

APPEAL NO. 032087
FILED SEPTEMBER 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 (CCH) was held on July 8, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the seventh and eighth quarters. The claimant appeals, contending for the first time on appeal that the respondent (carrier) waived its right to dispute the claimant's entitlement to SIBs for the seventh and eighth quarters under Section 408.147(b) and that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(d) (Rule 130.108(d)) is an illegal rule because, in claimant's opinion, it conflicts with Section 408.147(b). The carrier asserts that the Appeals Panel cannot consider an issue that is raised for the first time on appeal and that the evidence supports the hearing officer's decision.

DECISION

Affirmed.

The only unresolved issues listed in the benefit review conference (BRC) report are whether the claimant is entitled to seventh quarter SIBs and whether the claimant is entitled to eighth quarter SIBs, and the parties agreed at the CCH that entitlement to seventh and eighth quarter SIBs were the issues in dispute. There was no disputed issue at the BRC or the CCH regarding the carrier's waiver of its right to dispute the claimant's entitlement to SIBs, and no such issue was litigated.

The claimant had the burden to prove her entitlement to SIBs. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. The SIBs criterion in issue was whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying periods for the seventh and eighth quarters. It is undisputed that the claimant did not work or look for work during the relevant qualifying periods. The claimant contended that she had no ability to work during the relevant qualifying periods. 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. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and 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.

Conflicting evidence was presented on the matter of the claimant's ability to work during the relevant qualifying periods. The hearing officer resolved the conflicts in the

evidence by deciding that the claimant did not establish that she was unable to perform any work at all during the relevant qualifying periods and that the claimant did not make a good faith effort to seek employment during the relevant qualifying periods. The hearing officer concluded that the claimant is not entitled to SIBs for the seventh and eighth quarters. 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. We conclude that the hearing officer's decision that the claimant is not entitled to SIBs for the seventh and eighth quarters is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the claimant's waiver argument on appeal, Section 410.151 pertains to the scope of a CCH and subsection (b) provides that an issue that was not raised at a BRC may not be considered unless the parties consent or the Texas Workers' Compensation Commission (commission) determines that good cause existed for not raising the issue at the BRC. Rule 142.7 provides the procedures for submitting an additional dispute by unanimous consent of the parties and for requesting the hearing officer to include an additional dispute upon a finding of good cause. The CCH record reflects that an issue regarding whether the carrier timely contested the claimant's entitlement to SIBs was not an issue at the BRC, was not a disputed issue at the CCH, and no request to add such an issue was made to the hearing officer. Since the carrier waiver issue was raised for the first time on appeal, the Appeals Panel will not consider that issue. Texas Workers' Compensation Commission Appeal No. 001189, decided July 3, 2000.

We do not find merit in the claimant's assertion that, because he was assisted by an ombudsman at the CCH and is represented by an attorney on appeal, he had good cause for not raising a carrier waiver issue prior to raising it in his appeal. As noted, Rule 142.7 provides the procedures for requesting that the hearing officer consider additional disputes, and it is the hearing officer's responsibility to make a determination regarding whether good cause exists for granting the request.

With regard to the claimant's assertion that Rule 130.108(d) is illegal, the Appeals Panel has stated that it does not have the authority to decide the validity of Commission rules, that administrative rules are presumed to be valid, that the burden of proving the invalidity of a rule is on the party asserting invalidity, and that the courts are the proper forum for deciding the validity of agency rules. Texas Workers' Compensation Commission Appeal No. 021382, decided June 26, 2002.

We affirm the hearing officer's decision and order.

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

**JEFF W. AUTREY
400 WEST 15TH STREET, SUITE 710
FIRST BANK TOWER
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge