APPEAL NO. 000276

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 10, 2000, a hearing was held. The hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first, second, and third compensable quarters. Appellant (carrier) asserts that claimant did have some ability to work during all of the filing/qualifying periods in issue, citing medical records and a functional capacity evaluation (FCE). The appeals file does not contain a reply from claimant.

DECISION

We affirm in part, and reverse and remand in part.

Claimant worked for (employer) on _____. The parties stipulated that he sustained a compensable neck and right shoulder injury, has an impairment rating of 18%, commuted no benefits, and that the first quarter began on March 30, 1999. No finding of fact was made as to whether claimant sought work but the record shows that claimant testified that he did not look for work during any filing/qualifying period in issue. The record also shows that the parties addressed the filing period for the first quarter as beginning on December 29, 1998; the parties apparently recognized the relevance of the new, 1999 SIBS rules because March 15, 1999, not March 30, 1999, was said to mark the beginning of the "period of time for the second quarter"; similarly, June 16, 1999, through September 14, 1999, was said to be the "qualifying period" for the third quarter. Otherwise, the record and the findings of fact do not reference that one set of SIBS rules applies to the filing period of the first quarter and another set of SIBS rules applies to the qualifying periods of the second and third quarters.

There is some evidence of an inability to work provided by Dr. G in late March 1999, which may minimally support a finding of no ability to do any work of any kind during the filing period of the first quarter under the old SIBS rules. That report says that claimant can lift minimum amounts, but then says that he cannot do "any type of gainful employment." Dr. G also refers to medications as possibly harmful especially if the claimant is working in a "hazardous environment." Dr. G then says that he "does not feel that it is practical for this patient at this time to be considered a vocational candidate." An FCE was performed in mid-March 1999, which showed that claimant was not able to meet the physical demand level requirements of a "warehouse worker." (Emphasis added.) Claimant was restricted to lifting no more than 40 pounds, with "decreased tolerance" to prolonged activities. A work hardening program was recommended.

Prior to the new, 1999 SIBS rules, the hearing officer could give significant weight to conclusory medical opinions (*see* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997) and did not have to address reports, which said a claimant could work, in findings of fact. Under the prior rules, the hearing officer could choose to

give no weight to the FCE, which considered claimant's past job as a warehouse worker and then said claimant could lift up to 40 pounds, and could give significant weight to Dr. G's opinion, even though Dr. G used a standard not found in Sections 408.142 and 408.143 (gainful employment as opposed to ability to work). As a result, the determination that claimant is entitled to SIBS for the first quarter is not found to be so against the great weight and preponderance of the evidence as to be unjust; that part of the decision is affirmed.

The new, 1999 rules, in instances in which SIBS are determined based on an inability to work, impose specific requirements. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992650, decided January 18, 2000; Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; and Texas Workers' Compensation Commission Appeal No. 992877, decided February 4, 2000. When the criteria set forth in the new, 1999 rules have not been addressed in the decision under review, the decision has been remanded for findings of fact that address each applicable criterion. *See* Texas Workers' Compensation Commission Appeal No. 991598, decided September 10, 1999; and Texas Workers' Compensation Commission Appeal No. 991456, decided August 16, 1999.

In reviewing the record, we note two reports that should be addressed in regard to whether "no other records show that the injured employee is able to return to work," the FCE provided during the filing period of the first quarter and an evaluation by Dr. L provided during the qualifying period of the third quarter. In addition, Appeal No. 992197, *supra*, pointed out that the rationale of Appeal No. 970834, *supra*, is no longer relevant because of the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) that in inability-to-work cases a "narrative report" has to "specifically explain how the injury causes a total inability to work." In that regard, the record also contained testimony that emphasized claimant's depression, but the reports of Dr. G, the treating doctor, through September 1999, the end of the qualifying period of the third quarter, do not appear to rely upon, or even refer to, depression as a basis for a total inability to work, or as Dr. G says on September 7, 1999, "this patient is totally disabled . . . I do not feel that it is practical for this patient at this time to be considered a vocational candidate." A record of Dr. G of October 7, 1999, does say claimant is "getting very depressed," but Dr. G's later report of October 8, 1999, does not mention depression or any psychological condition as being part of the injury.

On remand, the hearing officer should consider the evidence of record under the applicable provisions of Rule 130.102 and make findings of fact that address the three requirements for awarding SIBS based on a total inability to do any work at all. As stated, claimant testified that he did not look for work in any relevant filing/qualifying period.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur with the majority's determination to remand the case for the hearing officer to discuss the application of the "new"supplemental income benefits (SIBS) rules regarding the claimant's eligibility for SIBS for the second and third compensable quarters. This was the basis for my concurring in Texas Workers' Compensation Commission Appeal No. 991456, decided August 16, 1999. I do not necessarily believe that the cases cited by the majority reflect a correct understanding of the "new" SIBS rules. I specifically dissented in Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999, which is cited by the majority. I agree that the "new" SIBS rules were intended to make the requirements for SIBS eligibility more objective than previously. However, I do not believe that it was the intention of the Commissioners in promulgating the "new" rules to strip the hearing officers of their function as fact finders to weigh the evidence presented or to make qualification for SIBS more difficult than for a camel to go through the eye of a needle. I believe that a hearing officer still has latitude to both interpret the medical evidence in regard to inability to work and the evidence in regard to ability to work in determining whether or not the evidence shows that the claimant is unable to work and whether any contrary medical evidence actually does show an ability to work. *See* Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

Gary L. Kilgore
Appeals Judge