the 15% IR. The Guides instruct that, if upon examination, evidence of radiculopathy is present, a neurologic impairment *may* be verified by electrodiagnostic or other criteria. We do not read this instruction as requiring electrodiagnostic verification of radiculopathy where, as here, the certifying doctor notes that the patient exhibited signs of radiculopathy during the examination. However, we note that the designated doctor noted that an EMG performed approximately eight months prior to the certifying examination revealed radiculopathy in the left upper extremity.

Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Texas Workers' Compensation Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. See *also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. We perceive no error in the hearing officer's determination that the claimant's IR is 15%, in accordance with the opinion of the designated doctor.

The hearing officer's decision and order is affirmed.

The true corporate name of the insurance carrier is **FREMONT INDUSTRIAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Gary L. Kilgore
Appeals Judge