APPEAL NO. 010483-S

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 February 7, 2001. With respect to the issues before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first through fourth quarters and that, consequently, she has permanently lost entitlement to SIBs. In her appeal, the claimant contends that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on September 30, 1998, with an impairment rating of 19%; that the first quarter of SIBs ran from November 4, 1999, to February 2, 2000, with a corresponding qualifying period of July 23 to October 21, 1999; that the second quarter of SIBs ran from February 3 to May 3, 2000, with a corresponding qualifying period of October 22, 1999, to January 20, 2000; that the third quarter of SIBs ran from May 4 to August 2, 2000, with a corresponding qualifying period of January 21 to April 20, 2000; and that the fourth quarter of SIBs ran from August 3 to November 1, 2000, with a corresponding qualifying period of April 21 to July 20, 2000. The claimant introduced evidence that on January 10, 2000, she was referred by the Texas Rehabilitation Commission (TRC) to Dr. H for a psychological evaluation; on January 11, 2000, the claimant attended an eye examination, which also had been arranged by the TRC; and on January 19 and 20, 2000, the claimant was referred by the TRC for a two-day vocational evaluation in order to identify vocational potential, transferable skills, job stability, and overall vocational functioning.

The claimant also introduced an Individualized Plan for Employment (IPE) dated March 23, 2000, with an employment goal of becoming an office clerical worker. The IPE states that the following steps were necessary to achieve the employment goal: registration with the Texas Workforce Commission; obtaining job leads from various sources; improved ability to communicate; increased physical stamina; obtaining certifications/licenses; and completion of a training program. The IPE provides that from April 3 to August 30, 2000, the claimant was to attend a workforce program purchased by the TRC; that from March 21 to May 21, 2000, the TRC was to purchase eyeglasses for the claimant; that from February 1 to August 30, 2000, the claimant was to get counseling and guidance services from her TRC counselor; and that from February 3 to April 3, 2000, the TRC would purchase an ophthamological examination and evaluation for the claimant. On December 1, 2000, the claimant's IPE was amended to include college attendance. The claimant testified that she began classes in January 2001. She further stated that she attended English classes at a library and a church; however, she did not provide details of when she

attended those classes. In addition, the claimant testified that she saw her TRC counselor once or twice a month. In a letter dated November 17, 2000, Ms. S, the claimant's vocational rehabilitation counselor at the TRC, 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."

It is the claimant's contention that she had no ability to work during the qualifying period for the first SIBs quarter. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) states 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 determined that the claimant did not provide a narrative report from a doctor which specifically explained how her injury caused a total inability to work. That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination, or the determination that the claimant is not entitled to SIBs for the first quarter, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant argues that she is entitled to second through fourth quarter SIBs because she was enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying periods for those quarters. 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(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 her decision, the hearing officer determined that the claimant was not involved in a full-time vocational program sponsored by the TRC. In so doing, the hearing officer focused on the activities that the claimant performed in the period from October 22, 1999, to July 20, 2000. Specifically, the hearing officer noted that the evidence did not demonstrate that the claimant "had in any way been enrolled in and participated in anything resembling a full time program." To determine what programs are to be considered full-

time vocational rehabilitation programs, we have previously turned to the preamble and comments to Rule 130.102(d)(2). As we noted in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2000, the preamble to Rule 130.102(d)(2) states that any program provided by the TRC should be considered a full-time program. The preamble further states that "[t]his concept precludes an insurance carrier from requiring an injured employee to participate in a vocational rehabilitation program sponsored by the TRC . . . and then expect the injured employee to continue to seek employment commensurate with the injured employee's ability over and above the rehabilitation plan requirements; seeking employment may be a part of the rehabilitation program." In this instance, the evidence, and more specifically, the IPE, the TRC letter, and the claimant's testimony, clearly establish that the claimant was enrolled in a vocational rehabilitation program sponsored by the TRC and, based upon the unambiguous language in the preamble, that program was to be considered a full-time program. The hearing officer erred in determining that the claimant's program was not a full-time program, based upon her apparent disagreement with the time table set by the TRC for the claimant's progression through vocational rehabilitation.

The question of whether the claimant satisfactorily participated in the full-time TRC program remains. That question presents a question of fact for the hearing officer to resolve. However, reference to the preamble is again instructive on how the issue of satisfactory participation is to be resolved. In response to a comment that the phrase "satisfactorily participated in" should be defined, the Texas Workers' Compensation Commission noted that the TRC uses a variety of retraining programs, that each of the programs could have different durations and methods to evaluate satisfactory participation; and concluded that based on those differences, it would be difficult to define the phrase in a way that would apply to each situation. The response explained:

> If the injured employee wishes to show that this provision applies, the injured employee can secure information from his or her counselor with the [TRC] to supply to the carrier. If the insurance carrier believes the information provided is not sufficient to meet the requirement of this provision, the insurance carrier can dispute entitlement. The decision of whether or not the injured employee has satisfactorily participated in a TRC sponsored program will be made by the finder of fact during the dispute resolution process.

Based upon this language, it appears that the Commissioners envisioned that the evidence of satisfactory participation presented by the claimant would come from the TRC. In this case, the November 17, 2000, letter from the claimant's TRC counselor states that the claimant has been in compliance with the requirements established by the TRC for the claimant's vocational rehabilitation program since November 12, 1999. Although the response quoted above states that the hearing officer, the fact finder, is to resolve the issue of satisfactory participation, the response also appears 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. That is, there should be some affirmative showing that the

claimant is not meeting the requirements of the vocational rehabilitation program established for her by the TRC, where, as here, the evidence from the TRC indicates satisfactory participation. There is no such evidence in this case. In the absence of such evidence, the hearing officer's determination that the claimant did not satisfactorily participate in a vocational rehabilitation program during the qualifying periods for the second, third, and fourth quarters is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool, *supra*; Cain, *supra*. Accordingly, we reverse the hearing officer's determination that the claimant did not satisfy the good faith requirement under Rule 130.102(d)(2) and render a new decision that the claimant did prove that she had made the required good faith effort in the qualifying periods for the second, third, and fourth quarters by satisfactorily participating in a full-time vocational rehabilitation program sponsored by the TRC and that the claimant is entitled to SIBs for the second, third, and fourth quarters.

We affirm the determination that the claimant is not entitled to SIBs for the first quarter. We reverse the determinations that the claimant is not entitled to SIBs for the second, third, and fourth quarters and render a new decision that the claimant is entitled to those benefits. Given our reversal of the determinations that the claimant is not entitled to SIBs for the second, third, and fourth quarters, we likewise reverse the determination that the claimant has permanently lost entitlement to SIBs under Section 408.146(c). The carrier is ordered pay accrued and unpaid benefits in a lump sum with interest.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge