APPEAL NO. 000098

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 30, 1999, a hearing was held. The hearing officer determined that appellant (claimant) was entitled to supplemental income benefits (SIBS) for the 12th compensable quarter. Texas Workers' Compensation Commission Appeal No. 992147, decided November 12, 1999, remanded for the hearing officer to make findings of fact addressing the criteria set forth in the new, 1999 SIBS rules as found in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). In his decision on remand, the hearing officer found claimant was not entitled to SIBS for the 12th quarter. Claimant asserts that Rule 130.102(d) does not provide the only means to satisfy "good faith" required by the 1989 Act, although it does list four ways in which good faith is shown, adding that a carrier may counter whether good faith is present by "some record . . . stating" an ability to work. Claimant also states that Dr. S opinion does specifically state how the injury keeps claimant from work. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) as a plumber in 1993 when he hurt his back. There is no dispute that the qualifying period for the 12th quarter basically included the majority of April, May, and June, with a short time in July 1999. Consistent with the comments in Appeal No. 992147, *supra,* the hearing officer conducted no hearing, but made findings of fact applying Rule 130.102(d) based on the same evidence previously provided.

The hearing officer provided a discussion in his opinion on remand; none was provided in the original decision. The discussion included that claimant's "heart problems . . . [have] previously been determined to be part of the compensable injury." Stating the scope of the compensable injury, either as a result of litigation or acceptance by carrier, is very germane in view of the phrasing in Rule 130.102(d)(3), which refers to a "narrative report from a doctor which specifically explains how the injury causes a total inability to work." (Emphasis added.)

The hearing officer found that claimant had no ability to work during the qualifying period of the 12th quarter, that Dr. S's report did not specifically explain how the injury causes a total inability to work (and no other medical report was found to specifically explain how the injury caused a total inability to work) and that other reports from 1998 and 1999 "indicate" that claimant can do sedentary work depending on his pain; another finding then said that medical reports in 1998 were not relevant because claimant was "pain medication limited."

Claimant, on appeal, states that Rule 130.102(d) only provides "one of the means" to show good faith but is not the "sole means of proving satisfaction of the good faith effort requirements. . . ." The pertinent part of the rule does begin by saying, "employee has made a good faith effort . . . if the employee:" (four methods of satisfying good faith are then provided; they include returning to work, training relative to the Texas Rehabilitation

Commission, documentation of the good faith effort, and inability to work). The latter, inability to work, Rule 130.102(d)(3) is made up of three things: inability to perform any work, evidence of a narrative report "specifically explain[ing]" how it is the injury causes an inability to work and no other records "show[ing]" a return to work is possible. (Emphasis added.) With the detail provided by the new, 1999 rules, with four methods set forth to meet the requirements for good faith, and with no provision indicating that these methods provide examples but that good faith is not limited to these four methods, we are not prepared at this time to say that Rule 130.102(d) merely provides examples of how good faith may be met; we agree that the rule does not use words such as, "employee must meet the following criteria, as relevant, in order to qualify for SIBS."

The 1999 rules do not strip the hearing officer of his fact finding ability. While Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999, said that reliance on Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997 (saying the fact finder determines the weight to give any medical opinion including one clearly conclusory), is no longer permitted by the requirement to "specifically explain how the injury causes," the hearing officer's determination as to whether a narrative "specifically explains how the injury causes" is still a factual question which will be reviewed under a great weight and preponderance of the evidence standard.

Rule 130.102(d)(3) also imposes a criterion concerning whether other records "show" an ability to work. This also presents a factual determination for the hearing officer to make, in addressing this criterion, that will only be overturned if against the great weight and preponderance of the evidence. The criterion is not, as claimant states, that a carrier merely has to provide a record "stating" that a claimant has some ability to work; the rule says that the hearing officer, as fact finder, must decide whether the "other records show an ability to work." Under this requirement, a record might state that a claimant could work, but still be found not to "show" that the claimant could work. *See* Texas Workers' Compensation Commission Appeal No. 992274, decided November 29, 1999.

Dr. S's report of June 16, 1999, has been reviewed; it basically addresses back pain, adding that claimant "says he would rather die than live with the kind of pain that he is experiencing," but also says that claimant has no radicular pain, "relatively normal range of motion . . . 5/5 strength, normal sensation, and symmetrical reflexes." While claimant is said to report that his pain "bothers him" when he is standing and walking, sitting in a recliner is said to be "fairly comfortable." Claimant's fusion is questioned as to solidity, but no reference is made to any indication that it is not solid. Dr. S also says that claimant is confused due to the amount of medication he takes. The hearing officer's finding that Dr. S's June 16, 1999, report does not specifically explain how the injury causes an inability to work is not against the great weight and preponderance of the evidence.

