

APPEAL NO. 080096
FILED MARCH 19, 2008

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 December 10, 2007. With regard to the sole disputed issue the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 18th quarter.

The claimant appealed, contending that she was enrolled in a vocational rehabilitation program sponsored by the Department of Assistive and Rehabilitative Services (DARS) during the 18th quarter qualifying period. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the claimant reached maximum medical improvement with an impairment rating of 15% or greater; (3) the claimant did not elect to commute any portion of impairment income benefits; (4) the 18th quarter qualifying period began July 13, 2006, and ended October 11, 2006; and (5) the 18th quarter began October 25, 2006, and ended January 23, 2007. The hearing officer's determination that the claimant's unemployment during the 18th quarter qualifying period was a direct result of the impairment resulting from the compensable injury has not been appealed.

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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation. At the CCH, the claimant contended that she met the requirement to make a good faith effort to obtain employment commensurate with her ability to work based on Rule 130.102(d)(2).

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 Texas Rehabilitation Commission (now part of

DARS) during the qualifying period. An amended DARS Individualized Plan for Employment (IPE) for the claimant dated February 13, 2006, was in evidence. The amended IPE listed the services provided from February 13, 2006, to December 31, 2006, as including guidance/counseling with tuition/fees/books and supplies at a specified community college for required courses leading to certification and a degree. The IPE stated that it is expected the claimant will become employed after completing the last service on the IPE. The claimant acknowledged that she was having some difficulties with some of the required courses and that she had missed some classes due to medical conditions.

In evidence is a letter from DARS stating that the claimant “is satisfactorily participating in an IPE dated 2/13/06” signed by (Ms. CS) and dated October 13, 2006. The signature block on the letter indicates “DRS Representative (VRC/RST).” (Ms. TH) testified that she was promoted to a DARS counselor in February 2007, that she is currently the claimant’s DARS counselor, and that during the July 13 through October 11, 2006, period at issue (Mr. JR) was the claimant’s DARS counselor, which is shown on the amended IPE. Ms. TH also testified that Ms. CS was a DARS Rehabilitative Services Technician (RST) and that RSTs sign forms “under the directive of the counselor.”

The hearing officer in the Background Information portion of her decision wrote: “A DARS counselor [Ms. TH] testified that Claimant did not meet DARS’ requirements for satisfactory participation during the 18th quarter qualifying period.” That statement is not supported by the evidence. In response to a question Ms. TH testified that there were records that indicate that the claimant is complying with the DARS retraining program. Ms. TH also testified that during the July 13, 2006, to October 11, 2006, qualifying period there were records which Ms. TH reviewed that indicated the claimant was “in compliance with the IPE that existed at that time.” The self-insured argues that because the claimant was not taking 12 credit hours and did not have a 2.0 grade point average (GPA) the claimant was not satisfactorily participating in her IPE. Ms. TH testified that even if the claimant did not maintain a 2.0 GPA “we would not kick her out of the program because she did not maintain that.”

The Division has the authority to refer injured employees to DARS for retraining in an effort to expedite a return to the workforce. Appeals Panel Decision (APD) 070825, decided June 25, 2007. Section 408.150(b) provides that an employee who refuses services or refuses to cooperate with services provided by DARS loses entitlement to SIBs. Rule 130.101(8) sets out the requirements for a full-time vocational rehabilitation program. As noted in APD 070702, decided June 12, 2007, it is the obligation of DARS to assess the injured worker and develop an appropriate IPE for each worker due to its expertise. In this case, the evidence reflects that the claimant’s former counselor, Mr. JR, had discussed changing the claimant’s court reporting program, but due to counselor turnover, a change of program had not been accomplished during the qualifying period. There is no authority which supports the proposition that a hearing officer may substitute his or her own judgment for that of

DARS in determining how to best retrain and return an injured worker to the workforce. APD 070702, *supra*.

In this case, the hearing officer's comment that a DARS counselor testified that the claimant did not meet DARS' requirements for satisfactory participation during the 18th quarter qualifying period and the determination that the claimant is not entitled to SIBs for the 18th quarter qualifying period are not supported by the evidence. Accordingly, we hold that under the evidence presented, the hearing officer's determination that the claimant did not satisfactorily participate in a full-time vocational rehabilitation program sponsored by DARS during the qualifying period at issue is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 18th quarter and render a new decision that the claimant is entitled to SIBs for the 18th quarter.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

PA
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge