

APPEAL NO. 031602
FILED AUGUST 5, 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 May 15, 2003. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first through eighth compensable quarters. The claimant appeals these determinations and attaches new evidence to his request for review. The respondent (carrier) urges affirmance of the hearing officer's decision and asserts that the new evidence should not be considered.

DECISION

Affirmed.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that is offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the documents that the claimant attached to his request for review, which were not offered into evidence at the hearing. Accordingly, we decline to consider these documents on appeal.

The claimant complains on appeal that the carrier's adjuster acted in bad faith by presenting only two pages of the surgical report contained in Carrier's Exhibit No. 12 when, in fact, the report actually contained 33 pages. We note that Carrier's Exhibit No. 12 contains only one page, not two pages. Additionally, the 33 pages in question, which are attached to the claimant's appeal, do not represent one surgical report; rather, they include three different versions of operative reports documenting an August 14, 2002, surgery, laboratory results, and miscellaneous medical documentation. The claimant did not object to the admission of Carrier's Exhibit No. 12 or complain that the documentation was incomplete and, accordingly, waived the right to do so on appeal. We further note that the Appeals Panel does not have jurisdiction to consider bad faith claims involving a party's representative.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the first through eighth SIBs 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 period [IIBs] 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)(4) (Rule 130.102(d)(4)), applicable in this case, 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[.]

A finding of no ability to work is a factual determination for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. With regard to the qualifying periods corresponding to the first through sixth SIBs quarters, the hearing officer found that the claimant did not provide a narrative from a doctor which specifically explains how the injury causes a total inability to work and, consequently, is not entitled to SIBs. Because the claimant did not satisfy the good faith requirement for SIBs entitlement for four consecutive quarters, the hearing officer further found that the claimant permanently lost eligibility to SIBs entitlement pursuant to Section 408.146(c) and Rule 130.106. 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 decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance National Indemnity Company**, an **impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Chris Cowan
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica Lopez-Ruberto
Appeals Judge