We believe the hearing officer was correct in not rejecting reports (in this case the reports were medical reports) from outside the qualifying period merely because they were not made within the qualifying period. The hearing officer, however, does appear to be rejecting "other records" (a finding of fact says medical reports from late 1998 and early 1999 indicate an ability to work as pain permitted, and another finding of fact then says the 1998 medical reports are not relevant because of claimant's level of pain medication, but

this finding did not address the 1999 records). While the latter finding as to "other records" does not appear to address all the records identified, the hearing officer's determination that no SIBS are due may be affirmed based on his factual finding that Dr. S's report does not specifically explain how the injury caused the inability to work.

Claimant points out that the hearing officer's decision on remand contains a finding of fact which says that claimant had no ability to work and, therefore, claimant is entitled to SIBS. As stated previously, Rule 130.102(d)(3) provides three requirements in regard to no ability to work; they include that claimant is unable to perform any type of work, that a narrative report has been provided which specifically explains how the injury causes a total inability to work, "and" no other records show an ability to return to work. All must be addressed and answered favorably to claimant to result in an award of SIBS based on no ability to work. The finding of fact that claimant has no ability to work does not control and determine whether SIBS are due when other findings of fact do not show that the terms of Rule 130.102(d) have been met.

Claimant also says that the 1999 rules conflict with the statute by "requiring additional conditions." No appellate court has so ruled; the 1989 Act does not even contain a reference to "no ability to work" in requiring a good faith attempt to obtain employment commensurate with the ability to work; and Rule 130.102 may be construed as implementing Sections 408.142 and 408.143.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in the decision reached by the majority. In Finding of Fact No. 14, the hearing officer states "[t]he report of [Dr. S] of June 16, 1999 does not set out specifically how the injury produces a total inability to work." That factual finding of the hearing officer is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no basis exists for us to reverse that

determination on appeal and, in light of that determination, the hearing officer's determination that the claimant is not entitled to supplemental income benefits (SIBS) for the 12th quarter is likewise not subject to reversal.

I write separately to express my concern that the hearing officer appears to have believed that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) compelled this outcome and I do not believe that it did. In this instance, the hearing officer made a specific finding that the claimant had no ability to work in the qualifying period for the 12th quarter. In his discussion, the hearing officer noted that the Texas Rehabilitation Commission had determined based on Dr. S's June 16, 1999, letter that the claimant had no ability to work or to retrain for work and indicated his agreement with that assessment. Nonetheless, as noted above, the hearing officer determined that the claimant is not entitled to SIBS for the 12th quarter based upon his determination that Dr. S's June 16, 1999, narrative report did not "set out specifically how the injury produces a total inability to work." While that interpretation of Dr. S's report is not so contrary to the great weight of the evidence as to compel its reversal, I believe that when Dr. S's report is considered as a whole, it could have been found to satisfy the narrative requirement of Rule 130.102(d). In his June 16, 1999, report, Dr. S states that the claimant "continues to have severe pain in his low back," that the claimant "just can't do any type of activity whatsoever," that the claimant is "taking so much pain medication that he is a bit off," and that "[i]t had gotten to the point that he says he would just rather die than live with the kind of pain that he is experiencing now." Dr. S further noted that the only thing he could offer the claimant would be surgery to see if the fusion is solid and concluded "[o]ne thing is for sure, he is not doing well. I just don't know if we can, in good conscious [sic], leave him in his current situation." Although Dr. S did not specifically reference work, he made a much broader statement that the claimant "just can't do any type of activity whatsoever." It would have been reasonable to interpret the prohibition against "any activity" as encompassing work. In addition, I believe that the hearing officer could have determined that Dr. S provided sufficient explanation for his opinion by detailing the interplay of the claimant's severe pain and the effects of the substantial pain medication taken by the claimant in an effort to manage his pain. The hearing officer could have found that Dr. S's June 16, 1999, report satisfied the requirement of a narrative and, thus, awarded 12th quarter SIBS to the claimant. In my view, such a determination would not have been subject to reversal under a sufficiency standard of review.

Elaine M. Chaney
Appeals Judge