

APPEAL NO. 010952-S

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 6, 2001, in _____, Texas, with (hearing officer) presiding as the hearing officer. With respect to the issues before him, the hearing officer determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the first, second, and third quarters; that the claimant is entitled to SIBs for the fourth quarter; and that the appellant (carrier) is relieved of liability for SIBs for the second, third, and a portion of the fourth quarters because of the claimant's failure to timely file an Application for [SIBs] (TWCC-52) for the period from February 1, 2000, to August 7, 2000. The hearing officer's determination regarding entitlement to SIBs for the first, second, and third quarters and the determination relieving the carrier of liability for the second, third, and a portion of the fourth quarters have not been appealed and have become final pursuant to Section 410.169. The carrier appealed the determination regarding entitlement to fourth quarter SIBs on the basis that the claimant "was not enrolled in, nor satisfactorily participating in a full time vocational rehabilitation program [VRP] sponsored by the Texas Rehabilitation Commission [TRC] during the qualifying period for the 4th quarter." The file does not contain a response from the claimant.

DECISION

Affirmed.

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). At issue in this case is whether the claimant met the good faith requirement of Section 408.142(a)(4) by complying with the requirements of Rule 130.102(d)(2). Rule 130.102(d)(2) provides that a good faith effort to obtain employment has been met if the claimant "has been enrolled in, and satisfactorily participated in, a full time [VRP] sponsored by the [TRC] during the qualifying period."

In evidence is an Individualized Plan of Employment (IPE) dated August 10, 1999, which has a plan for the claimant to attend college. The claimant was to maintain a 2.0 grade point average, enroll in 12 credit hours per semester, and maintain 90% attendance. The claimant testified that about two weeks after he began his college courses, he withdrew with the permission of his TRC counselor. He stated that he intended to reenroll in college the next semester. The claimant was incarcerated from October 16, 1999, to April 16, 2000. The parties stipulated that the qualifying period for the fourth quarter was from April 19 to July 18, 2000, and that the fourth quarter ran from August 1 to October 30, 2000. The claimant testified that when he was released from jail, he contacted his TRC counselor and that his original IPE was changed from a program to attend college to a shorter program involving enrollment in a refrigeration course. A copy of the modified IPE was not in evidence. The claimant stated that he began attending the refrigeration course on or about June 15, 2000, and that the TRC paid for the program. In evidence is a certificate of

completion dated July 1, 2000, and a letter dated December 15, 2000, from the associate director of the refrigeration school stating that the claimant attended classes beginning June 19, 2000, and that he had a grade average of 96. The claimant testified that because he had done poorly on a practice certification exam, his TRC counselor approved the claimant's request to reenroll in the refrigeration course in October 2000 at his own expense.

Rule 130.101(8) defines VRP as “[a]ny program, . . . , for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes, a [VRP]. A [VRP] 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.” We have previously recognized that the preamble to Rule 130.102(d)(2) states that any program provided by the TRC should be considered a full-time program. Texas Workers’ Compensation Commission Appeal No. 000001, decided February 16, 2000. Reference to the preamble and comments is also instructive on how the issue of satisfactory participation is to be resolved by the hearing officer. In response to a comment that the phrase “satisfactorily participated in” should be defined, the Texas Workers’ Compensation Commission (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.

The hearing officer determined that the claimant is entitled to SIBs for the fourth quarter because during the qualifying period for the fourth quarter “Claimant was enrolled in, and satisfactorily participating in, a full time [VRP] sponsored by the [TRC] which consisted of 108 hours of instruction in refrigeration.” The evidence of the claimant’s satisfactory participation in the refrigeration program is well-documented by the certificate of completion and a letter from the associate director of the program stating that the claimant had a 96 grade average. The sufficiency of the evidence of TRC sponsorship of the claimant’s participation in the refrigeration program is more problematic. As noted above, all of the evidence of TRC sponsorship comes from the claimant’s testimony that he contacted the TRC upon his release from jail, that the TRC agreed to modify his IPE to have him attend the refrigeration course rather than college, and that the TRC paid for the refrigeration program he attended during the qualifying period. Despite some equivocal language in the discussion section of the hearing officer’s decision, his unequivocal factual

finding demonstrates that the hearing officer credited the claimant's testimony and determined that the refrigeration course that the claimant attended during the qualifying period for the fourth quarter was sponsored by the TRC and that the claimant's completion of that course during the qualifying period satisfied the requirements of Rule 130.102(d)(2). As noted above, the claimant testified that the TRC sponsored his participation in the refrigeration course. That evidence provides minimally sufficient support for the hearing officer's determination that the claimant satisfied the good faith requirement under Rule 130.102(d)(2). Our review of the record does not reveal that the hearing officer's good faith determination is so against the great weight 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 entitled to SIBs for the fourth 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).

