APPEAL NO. 992197

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Texas Workers' Compensation Commission Appeal No. 991456, decided August 16, 1999, affirmed determinations as to supplemental income benefits (SIBS) for the 12th through 16th quarters under SIBS rules relevant prior to January 31, 1999. The case was remanded to consider whether SIBS were due for the 17th compensable quarter under the different standards set forth in SIBS rules applicable after January 31, 1999. The hearing officer did not hold a hearing on remand, but her Statement of Evidence shows that she addressed the evidence in light of the criteria set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). No findings of fact were made as to the new criteria, but respondent (claimant) was determined to be entitled to SIBS for the 17th quarter. Appellant (carrier) asserts that there are records in evidence showing that the claimant is able to return to work, stressing that the applicable rule does not allow the hearing officer the discretion to ignore a report which says that claimant is able to work. The appeals file contains no reply from claimant.

DECISION

We reverse and render.

Rule 130.102(d)(3) provides that a claimant has made a good faith effort to obtain employment "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 carrier has directed its appeal to the third criterion set forth above. As such we will not base this decision on whether or not the second criterion has been met–the requirement that a narrative report from a doctor specifically explain how the "injury" (the rule does not say "impairment") causes total inability to work. We do observe that the hearing officer says that records of Dr. M and Dr. R "during the relevant qualifying period" specifically explain how the injury caused a total inability to work. (The qualifying period for the 17th quarter began on February 12, 1999, and ended on May 14, 1999.) The only record of Dr. M during the qualifying period (the hearing officer chose to describe the record she identified in this manner) is a letter dated April 12, 1999, which states in its entirety:

> [Claimant] has been seeing me because of her back injuries and back pain since 9-27-95. Since then I have seen her repeatedly in the clinic. Her problems have been predominantly those related to her back pain. Her back pain has been intermittent but severe and the level of severity has gone up and down. However, for the most part, she has hurt a great deal since her first evaluation. She continues to have a lot of back pain. She needs a lot of medications to help with this pain. She is unable to live a normal lifestyle and I do not expect that this will improve very much in the future. The patient still has clinical evidence of inflammation of the joints with pain and stiffness.
>
> I understand that she was hurt on her job. She sustained an injury on the _____ with neck, back and spinal injuries. Unfortunately, to this day she is unable to work.

Under prior rules and under the opinion of the author judge set forth in Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997, entitlement to SIBS quarters 12 through 16 was affirmed; the above letter of Dr. M under prior rules and Appeal No. 970834 could provide sufficient evidence of an inability to work. In regard to the second criterion provided in the 1999 version of Rule 130.102(d)(3), which now calls for a narrative that "specifically explains how the injury causes a total inability to work" (Emphasis added), the points made in Appeal No. 970834, and in our review of the 12th through 16th quarters (under prior rules) in Appeal No. 991456, are no longer applicable. The second criterion in requiring a specific explanation as to how the injury causes total inability rejects conclusory opinions as to that criterion and sets parameters of what is acceptable. The letter of Dr. M above quoted would probably not meet the requirement of a narrative that specifically explains how the injury causes a total inability to work.

The opinion of Dr. R is more thorough; he mentions that claimant's lumbar MRI of 1997 shows a "marked narrowing at the 4-5 space; reactive sub-chondral bone and sclerosis; and little, if any, residual disc material," but he also observed no evidence of recurrent herniation at L4-5 (claimant has had spinal surgery). Dr. R in referring to a cervical MRI said, "[t]he only thing it says is that there is a prominent extradural defect at the C5-6 level. . . ." He states that claimant said her back pain had "recently begun to become worse," but observed in the last paragraph of his report that in comparing her "93 and 97 clinical evaluations and mine today, there has been no change whatsoever objectively, only in her subjective complaints." He had said earlier in the report, in referring to a January 1997 note, that claimant was "basically complaining of the same things that she is complaining of now." He also noted in the last paragraph of the report that claimant "is horribly deconditioned," stating that she has been out of work for almost eight years. He noted that there are no "reproducible findings of a neurological basis" so he would not recommend surgery. He then stated that claimant is "disabled for any and all occupations." Dr. R's statement was also considered under different criteria (old rules and Appeal No. 970834) as providing some evidence that claimant had deteriorated and that she could do

no work in affirming SIBS for the 12th through 16th quarters. Dr. R's statement is not conclusory but for the 17th quarter it would need to "specifically explain" how the injury causes inability, which would appear to mean that a fact finder would need to make few inferences in order for that criterion to be met. However, neither Dr. M in his letter quoted above nor Dr. R in his report states that he believes claimant's injury has gotten worse.

The third criterion found in Rule 130.102(d)(3), upon which the carrier appeals, requires that "no other records show that the injured employee is able to return to work." There is no condition in the rule that limits the "other records" as to time of inception or as to when an examination was conducted. The decision in Rodriguez v Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J. 900 (July 1, 1999), indicates that the Appeals Panel should be cautious about adding (or subtracting) from the language of rules made by the Texas Workers' Compensation Commission (Commission). In so saying, I point out that Rodriguez did not find error in the Appeals Panel requirement of notice concerning the inception of the 90-day period provided in Rule 130.5(e), and similar to consideration given to notice in Rule 130.5(e), some consideration may be given to whether records which are so removed from a qualifying period as to be not relevant, particularly if there has been some intervening event such as a surgical procedure directed toward the injury in question, would address the third criterion.

