

APPEAL NO. 991973

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 5, 1999, a hearing was held. She (the hearing officer) determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third compensable quarter beginning on May 17, 1999, based on a total inability to work. Appellant (carrier) asserts that the evidence shows some ability to work and that SIBS should not have been awarded, citing a functional capacity evaluation (FCE) and comments about it and claimant's medical records by Dr. D. The appeals file contains no reply from the claimant.

DECISION

We reverse and remand.

The record reflects that the hearing officer mentioned at least twice that the "new rules" apply. The only issue at this hearing was whether claimant is entitled to SIBS for the third quarter "which began on May 17, 1999, and ends on August 15, 1999." The parties stipulated that the qualifying period for the third quarter began February 2, 1999, and ended on May 3, 1999. No one at the hearing took issue with the statement that the "new rules" apply, and the Appeals Panel also agrees that the new rules apply. See Texas Worker's Compensation Commission Appeal No. 991634, decided September 14, 1999.

In this case there was evidence presented in the form of testimony of claimant; medical documents of his treating doctor, Dr. S; an FCE dated October 14, 1998; and a record review report of Dr. D dated July 14, 1999 (we note that Dr. D labels his report as a supplement to his report provided after an evaluation on August 15, 1995—with four years having passed since evaluating claimant, we believe the current report is most accurately described as a record review). Claimant testified that he did not look for work during the qualifying period.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) sets forth four methods in which a claimant may prove that a good faith effort has been made relative to Sections 408.142 and 408.143. The evidence at the hearing did not address three of the possible methods to prove good faith; there was no indication that claimant has returned to work; there was no indication that claimant is "enrolled in . . . a full time vocational rehabilitation program . . ."; and claimant testified that he made no job search. Therefore, the only method applicable to this claimant in this case is found in Rule 130.102(d)(3) which provides that good faith has been shown 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.

As can be seen, the above quoted criterion is made up of three parts. In order to affirm any determination which finds good faith based on the above-quoted passage, the Appeals Panel will need to address each of the three parts. The hearing officer should also address these parts in her findings of fact. The hearing officer refers generally to Dr. S's "medical evidence" and to recommendations for spinal and knee surgery; however, she did not specifically explain how these factors caused a "total inability to work." More significant in the decision now under review is the total absence of any finding of fact regarding "other records" and a statement as to whether those other records do or do not show an ability to work. A comment was made in the Statement of Evidence that the FCE "showed claimant had an ability to work" but the hearing officer then observed that Dr. S disagreed with the results. The Statement of Evidence was silent as to Dr. D's opinion. On remand a finding of fact should be made as to whether or not "other records show that the injured employee is able to return to work," as stated in Rule 130.102(d)(3). See Texas Workers' Compensation Commission Appeal No. 991598, decided September 10, 1999, which remanded for findings of fact that addressed the requirements of Rule 130.102(e) in regard to whether that claimant looked for work "every week" and documented the job search. See *also* Texas Workers' Compensation Commission Appeal No. 991762, decided September 30, 1999, and Texas Workers' Compensation Commission Appeal No. 991922, decided October 18, 1999.

When additional findings of fact are made, some of the existing findings of fact may, or may not, need to be changed. The decision should be consistent with the findings of fact and conclusions of law. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In this case, the hearing officer could consider the medical reports that state that claimant is able to work, and decide that they do not "show" that claimant is able to return to work. In my opinion, we should not interpret Rule 130.102(d)(3) to mean that if *any* medical record states that a claimant has an ability to work, then the hearing officer is *automatically required* to find that the injured employee has an ability to work. If the rule is interpreted that way, then how is the hearing officer then the "sole judge" of the weight and credibility to be given to the evidence, as stated in Section 410.165(a)? To interpret the rule that way means that the rule dictates what the hearing officer will find and that the hearing officer is no longer the sole judge of the credibility of the evidence. The majority has not stated that the rule should be interpreted that way. However, to the extent that this is raised, I have addressed how I would interpret the rule. In my opinion, even if a medical record states that claimant has an ability to work, the hearing officer still judges the credibility of the medical evidence and still decides whether the other medical record "shows" that the injured employee is able to return to work. Here, the hearing officer considered the totality of the evidence but did not find that the other medical records showed that claimant is able to work.

Regarding whether the medical evidence sufficiently explained the inability to work, again, the hearing officer judged the credibility of the evidence and determined what facts were established. The hearing officer was not required to list every piece of evidence considered and she stated that she considered the "totality" of the evidence. I believe the hearing officer's fact findings were sufficient in this case, although more detailed fact findings are preferred. It was specifically recognized that the "new" rules apply. The hearing officer discussed the medical findings of Dr. S in a fact finding. The hearing officer could determine that the January 22, 1999, report from Dr. S, dated about two weeks before the filing period began, specifically explained how the injury caused a total inability to work.

It does not appear from the record that the hearing officer failed to consider and apply the new supplemental income benefits rules. I would affirm.

Judy L. Stephens
Appeals Judge