Although we have affirmed the hearing officer's decision, some explanation of our hesitancy in doing so seems appropriate. By consulting the preamble to the SIBs rules that became effective January 31, 1999, it is apparent that the Commission amended the SIBs rules in an attempt to reduce the number of SIBs disputes in formal dispute resolution and to "provide more consistency and predictability in the resolution of disputes related to [SIBs]." By imposing a requirement that the claimant send supporting documentation along with the TWCC-52 to the carrier, the Commission was aiming to ensure that the carrier would receive the information supporting the application close in time to the date it received the application so that an informed decision of whether to pay the benefits or to dispute could be made. Here, the evidence of TRC sponsorship does not appear to have been submitted until the testimony at the hearing. That type of delay is inconsistent with the goals of reducing disputes and advancing predictability, and claimants are strongly cautioned that the decision to rely on testimony to establish TRC sponsorship is made at their peril. The better practice would surely have been for the claimant to have provided documentary evidence of the TRC sponsorship of the refrigeration course with his TWCC-52 and/or to have exchanged such evidence with the carrier in accordance with Rule 142.13 and to have offered that evidence at the hearing. In Texas Workers' Compensation Commission Appeal No. 010483-S, decided April 20, 2001, where we reversed and rendered awarding SIBs based upon participation in a TRC-sponsored VRP, we noted that the Commission envisioned that the claimant's evidence of satisfactory participation in a TRC-sponsored program would come from the TRC. While we do not believe that documentary evidence establishing TRC sponsorship of the VRP is absolutely required such that this case necessitates reversal because only testimony establishes that sponsorship here, this decision should not be read as an endorsement of the practice of relying solely on testimony, particularly because it would seem that another fact finder might well discount uncorroborated testimony of TRC sponsorship.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the well-written affirmance by the majority. I, further, whole-heartedly agree with the cautionary explanation by the majority that the better practice in this case would have been for the claimant to provide documentary evidence of the Texas Rehabilitation Commission (TRC) sponsorship of the refrigeration course and whether the claimant's failure to take the certification exam constituted satisfactory participation in the TRC vocational rehabilitation program (VRP). Such evidence could have easily been obtained by calling the TRC counselor or writing the TRC and specifically asking the question rather than relying on what the claimant "appeared to testify to." The claimant's testimony that the refrigeration course constituted satisfactory participation in a full-time VRP sponsored by the TRC is sheer speculation and constitutes only the claimant's perhaps optimistic, view of what the TRC would actually agree to. Certainly the best evidence would be from the TRC itself. I would have either reversed this case and rendered a new decision that the claimant had not met his burden of proof or I would have remanded for some evidence about TRC involvement to support the claimant's testimony.

However, of far greater concern of this case is the precedent it sets. Regardless of the explanation and cautionary language in the majority decision, claimants will cite this case for the proposition that a claimant's testimony is sufficient to prove enrollment in and satisfactory participation in a full time VRP sponsored by the TRC without even the Individualized Plan of Employment (IPE) in evidence. The carrier would argue the documentary evidence submitted with the TWCC-52, or properly exchanged, is necessary. Undoubtedly, there are hearing officers who would have decided this case differently on precisely the same evidence. Consequently, instead of providing guidance and striving for some kind of consistency on similar facts we have equivocated, giving lip service to one standard while applying the other. Whether a claimant has met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) and the guidance given in the preamble (which I believe clearly contemplates some kind of documentation) comes down largely to the personal proclivities of the individual hearing officer. Therefore, whether one can prove entitlement under Rule 130.102(d)(2) becomes a matter of luck of the draw as to which hearing officer hears the case. I do not believe that in the absence of documentary evidence of TRC involvement and statement of satisfactory

participation, it is fair to either claimants or carriers that their case rests on what a particular hearing officer is or is not willing to believe. I fear that instead of resolving this issue, unless some internal policy of requiring documentary evidence in cases which involve Rule 130.102(d)(2) or (3) is developed, we will see more inconsistent cases involving this rule.

Thomas A. Knapp
Appeals Judge