This opinion is not saying that a fact finder cannot consider the length of time between the "record" and the SIBS period in question, but does say that the 1999 rule does not make length of time determinative; we are not saying that a fact finder cannot consider the language of a relevant "other record," such as whether it notes restrictions but still questions, for instance, the stability of the spine at the site of injury, in deciding whether the record shows an ability to return to work; we are not saying that a peer review report, or any other report, that erroneously states facts, that is so conclusory as to fail to constitute a record, or that is lacking in credibility may not be found as failing to show an ability to return to work.

The hearing officer, in her Statement of Evidence, addressed the "new" rules and concluded that the required narrative report was provided. As stated, this opinion is not directly based on whether the hearing officer's determination that a narrative "specifically" explained how the injury caused a total inability to work met the requirements of the 1999 rule. The hearing officer next stated in her Statement of Evidence that:

> no other records show that claimant is able to return to work. The records of Dr. B and Dr. K show that those doctors examined claimant in January of 1998 and June of 1997, respectively. Further their reports in 1999, came after the end of the qualifying period for the 17th quarter merely confirmed their previous findings, without the benefit of any subsequent examination.

The discussion of the "new" rules in the Statement of Evidence says that neither Dr. B nor Dr. K's documents show an ability to return to work; this conclusion is based on each doctor's dates of examination of claimant and their updates of such evaluations (these updates were based on their past evaluations coupled with their review of Dr. R's and Dr. M's records). No indication is given that Dr. B (and Dr. K) did not address ability to work or were not credible in the opinions given. No specific time removes a doctor's report of his examination of a claimant from constituting an "other record." Similarly, peer review reports, by doctors who have previously examined a claimant, when there is no indication by the hearing officer that either report is not credible, may constitute "other reports."

In this case, Dr. B clearly states that claimant can perform sedentary work. The great weight and preponderance of the evidence shows that Dr. B's reports are "other reports" that show an ability to return to work. At least one record shows that claimant is able to return to sedentary work.

With the above determination the requirements of Rule 130.102(d)(3) have not been met in this case. Since claimant did not seek any work during the qualifying period in question for the 17th quarter, her failure to show that the requirements of Rule 130.102(d)(3) were met results in a determination that no SIBS are due for the 17th quarter.

At some point after September 1, 1999, the provisions of Section 408.151(b), may augment, and may be controlling over, the criteria of Rule 130.102(d)(3), in determining questions of whether there is no ability to work in SIBS quarters.

The decision and order relative to all points made about SIBS in the 12th, 13th, 14th, 15th, and 16th quarters were affirmed in Appeal No. 991456, *supra*; as such they were not under consideration in this decision on remand. Since the hearing officer again addressed the 12th through 16th quarters in her decision on remand, that part of her decision and order will be affirmed to prevent any confusion. That part of the decision and order which states that claimant is entitled to SIBS for the 17th quarter is reversed. A new decision is rendered that claimant is not entitled to SIBS for the 17th quarter.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

Dissenting Opinion:

With all respect to my colleagues in the majority, I am constrained to dissent. In the present case, I believe the hearing officer clearly addressed the requirements of Rule 130.102(d)(3) in her decision. To have her do so was the very reason we had remanded the case in the first place. The hearing officer explained in detail why she felt that the medical evidence failed to show that the claimant could work. She noted that the recent reports of the doctors who said the claimant could work were not based upon an examination and that their previous opinions were remote in time and prior to deterioration which had taken place in the claimant's condition.

I believe that under Rule 130.102(d)(3) the hearing officer still has the authority to determine whether or not the medical evidence shows the claimant has ability to work. If the hearing officer determines that the evidence shows that the claimant has an inability to work and that contrary medical evidence does not show an ability to work, then the hearing officer may find that the claimant has met the good faith requirement. Rule 130.102(d)(3) clearly recognizes that a claimant who is unable to work will not be required to make a futile job search and can meet the requirement of seeking employment in good faith commensurate with his or her ability to work without seeking employment.

The real question in the present case is whether or not the hearing officer erred in determining that the medical evidence did not show the claimant had an ability to work. I believe that the proper standard of review for us to apply in such a case is the same standard we have applied in regard to other factual determination--whether or not the factual determination is contrary to the great weight and preponderance of the evidence. I do not find that to be the case here and I would affirm the decision of the hearing officer.

I believe that an overly strict reading of Section 130.102(d)(3) would simply undermine the purpose of the workers' compensation system to provide benefits to injured workers by denying SIBS benefits to the most injured workers. It also would contradict the provision of Section 410.165(a) that provides that the hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. I do not believe that doing either of these things was intended by the Commissioners in promulgating Rule 130.102(d)(3). In fact the preamble to the new SIBS rules as well as the comments concerning Rule 130.102(d)(3) found in the Texas Register indicate to me that this is not the case. Read overly strictly, Rule 130.102(d)(3) would leave a hearing officer powerless to grant SIBS benefits to an injured worker who failed to seek employment because the injured worker was totally unable to work due to the injury if there were any scrap of paper, no matter how unreliable, signed by a medical service provider stating the injured worker was able to do any work.

In dissenting, I draw upon many of the well-reasoned arguments found in the dissenting opinion of Judge Stephens in Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

_____
Gary L. Kilgore
Appeals Judge