

APPEAL NO. 062471
FILED JANUARY 26, 2007

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 November 3, 2006. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to first and second quarter supplemental income benefits (SIBs). The appellant (carrier) appealed, disputing the hearing officer's determination of entitlement to SIBs for the first and second quarters. The carrier contends the hearing officer's finding that the claimant made a good faith effort to obtain employment commensurate with her ability to work during the first and second quarter qualifying periods by virtue of her satisfactory participation in a full-time vocational rehabilitation program (VRP) sponsored by the Department of Assistive and Rehabilitative Services (DARS) was error. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable low back, neck, and left shoulder injury on _____; that the claimant reached maximum medical improvement on May 16, 2005, with an impairment rating (IR) of 20%; that no portion of impairment income benefits had been commuted; that the qualifying period for the first quarter was from March 29 through June 27, 2006; and that the qualifying period for the second quarter was from June 28 through September 26, 2006. The hearing officer's determination that the claimant's unemployment during the first and second quarter qualifying periods "was a direct result from her impairment from her compensable injury of _____" was not appealed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the [Texas Department of Insurance, Division of Workers' Compensation] (Division) Commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

The claimant proceeded on dual theories for entitlement to SIBs based on enrollment and satisfactory participation in a full-time VRP sponsored by DARS and a total inability to work. 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 found that there was a sufficient narrative in evidence which specifically explained how the claimant's compensable injury caused a total inability to work during the qualifying periods in terms of the claimant's chronic pain and mobility limitations. However, the hearing officer found the claimant had some ability to work during the first and second quarter qualifying periods because he found that another record, a functional capacity evaluation of September 21, 2006, showed the claimant had an ability to work during the relevant qualifying periods. These findings were not appealed.

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 VRP sponsored by the Texas Rehabilitation Commission (TRC) (now DARS) during the qualifying period.

The evidence reflected that the claimant inquired about services from DARS on or about March 30, 2006, and that at that time she did not wish to apply for services because she was not released by her doctor and wanted to consult an attorney. A second letter in evidence reflected that the claimant inquired about services for information only on or about June 13, 2006, and was interested in applying for vocational rehabilitation services and has scheduled an application appointment. A third letter from DARS in evidence dated July 25, 2006, noted that the claimant had completed her application and may or may not be determined eligible. The letter commented that the claimant was currently cooperating with the eligibility process by providing information and attending scheduled appointments. It was undisputed at the CCH that the claimant had not yet entered into an Individual Plan for Employment (IPE) with DARS.

The hearing officer relied on Appeals Panel Decision (APD) 010483-s, decided April 20, 2001, in making his determination in the instant case. In APD 010483-s, the hearing officer's decision that the claimant did not satisfy the good faith requirement under Rule 130.102(d)(2) was reversed and a new decision rendered that the claimant did prove that she made the required good faith effort in the qualifying periods for the second, third, and fourth quarters by satisfactorily participating in a full-time VRP sponsored by TRC entitling the claimant to SIBs for the second, third, and fourth quarters. In APD 010483-s, *supra*, the IPE in evidence was dated March 23, 2000, and the claimant had undertaken several evaluations and examinations prior to the IPE including an eye examination, a psychological evaluation, and a two-day vocational evaluation. However, in APD 010483-s, *supra*, there was a letter in evidence dated November 17, 2000, from a TRC rehabilitation counselor which stated that the claimant "has been in compliance with this TRC agency since November 12, 1999, and has made herself available to this TRC agency for examinations and evaluations upon

request to the present day.” The letter from TRC specifically related the claimant’s compliance to the qualifying periods at issue.

In the instant case, although there is evidence from DARS that the claimant was cooperating with the eligibility process by providing information and attending scheduled appointments, there is no evidence in the record from DARS that the claimant has of the date of the CCH been determined to be eligible for services. The claimant testified that she has been determined eligible, but as stated above, it was undisputed that as of the date of the CCH the claimant had not entered into an IPE.

The hearing officer has not correctly applied our decision in APD 010483-s, *supra*. As we said in that case:

Rule 130.101(8) defines the phrase “full time vocational rehabilitation program” as follows:

Any program, provided by the [TRC] . . . , for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a vocational rehabilitation plan. A vocational rehabilitation plan includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee’s responsibilities for the successful completion of the plan.

In APD 010483-s, *supra*, the IPE, the TRC letter, and the claimant’s testimony, clearly established that the claimant was enrolled in a VRP sponsored by the TRC. In the instant case there is no evidence of an employment goal, any intermediate goals, a description of services to be provided or arranged, or any responsibilities of the claimant for the successful completion of the plan. There is no evidence that a plan has been entered into between the claimant and DARS. Evidence of a VRP must be included in the record. APD 010631, decided May 2, 2001. In APD 010483-s, *supra*, an IPE identifying an employment goal, specifying services to be provided and the claimant’s responsibilities, was in evidence as was a letter from TRC specifically relating the claimant’s compliance to the qualifying periods at issue. As stated in APD 061027, decided July 20, 2006, simply making inquiry of DARS and cooperating with them does not meet the requirements of Rule 130.102(d)(2) that the claimant be “enrolled in” and “satisfactorily participated” in a VRP.

Accordingly, we reverse the hearing officer’s determination that the claimant is entitled to SIBs for the first and second quarters, and render a new determination that the claimant is not entitled to SIBs for the first and second quarters.

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

**RICHARD A. MAYER
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DALLAS, TEXAS 75243-9332.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge