

APPEAL NO. 033025
FILED JANUARY 8, 2004

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 October 23, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth and sixth quarters. The appellant (carrier) appeals, contending that the claimant was not enrolled in, and satisfactorily participating in, a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying periods for the fifth and sixth quarters. No response was received from the claimant.

DECISION

Affirmed.

The claimant injured his back on _____, when he lifted a heavy box while working for the employer's delivery service. He underwent lumbar surgery in 2000. At issue is the claimant's entitlement to SIBs for the fifth and sixth quarters. The parties stipulated that the claimant has an impairment rating of 15% or greater and that he did not commute impairment income benefits.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The only SIBs criterion that was in dispute at the CCH was whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the fifth and sixth quarters by meeting the requirements of Rule 130.102(d)(2). The qualifying periods for the fifth and sixth quarters were from February 6 through August 6, 2003.

Rule 130.102(d)(2) 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 enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period. Rule 130.101(7) defines vocational rehabilitation services, and Rule 130.101(8) defines a full-time vocational rehabilitation program.

In evidence is a TRC Vocational Rehabilitation Services Individualized Plan for Employment (IPE) dated January 8, 2003, which sets forth an employment goal for the claimant of becoming a computer technician, and which contains intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the claimant's responsibilities for the successful completion of the plan. Also in evidence is an August 18, 2003, letter from the claimant's TRC Vocational Rehabilitation Counselor, which advises that the claimant is "on target" with

all of the IPE goals. The claimant testified that he actually started his computer training under the IPE in February 2003, with both classroom training and “on-line” training at home, and that he has continued with that training. The evidence reflects that his training was put “on hold” for several weeks during the qualifying period for the fifth quarter when he and his doctor believed that he was going to undergo additional back surgery for his compensable injury, which surgery did not take place, and that the training was again put “on hold” for about a month during the qualifying period for the sixth quarter while the claimant was in a substance abuse residential rehabilitation program. The claimant testified that the chemical dependency was attributable to both a medicine he was prescribed for his compensable injury and for cocaine.

With regard to the disputed good-faith criterion, the hearing officer found that during the qualifying periods for the fifth and sixth quarters, the claimant had an IPE in effect with the TRC and was enrolled in a full-time program, making satisfactory progress toward the completion of the plan, and that the claimant’s cooperation with the TRC constituted a good faith effort to find employment commensurate with his ability to work. The hearing officer concluded that the claimant is entitled to SIBs for the fifth and sixth quarters.

The carrier contends that the evidence does not establish that the claimant was enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation plan sponsored by the TRC during the relevant qualifying periods, and requests that the Appeals Panel create objective, measurable criteria for analyzing whether a claimant has met the requirements of Rule 130.102(d)(2).

With regard to the carrier’s request to develop criteria for analyzing the good faith effort under Rule 130.102(d)(2), we note that the definition of vocational rehabilitation services in Rule 130.101(7) includes, among other things, development of an individualized vocational rehabilitation plan, which is what the TRC IPE is. In addition, the IPE in evidence meets the definition of a full-time vocational rehabilitation plan as set forth in Rule 130.101(8). The Appeals Panel noted in Texas Workers’ Compensation Commission Appeal No. 000001, decided February 16, 2000, that the preamble to the amended SIBs rules stated that any vocational rehabilitation program sponsored by the TRC should be considered a full-time program. In Texas Workers’ Compensation Commission Appeal No. 012351, decided November 13, 2001, the Appeals Panel noted that the preamble to the SIBs rules concluded that it would be difficult to define the phrase “satisfactorily participated in” in a way that would apply to each situation, because the TRC uses a variety of retraining programs and each of the programs could have different durations and methods to evaluate satisfactory participation. In Texas Workers’ Compensation Commission Appeal No. 010483-s, decided April 20, 2001, the Appeals Panel again noted language from the preamble to the SIBs rules in discussing the requirement for satisfactory participation and concluded that the response given in the preamble appeared to envision that where there is evidence from the TRC of satisfactory participation, the carrier has the responsibility to come forward with evidence demonstrating that the claimant is not satisfactorily participating in the program. In Texas Workers’ Compensation Commission Appeal No.

020713, decided April 17, 2002, the Appeals Panel noted that the good faith requirement per Rule 130.102(d)(2) is met if at any time during the qualifying period for the quarter in dispute, the claimant is enrolled in, and satisfactorily participating in, a TRC-sponsored program. See *also* Texas Workers' Compensation Commission Appeal No. 020192, decided February 28, 2002.

In the instant case, given the IPE, the TRC letter, and the claimant's testimony, we conclude that the hearing officer's determination that the claimant met the good faith criterion per Rule 130.102(d)(2) by being enrolled in, and satisfactorily participating in, a full-time vocational rehabilitation program sponsored by the TRC during the relevant qualifying periods 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).

As previously noted, the only SIBs criterion in issue at the CCH was whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods by meeting the requirements of Rule 130.102(d)(2). In closing argument, the carrier stated that that was the only question before the hearing officer. There was no contention that the claimant's unemployment was not a direct result of his impairment from his compensable injury (see Section 408.142(a) and Rule 130.102(b)(1)), and the hearing officer made no finding of fact on the direct result criterion. However, in the Statement of the Evidence portion of his decision, the hearing officer states that the claimant met the direct result requirement. To the extent that the carrier appeals that determination, we conclude that it 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, supra. We note that 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 evidence, including a medical report, reflects that due to the compensable back injury, the claimant was capable of performing only modified or light-duty work during the relevant qualifying periods.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service or process is

**TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664.**

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge