

APPEAL NO. 031424
FILED JULY 16, 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 April 23, 2003. The hearing officer determined that the appellant's (claimant) impairment rating (IR) is 16%, as stipulated by the parties; that the claimant is not entitled to supplemental income benefits (SIBs) for the first six quarters, beginning July 17, 2001, through January 13, 2003; and that the claimant has permanently lost entitlement to SIBs because she was not entitled to SIBs for four consecutive quarters. The claimant appeals, asserting that the evidence shows that she did not have any ability to work during the qualifying periods of the first through sixth quarters, that she was entitled to SIBs for those quarters, and that she has not permanently lost entitlement to SIBs. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and rendered as to direct result; affirmed as to nonentitlement to SIBs for quarters one through five, as noted by the hearing officer; affirmed as to nonentitlement to SIBs for quarter six, on other grounds; and affirmed as to permanent loss of entitlement to SIBs.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule criteria for SIBs. At issue in this case is whether the claimant met the direct result requirement of Section 408.142(a)(2) and Rule 130.102(b)(1) and the good faith job search requirements of Section 408.142(a)(4) by establishing that she was unable to work in any capacity, as specified in Rule 130.102(d)(4).

The claimant sustained a compensable right shoulder injury on _____. (The hearing officer erroneously indicates that the left shoulder was injured, but that error does not affect the results of the appeal.) The evidence shows that the claimant was treated conservatively for some time, and ultimately had surgery on July 17, 2002. The claimant testified that neither physical therapy nor the surgery had done much to improve her condition. The record contains numerous Work Status Reports (TWCC-73) that restricted the claimant from doing any work from November 27, 2000, through December 31, 2002. The claimant testified that she was unable to work, and did not look for work during the qualifying periods (April 4, 2001, through October 1, 2002). In addition, the claimant testified that she did not become aware of the 16% IR until late November 2002, and that she filed all of the Application for [SIBs] (TWCC-52) forms on December 3, 2002, when she became aware that she was eligible to apply for SIBs.

With regard to the direct result criteria, Rule 130.102(c) provides that an "injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the

compensable injury is a cause of the reduced earnings.” The Appeals Panel has held that the “direct result” criteria may be established by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the preinjury employment. Texas Workers’ Compensation Commission Appeal 950376, decided April 26, 1995; Texas Workers’ Compensation Commission Appeal No. 950771 decided June 29, 1995. We have also held that to meet the direct result requirement, one only need prove that the unemployment was a direct result of the compensable injury. See Texas Workers’ Compensation Commission Appeal No. 001786, decided September 13, 2000.

With these principles in mind, we are unable to affirm the hearing officer’s determination in this case that the claimant’s unemployment was not a direct result of her compensable injury. The claimant certainly had a significant injury, and her doctors treated her with physical therapy for an extended period, followed by shoulder surgery. Her preinjury employment was doing janitorial work, which we can conclude was beyond the “light work” ability found by the December 4, 2002, functional capacity evaluation (FCE). While direct result is normally a fact question for the hearing officer, we believe that the hearing officer’s direct result determination 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). We reverse that determination and render a new determination that the claimant’s unemployment is a direct result of her compensable injury.

Rule 130.102(d)(4) 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 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.” The hearing officer determined that there was no narrative medical report that explained how the claimant’s compensable injury resulted in a total inability to perform any work during the qualifying periods for the first through sixth quarters. In addition, it is clear from the Statement of the Evidence that the hearing officer was not satisfied that the claimant established that she had no ability to work, and he believed that some of the medical records in evidence showed that the claimant could return to work. The evidence sufficiently supports the hearing officer’s determinations for quarters one through five. As such, we will not disturb those determinations, or the determination that the claimant is therefore not entitled to SIBs for the first through fifth quarters, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain, supra.

As to the sixth quarter, we believe that the medical records pertaining to the surgery that the claimant underwent just two weeks after the start of the qualifying period, and those records covering the ensuing weeks, provide a sufficient narrative and demonstrate that the claimant did not have an ability to work. The FCE conducted on December 4, 2002, was completed more than two months after the end of the sixth quarter qualifying period, and placed the claimant at a light duty work ability more than four months after her surgery. As such, the evidence would not support the hearing

officer's determination of nonentitlement to SIBs for the sixth quarter. However, we affirm the hearing officer's determination that the claimant is not entitled to SIBs for the sixth quarter on the alternative basis that Section 408.146(c) provides that a claimant who is not entitled to SIBs for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

The determination that the claimant has permanently lost entitlement to SIBs flows from the determination of nonentitlement to SIBs for a period of 12 consecutive months. Section 408.146(c).

We reverse the determination that the claimant's unemployment is not a direct result of her compensable injury and render a new determination that the claimant's unemployment is a direct result of her compensable injury. We affirm the determination that the claimant is not entitled to SIBs for quarters one through five, as noted by the hearing officer. We affirm the determination that the claimant is not entitled to SIBs for quarter six, on other grounds. We affirm the hearing officer's determination that the claimant has permanently lost entitlement to SIBs.

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

**DENISE BLOCKBOURN
12225 GREENVILLE AVENUE
DALLAS, TEXAS 75243.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Veronica Lopez-Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge