APPEAL NO. 000227

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 January 6, 2000. The hearing officer determined that during the qualifying period for the first supplemental income benefits (SIBS) quarter, the respondent (claimant) had a total inability to work and in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) effective January 31, 1999, claimant is entitled to SIBS for the first compensable quarter. The hearing officer's finding that claimant's unemployment is a direct result of his impairment is not appealed and has become final. Section 410.169.

Appellant (carrier) appeals, contending that the hearing officer misinterpreted Rule 130.102(d), that other medical records show that claimant has some ability to return to work and that the claimant's treating doctor's reports are "conclusory opinions rather than medical narratives that specifically explain how the injury has caused a total inability to work." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

Claimant testified that he was a hospital respiratory therapy supervisor and that on _____, he slipped on some tile, fell backwards and sustained injuries to his neck, back and left hand. Claimant subsequently developed numbness in his left hand and reflex sympathetic dystrophy (RSD) of the left hand. It is undisputed that claimant sustained a compensable injury and the parties stipulated that claimant has at least a 15% impairment rating (IR) and has not commuted impairment income benefits (IIBS). The parties appear to agree that the qualifying period for the first compensable quarter is from February 5 through May 6, 1999.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant had made the requisite good faith effort to obtain employment commensurate with his ability to work.

Claimant contends that he has a total inability to work and Rule 130.102(d) addresses the good faith effort requirement of the 1989 Act. Rule 130.102(d)(3) (the version then in effect) provides that an injured employee had made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "(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 record shows that the injured employee is able to return to work." The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000. The Appeals Panel has also encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3) when that rule is applicable. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

Claimant's treating doctor is Dr. F, who, in a report dated February 4, 1999, detailed some of claimant's problems of "severe debilitating pain in the left arm," a diagnosis of RSD, "burning nature of his pain syndrome along with loss of hair, temperature and tolerance . . . typical of a neuropathic pain component" and commented on "interruptions in [claimant's] care due to insurance difficulties . . . ." In another report dated February 25, 1999, Dr. F mentions a neuropathy suggestive of RSD and that claimant "requires ongoing rehabilitation and physical therapy preceded by another round of stellate ganglion blocks and Bier blocks to try to reduce his contractures." Dr. F also recites the various medications claimant is taking and again notes problems obtaining carrier authorization. In reports dated April 13 and 15, 1999, Dr. F talks of splinting the fourth and fifth digits of the left hand due to contractures and the benefits of the "Bier Block and a couple of Stellate Ganglion Blocks." In a follow-up note dated April 15, 1999, to claimant, Dr. F addresses the ability to work, stating:

> I think that it is too early for you to be considering the return to any type of work yet. I want you to see if you can tolerate physical therapy two to three times per week. If there is little to no progress than [sic] you should consider filing for disability with the State as we discussed. Because if there is no progress than I do not believe you will be able to tolerate the pain in your arm at any type of job. In addition to the above, after the dizzy spell you had at the office I would like for you to not be driving or operating any equipment that would be dangerous to yourself or anybody else. This means drive only if you have no other choice, and then stop and rest along the way, no long trips of any kind. If you don't do this I will have to write a letter to the Department of Public Safety. As of today I will no longer be responsible for you operating a car without assistance.

In addition, there are reports from Dr. M in evidence. Dr. M, in a report dated April 26, 1999, states that claimant cannot return to work; and in a report of May 13, 1999, states that claimant "is unable to do any kind of work at this time since he suffers from contractures in his left hand and has to use a cane on the right to ambulate." In a report dated January 4, 2000, Dr. M disputes a carrier independent medical examination (IME) report done for the Texas Rehabilitation Commission which allegedly states "he certainly does not appear employable to me, on the basis of his pain and difficulty with his arm."

Carrier relies on the report of Dr. P, its IME doctor, and a functional capacity evaluation (FCE) performed on April 15, 1999. Dr. P, in his report dated April 6, 1999, recites claimant's history, including the ganglion and Bier blocks, notes his (Dr. P's) examination, comments that claimant is "looking forward to management training at [a home improvement store]," diagnoses cervical and lumbar strain and RSD of the left upper extremity and concludes that in his opinion claimant "could return to some sort of sedentary or light work. He is planning management training at a retail store." Dr. P references a scheduled FCE. The FCE performed on April 15, 1999, references "mild tendencies for symptom magnification" and summarizes that claimant "is capable of returning to work at a sedentary physical demand level" with restrictions of sitting no longer than 45 minutes, standing no longer than 30 minutes, no squatting and limited carrying.

The hearing officer, in his Discussion, references Dr. P's opinion and goes on to state:

> However, Rule 130.102(d) must be considered in conjunction with the rest of the Rule and other rules. The context in which 130.102(d) was drafted is for a determination at a level prior to a BCCH [benefit contested case hearing]; other portions of Rule 130.102 and other rules allow BCCH determination of whether Claimant is entitled to SIB's based on no ability and good faith effort.

Carrier's appeal contends that Dr. P's report and the FCE constitute such "other records" that show claimant has some ability to work, and cites Appeal No. 992197, *supra*; and Old Republic Insurance Company v. Rodriguez, 966 S.W.2d 208 (Tex. App.-El Paso 1998, no pet. h.).

In addressing the hearing officer's comment that Rule 130.102(d) was drafted in a context "for a determination at a level prior to a BCCH," we are not exactly clear what the hearing officer means but presume he is referring to Rule 130.102(e) which deals with an actual job search and provides that in determining whether the job search met the requirements of Rule 130.102(d)(4) "the reviewing authority shall consider" certain information. Reviewing authority is defined in Rule 130.101(5) as a person who reviews the SIBS application. We hold that the provisions of Rule 130.102(e) are only applicable to the documentation of an actual job search and are not applicable to the inability to perform any type of work in any capacity as set out in Rule 130.102(d)(3).

Although the hearing officer references "the rest of the Rule and other rules" he does not enlighten us to what specifically he was referring. The Appeals Panel has previously noted that the new SIBS rules are generally more demanding in showing no ability to work at all and that all three prongs of Rule 130.102(d)(3) must be established. The hearing officer makes no specific finding regarding the three prongs although perhaps one could reasonably infer that he is finding that claimant has been unable to perform any type of work in any capacity. The hearing officer makes no finding on which report or combination of reports he believes provide the narrative which specifically explains how the injury causes a total inability to work. Neither does the hearing officer make any specific findings

on the third element of whether there are other records which show an ability to return to work. We have earlier noted that it was desirable that the hearing officer make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3). It is fairly clear that both Dr. P's April 6th report and the FCE state that claimant "is capable of returning to work" at a sedentary or light work level. If the hearing officer believed that those reports, for whatever reason, did not show claimant was able to return to work, he should make findings why that was so or how the records failed to show that claimant was able to return to work. Appeal No. 992197*, supra*, gives some examples of how a particular report may state an ability to return to work but perhaps still not show that the injured worker is able to return to work.

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. *See* Rule 130.110, effective November 28, 1999.

We hereby remand the case for the hearing officer to specifically reference what "other rules" he was relying on and to make specific findings of fact regarding the elements in Rule 130.102(d)(3). 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge