APPEAL NO. 000310

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 20, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the sixth compensable quarter. The appellant (carrier) has appealed, urging that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. Claimant responds that the evidence is sufficient to support the findings and conclusions of the hearing officer and the decision should be affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable back injury in _____, was assigned an impairment rating of 18%, has had four surgeries, and has been recommended by her doctor for a surgery to remove hardware. 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 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 5th SIBS quarter was from October 6, 1999, to January 4, 2000, and the qualifying period was from June 23 to September 21, 1999.

The claimant did not look for any work during the qualifying period and contends that she was unable to work. Claimant's doctor, Dr. S, has indicated that another surgery is needed; however, surgery was denied under the spinal surgery second opinion process. That denial has apparently not been appealed. Dr. S states his opinion that the claimant is not able to work, is on strong pain medications, and is not able to perform activity involving pushing, pulling, stooping, bending, crawling, lifting, squatting or climbing because they aggravate her lumbar condition. He is also critical of a report of Dr. L, who evaluated the claimant on the carrier's behalf on May 19, 1999, and who opined the claimant should be weaned off narcotic medication immediately, that further medical or surgical treatment is not advisable, and that she is "certainly capable of doing sedentary work of a light capacity" and is capable of doing clerical work.

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 relate to a finding on the question of no ability to work. In later decisions we cautioned that express 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.

The hearing officer notes in her discussion that both parties argued that their opponent's doctor lacked credibility and was biased, and "actually both parties' positions were persuasive in that regard." Of course, weight of evidence and determining credibility are generally matters for the hearing officer. Section 410.165(a). In any event, she seems to accord the same consideration to both Dr. S and Dr. L. She notes as supportive of no ability to work one of the second opinion doctor's concurrence in the recommendation for hardware removal, but apparently discounts the other second opinion doctor and the determination of the Texas Workers' Compensation Commission (Commission) not approving surgery. In any case, her only dispositive finding of fact on the good faith effort issue was that the claimant was "unable to work." Finding of Fact No. 3. No further findings on the specific elements of Rule 130.102(d)(3) were made. For this reason, we reverse the determination that the claimant had no ability to work during the qualifying period and that she was entitled to sixth quarter SIBS and remand 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. *See* Texas Workers' Compensation Commission Appeal No. 991616, decided September 15, 1999. The hearing officer should also address the credibility of Dr. L'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). We affirm the direct result finding.

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 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:

Dorian E. Ramirez
Appeals Judge

DISSENTING OPINION:

I respectfully dissent concerning the remand and would render a new decision that the claimant is not entitled to supplemental income benefits (SIBS) for the sixth quarter. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) addresses good faith with regard to the requirement that an attempt in good faith be made to obtain or seek employment commensurate with the ability to work. Good faith, under the rule, can be shown even though there is no job search if the claimant "(4) 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." We have noted that the current SIBS rules are more demanding and that all three elements of the rule must be met to establish good faith in a no ability to work situation. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. It is the third element, that is, that "no other records show that the injured employee is able to return to work" that is not supported in the evidence in this case. The rule as now composed sets forth specific criteria that must be followed in determining good faith in this setting. Texas Workers' Compensation Commission Appeal No. 992650, decided January 18, 2000; Texas Workers' Compensation Commission Appeal No. 992877, decided February 4, 2000. Clearly, the Commission mandated that certain requirements be met and they cannot be discarded without compelling reasons supported in the record. Texas Workers' Compensation Commission Appeal No. 992692, decided January 27, 2000. Here, the report of Dr. L was rendered shortly before the qualifying period and would qualify as a

probative "other record" showing some ability to work. And while there was some question as to the second opinion spinal process and the procedures followed and denial thereof, at most, there was some medical evidence going both ways regarding any tangential effect on the ability to work during the qualifying period. In sum, I conclude from a review of the record that the evidence fails to meet the requirements of Rule 130.102(d)(4) for establishing good faith, and that the determination that the claimant is entitled to SIBS for the sixth quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, I would render a new decision that the claimant is not entitled to SIBS for the sixth quarter.

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Stark O. Sanders, Jr.
Chief Appeals Judge