

APPEAL NO. 000509

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 February 2, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 15th, 16th, and 17th quarters. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that during the qualifying period for the 15th, 16th, and 17th quarters, the claimant's unemployment was a direct result of his impairment and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned an impairment rating of 15% or greater for his injury; that the claimant did not commute his impairment income benefits; that the 15th quarter of SIBS ran from May 28 to August 26, 1999; that the 16th quarter of SIBS ran from August 27 to November 25, 1999; that the 17th quarter of SIBS ran from November 26, 1999, to February 24, 2000; and that during the qualifying periods for the 15th, 16th, and 17th quarters, the claimant earned no wages. The dates of the qualifying periods for the respective quarters were not specifically identified.

As noted above, the hearing officer determined that the claimant was not entitled to SIBS for the quarters at issue. From a statement the hearing officer made in his decision and at the hearing, it is apparent that he has misapplied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3)¹ (Rule 130.102(d)(3)) and thus, we remand the case for him to reconsider the claimant's entitlement to SIBS for the 15th, 16th, and 17th quarters. The subsection of Rule 130.102 concerning no ability to work provides that an injured employee has made a good faith effort to obtain employment commensurate with his 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 work." In a September 10, 1998, report, Dr. S, a Texas Workers' Compensation Commission (Commission)-selected required medical examination doctor, opined that the claimant "appears to be able to perform at sedentary work level." In his decision, the hearing officer acknowledged the existence of Dr. S's report and stated "[b]ased on Appeals Panel Decisions interpreting R 130.103, I am

¹Effective November 28, 1999, Rule 130.102 was amended and the no-ability-to-work provision became subsection (d)(4).

required to find claimant has some ability to work." In Finding of Fact No. 2 A the hearing officer found that "[t]here is a record indicating claimant had some ability to work." Similarly, the hearing officer had an exchange with the ombudsman assisting the claimant at the hearing during her closing statement in which he stated that the Appeals Panel had interpreted Rule 130.102(d)(3) such that once a record "indicates" an ability to work the no-ability-to-work theory is "eliminated." The ombudsman disagreed saying that the question was still one of fact for the hearing officer and the hearing officer responded he believed that it should be a question of fact but it was "clear" that it was not. The hearing officer did not identify the case (or cases) in which the Appeals Panel stated that the admission of a record "indicating" that the claimant had some ability to work ends the inquiry of whether the claimant is entitled to SIBS under subsection (d)(3) of Rule 130.102 and we did not find cases so stating. Rather, our research revealed several Appeals Panel decisions in which the question as to whether another record "shows" an ability to work is a question of fact for the hearing officer, as the fact finder and the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000; Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000; and Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000. Those cases have emphasized that the question of whether a record "shows" an ability to work is a different question than the question of whether the record states that the claimant has some ability to work. In this instance, Dr. S's report does state that the claimant can work in a sedentary capacity. However, the mere existence of that report does not resolve the issue of whether the claimant is entitled to SIBS for the quarters at issue under Rule 130.102(d)(3). Rather, the hearing officer, as the fact finder, must determine if he is persuaded that Dr. S's report "shows" that the claimant had some ability to work in the relevant qualifying periods. The hearing officer has not resolved that factual question; thus, we reverse his determination that the claimant is not entitled to SIBS for the 15th, 16th, and 17th quarters and remand for him to do so and to reconsider the claimant's entitlement to SIBS for those quarters at issue.

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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge