

APPEAL NO. 031814
FILED AUGUST 18, 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 June 19, 2003. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth compensable quarter and that, if the claimant had been entitled to SIBs, the respondent (carrier) would be relieved of liability for the period from February 18 through April 21, 2003, due to the claimant's failure to timely file an Application for [SIBs] (TWCC-52). The claimant appeals the hearing officer's decision and attaches new evidence to his request for review. In its response, the carrier contends that the claimant's appeal is not sufficient to invoke the jurisdiction of the Appeals Panel; that the new evidence submitted by the claimant on appeal should not be considered; and that the hearing officer's decision should be affirmed.

DECISION

Affirmed as reformed.

It is noted that in the Statement of the Case portion of the decision, the hearing officer incorrectly phrased the second disputed issue as being "Whether claimant has had disability?" The correct issue, as certified in the benefit review conference report was "Is the Carrier relieved of liability for SIBs because of Claimant's failure to timely file an *Application of* [SIBs] for the 6th quarter, and if so, for what period?" Throughout the remainder of the decision, however, the hearing officer referred to the issue correctly and resolved the correct issue. For clarification purposes, the second issue contained in the Statement of the Case portion of the decision is hereby reformed to reflect the following:

2. Is the carrier relieved of liability due to the claimant's failure to timely file an application for SIBs and, if so, for what period?

We initially address the carrier's assertion that the claimant's appeal is not sufficiently specific to invoke the jurisdiction of the Appeals Panel. Section 410.202(c) provides that a "request for appeal or a response must clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought." We have held that no particular form of appeal is required and that an appeal, even though terse and unartfully worded, will be considered. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992; Texas Workers' Compensation Commission Appeal No. 93040, decided March 1, 1993, and cases cited therein. We have also held that appeals that lack specificity will be treated as attacks on the sufficiency of the evidence. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. In the present case, while the claimant's request for review does not argue the specific evidence that constitutes the great weight and preponderance of the evidence contrary to the hearing officer's decision, it does clearly

state that he is appealing the hearing officer's decision and, therefore it is adequate to invoke our jurisdiction.

The claimant attached one medical document to his appeal. The document, which was not offered into evidence at the hearing, advances a theory of SIBs entitlement that was not argued by the claimant at the hearing. In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we generally will 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). Although the document in question is dated after the hearing, there is no indication that it could not have been obtained earlier or that it is so material that it would probably produce a different result. Accordingly, we decline to consider the document on appeal.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) (Rule 130.102(d)(5)), applicable in the present case, provides, in pertinent part, that an injured employee has made the required good faith effort if the employee "has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment." Subsection (e) further provides that the injured worker "who is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." Rule 130.102(e) then lists information to be considered in determining whether the injured employee has made a good faith effort, including, among other things, the number of jobs applied for, applications which document the job search, the amount of time spent in attempting to find employment, and any job search plan.

Whether the claimant satisfied the good faith requirement for SIBs entitlement as provided for in Rule 130.102(e) was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and resolves the conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). In the present case, the hearing officer determined that the claimant is not entitled to sixth quarter SIBs and that, had he been entitled, his failure to timely file the TWCC-52 would have relieved the carrier of liability for the period from February 18 through April 21, 2003. 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's decision and order are affirmed as reformed.

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

**ROBIN MOUNTAIN
ACE USA
6600 CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.**

Chris Cowan
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge