APPEAL NO. 000091

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 December 20, 1999. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 10th quarter. The appellant (carrier) appeals this determination, contending error as a matter of law in that the hearing officer failed to apply the applicable rules for determining SIBS entitlement in a claimed "no ability to work" case. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant sustained a compensable injury on _____, while working as a long distance truck driver when a door slammed into his head, knocking him unconscious. According to unappealed findings of the hearing officer, the compensable injury included two subdural hematomas and weakness on the left side requiring the use of a cane to ambulate. Finding of Fact No. 2. The claimant is also completely blind in his right eye and nearly blind in his left eye as a result of diabetes. Finding of Fact No. 3. The compensable injury does not include the diabetic retinopathy. Finding of Fact No. 4.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The 10th SIBS quarter was from September 12 to December 11, 1999, and the qualifying period was from June 12 to August 30, 1999.

The claimant's position was that he had no ability to work in any capacity during the qualifying period primarily because of his left-sided weakness. Rule 130.102(d)(3), in effect at the relevant time, provides that an injured employee has made the required good faith effort to obtain employment commensurate with the 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[.]

In Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999, we stated that each of the three parts of this rule should be considered by the hearing officer, with an explanation of how these factors effect in making a finding on the question of no ability to work. In later decisions we cautioned that findings of fact should be made on each of these elements particularly where there is no indication that the hearing officer considered the case under the applicable rules. *See* Texas Workers' Compensation Commission Appeal No. 992804, decided January 31, 2000.

In the case we now consider, the hearing officer commented in her discussion of the evidence that Dr. G, an independent medical review doctor, "has stated the Claimant is capable of working." More specifically, Dr. G wrote that the hematomas "are not a cause of his current inability to return to work" and that absent his other medical conditions, the claimant "would be able to return to work. . . ." There was also a functional capacity evaluation in evidence that concluded the claimant could work in a sedentary position. Other medical evidence of the claimant addressed his ability to work generally in the context of his entire medical condition. In response to this evidence, the hearing officer found that a "preponderance of the medical evidence shows that the Claimant cannot work in a sedentary position because of the weakness in his left side." Finding of Fact No. 6.[1] Given the hearing officer's assertion in her discussion of the evidence that Dr. G found some ability to work and the hearing officer's only finding on inability to work was premised on left-sided weakness, we cannot determine whether the hearing officer applied Rule 130.102(d)(3) in concluding that the claimant had no ability to work. For this reason, we reverse the determination that the claimant had no ability to work during the qualifying period and remand this issue for further specific findings of fact on each element of Rule 130.102(d)(3) required to establish an inability "to perform any type of work in any capacity." On remand, the hearing officer should consider whether the narratives relied on by the claimant specifically explain how "the injury" causes the total inability to work. This is especially important in this case because of the claimant's multiple medical conditions. *See* Texas Workers' Compensation Commission Appeal No. 991616, decided September 15, 1999. The hearing officer should also address the credibility of Dr. G's opinion and expressly find whether or not it is a record showing the claimant is able to return to work. *See* Texas Workers' Compensation Commission Appeal No. 992554, decided December 22, 1999 (Unpublished).

The carrier also appeals the hearing officer's finding that the claimant's unemployment was a direct result of his impairment, arguing that the "barrier to employment" is the blindness. Rule 130.102(c) provides that an injured employee has earned less than 80% of the AWW as a direct result of the impairment from the compensable injury "if the impairment from the compensable injury is a cause of the reduced earnings." This is consistent with our prior decisions that the claimant need prove the impairment is a cause of the underemployment or unemployment, not that it is the sole

[1]Although cast in terms of inability to work in a sedentary position, we construe this finding to be that the claimant is unable to perform any type of work in any capacity.

cause. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. Thus, we do not believe that the impairment has to be the predominant cause of the unemployment to satisfy the direct result criterion of SIBS entitlement. In its appeal, the carrier quotes extensively from the medical evidence that the claimant's unemployment is "more related to his ordinary diseases of life" or that his "main problem" is his blindness. This provides a sufficient evidentiary basis to uphold the finding of direct result, which under our standard of review we decline to reverse. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). *See also* Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

For the foregoing reasons, we affirm the finding of direct result. We reverse and remand the determinations that the claimant had no ability to work and was entitled to 10th quarter SIBS and remand these issues for further consideration consistent with this opinion.

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.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge