

APPEAL NO. 081730
FILED JANUARY 23, 2009

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 October 29, 2008. The hearing officer decided that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter. The appellant (carrier) appealed the hearing officer's SIBs determination. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____; (2) the claimant had at least a 15% impairment rating; (3) the claimant did not elect to commute any part of his impairment income benefits; (4) the fourth quarter of SIBs was from May 22 through August 20, 2008; and (5) the qualifying period for the fourth quarter of SIBs was from February 8 through May 8, 2008. It is undisputed that during the qualifying period for the fourth quarter of SIBs, the claimant had an ability to work.

SIBS FOURTH QUARTER

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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.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 vocational rehabilitation program (VRP) sponsored by the Department of Assistive and Rehabilitative Services (DARS) and a good faith effort to obtain employment through job search efforts. Rule 130.102(d)(2) and (5).

The hearing officer's finding that during the qualifying period for the fourth quarter of SIBs, the claimant was unemployed as a direct result of the impairment from the compensable injury is supported by sufficient evidence.

Rule 130.102(d)(2) provides in part that an injured worker 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 (now DARS) during the qualifying period. The hearing officer in the Background Information section of her decision states that the claimant "was attending school and actively participating with [DARS] during the subject qualifying period" and that the claimant was persuasive that he met the requirements for SIBs entitlement under Rule 130.102(d)(2). In Appeals Panel Decision (APD) 061027, decided July 20, 2006, the Appeals Panel held that 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.

In evidence is an Individualized Plan for Employment (IPE) dated October 4, 2007, which lists the services provided from October 4, 2007, to October 4, 2008, as including counseling and guidance, tuition, books, and supplies at a specified community college for required courses leading to certification and a degree. The IPE specified the claimant was to maintain a 2.0 grade point average (GPA) and take 12 credit hours each semester. The claimant gave conflicting testimony regarding which semesters he attended classes; however, he testified that during the qualifying period in dispute he attended classes but did not pass those classes. Additionally, the claimant testified that he did not have documentation of his dates of enrollment at school, the number of semester hours, or his GPA because he did not know that he would have to prove it to be entitled to SIBs. Further, the claimant testified that he was in contact with his DARS counselor; however, he did not have any DARS documentation because he missed his appointment with his counselor. The claimant also testified that his medical condition worsened during the fourth quarter qualifying period, and that he never registered with the Texas Workforce Commission for assistance with his job search.

In APD 010483-s, decided April 20, 2001, the Appeals Panel held that the best evidence of satisfactory participation will be that coming directly from DARS. There is no documentary or testimonial evidence from DARS that during the qualifying period of the fourth quarter, February 8 through May 8, 2008, that the claimant was enrolled in and satisfactorily participated in a full-time VRP sponsored by DARS.

As previously noted, the claimant testified he attended classes during the qualifying period but did not testify as to the number of credit hours he attended. Further, the claimant testified that he did not pass the courses that he did attend. The IPE contained specific requirements as to the number of hours the claimant was required to take as well as a minimum GPA he was required to maintain. There is no evidence that the claimant met the basic minimum requirements contained in the IPE. In fact, according to the claimant's own testimony, he did not meet the requirements of the IPE. There is no evidence that DARS considered his participation in the full-time VRP satisfactory. Under these circumstances, the hearing officer's determination that the claimant did satisfactorily participate in a full-time VRP 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.

Rule 130.102(d)(5) 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 provided sufficient documentation as described in Rule 130.102(e) to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides 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, and that in determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5), the reviewing authority shall consider the information provided by the injured employee, which may include, but is not limited to information listed in subsection (e)(1)-(11). The qualifying period for the fourth quarter, as stipulated, began on February 8, 2008. Thus, in this instance the weeks ran from Friday to Thursday, because the first day of the qualifying period was Friday, February 8, 2008, and the last day of the qualifying period was Thursday, May 8, 2008. APD 002163-s, decided November 1, 2000. During the qualifying period in dispute, the claimant documented job searches during the 1st through the 6th weeks (February 8 through March 20, 2008), and during the 8th through the 13th weeks (March 28 through May 8, 2008). The claimant failed to document any job searches during the 7th week of the qualifying period (March 21 through March 27, 2008). The hearing officer, in the Background Information, commented that the "7th week of the qualifying period was from March 22, 2008 through March 28, 2008." The hearing officer incorrectly identified week 7.¹ Rule 130.102(e) requires that a job search be made every week of the qualifying period, and the claimant did not make a job search for the 7th week of the qualifying period, therefore, he did not meet the requirements of Rule 130.102(e). Accordingly, the hearing officer's determination that the claimant made a good faith effort to find employment commensurate with his ability to work is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter and render a new decision that the claimant is not entitled to SIBs for the fourth quarter.

¹ We note that the year "2008" was a leap year (February 1 through February 29, 2008).

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

**CHARLES HARDY
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Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge