APPEAL NO. 992952

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 25, 1999, Texas Workers' Compensation Commission Appeal No. 991973 remanded a case involving supplemental income benefits (SIBS) under the new, 1999 rules, specifically Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) for the hearing officer to make findings of fact addressing the criteria of the new, 1999 rules. On December 3, 1999, the hearing officer, provided an opinion with such findings of fact, which again found respondent (claimant) entitled to SIBS for the third quarter. Appellant (carrier) asserts that the great weight of credible evidence shows that claimant had an ability to work and did not attempt to find work. The appeals file contains no reply from claimant.

DECISION

We affirm.

Appeal No. 991973 provided a summary of medical reports provided in this case. It remanded for the hearing officer to consider the criteria of Rule 130.102(d) and make findings of fact addressing that criteria. Such findings of fact have been made and those findings of fact may be considered to minimally support the determination awarding SIBS for the third quarter. That another fact finder would not have given the same weight to certain opinions and reports is not a basis for reversal. Accordingly, the decision and order on remand are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Judy L. Stephens
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. In Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999, we specifically referenced Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) and requested the hearing officer to address the three elements in that rule, which state:

(3) 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; . . .

Without specifically citing Rule 130.102(d)(3), the hearing officer does make "findings of fact" which summarize Dr. S reports and meets the element of a narrative report which specifically explains how the injury causes a total inability to work. It is the hearing officer's dismissal of the October 14, 1998, functional capacity evaluation (FCE), which "showed Claimant had an ability to work at the lower end of the medium work level" (quoted from the hearing officer's Finding of Fact No. 7) on the basis that it was performed about three months before the relevant qualifying period that gives me pause. While the Appeals Panel has suggested that medical reports in supplemental income benefits (SIBS) cases might have greater weight by being close to the filing or qualifying period, we have not rejected out of hand a report which was three months prior to the qualifying period and required that only medical reports rendered during the qualifying period had any weight. Further, the hearing officer, while recognizing that Dr. D had examined claimant, she apparently rejects a supplementary report because there was no reexamination and therefore was "in essence a peer review and not credible."

While there could be some disagreement as to what a record, or medical record, "shows," the hearing officer, by her own language in Finding of Fact No. 7, said that the FCE "showed Claimant had an ability to work" but then, in my opinion, erroneously rejected that report because it was three months prior to the qualifying period and refused to apply the plain language of Rule 130.102(d)(3). Further, based on the Supreme Court of Texas in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), holding that there were no exceptions to Rule 130.5(e), I believe that ignoring the plain language of Rule 130.102(d)(3) was error, particularly where the hearing officer herself commented on a medical record "which showed claimant had an ability to work" and then rejected that report because it was not in the qualifying period. If we are to reject a record in a SIBS case because it was not in the qualifying period, then all such records should be rejected, a position we have not yet taken.

I would have reversed and rendered a new decision that the elements of Rule 130.102(d)(3) not having been met, claimant was not entitled to SIBS for the third compensable quarter.

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Thomas A. Knapp
Appeals Judge