

## APPEAL NO. 000590

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 29, 2000. The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 10th quarter. The hearing officer determined that claimant is entitled to SIBs for the 10th quarter. The appellant (carrier) appeals requesting that we reverse the hearing officer=s decision and render a decision in its favor. Claimant responds urging affirmance.

### DECISION

Affirmed.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury; that she reached maximum medical improvement on August 27, 1996, with an impairment rating (IR) of 18%; that she has not commuted any portion of her impairment income benefits (IIBs); that the qualifying period for the 10th quarter began on August 26, 1999, and ended on November 24, 1999; and that the 10th quarter began on December 8, 1999, and ends on March 7, 2000.

Claimant testified that on \_\_\_\_\_, she was employed as a department manager for the employer and that while moving a sewing machine the left side of her neck and left shoulder area "went numb"; that she later underwent carpal tunnel surgery; that she developed reflex sympathetic dystrophy (RSD); and that she has "not been able to do anything since 1995" and is not able to do anything with her left hand. Claimant said she cannot stay up for long because of neck pain and that her neck even hurts riding in a car. She had to support her neck with her hand and arm while testifying. She said she is right- hand dominant and that nothing is wrong with her right hand. Claimant stated on her Application for Supplemental Income Benefits (TWCC-52) for the 10th quarter that during the qualifying period she earned no wages and did not look for employment and that her doctor documented that she cannot do any type of work in any capacity.

Claimant further testified that during the qualifying period, her treating doctor, Dr. H, told her not to work; that she was examined by a doctor for the carrier, Dr. B, who had previously been her treating doctor; and that she was subsequently examined by a designated doctor, Dr. E, at the behest of the Texas Workers= Compensation Commission (Commission).

On the "Disability Claim Form" of another carrier dated "1/19/99," which contained a definition of "total disability" not found in the 1989 Act, Dr. H stated that claimant has been totally disabled from 1995 to the present and that in his opinion, claimant will never be able to perform some gainful occupation.

Dr. B's report of November 30, 1999, states that claimant had minimal improvement from surgery on her left arm; that the results of stellate ganglion blocks were inconsistent that a bone scan was consistent with RSD; that an MRI revealed a left shoulder partial rotator cuff tear; that she developed adhesive capsulitis in the left shoulder; that she was not felt to be a candidate for left shoulder surgery and was referred to Dr. H for pain management; and that she underwent a sympathectomy in 1996 without any improvement. Dr. B further reported that claimant is managed on Oxycontin, Zoloft and four other medications; that she has family members perform the cooking, cleaning, and grocery shopping; that she reports being unable to drive because of loss of cervical range of motion; and that she is in therapy for depression. Dr. B stated further that claimant is extremely self-limited and passive in her approach to her current pain; that in evaluating her current condition the only type of work she could perform is that which is restricted to the right upper extremity function only; that she would need to work in a highly selected position to accommodate a handicapped individual with only right dominant upper extremity function; that she is able to sit and stand and change positions adequately; that she would have difficulty with repetitive neck movement; and that, in essence, she requires a sedentary work position such as telemarketing, dispatching or telephone work where she could function with only one upper extremity and use a headset; and that outside of a highly selected work position, she would otherwise be disabled.

Dr. E's report of December 29, 1999, stated that claimant experienced adverse effects after treatment for left carpal tunnel syndrome (in 1995) and has been left with RSD; that she has not responded well to medication, injections, or a surgical sympathectomy (in 1996); that she is now left with chronic pain involving her left upper extremity; that she has symptoms consistent with RSD; and that "[s]he has what appears to be a severe case." Dr. E further states that "[t]aking into consideration [claimant-s] work experience, age, and significant limitations for her left upper extremity, [h]e does not see any potential at all that she is going to be able to maintain any form of gainful employment"; and that he does not think a functional capacity evaluation is necessary in that she would most likely test out at a sedentary position and most sedentary positions require bilateral use of the upper extremities which she is not going to be able to do. Dr. E further stated that although a previous work evaluation (referring to Dr. B's report) indicated that claimant might be capable of working as a dispatcher or in telecommunications, in both situations she is going to be required to use both upper extremities with some aspects of her job; that she would not be functional using a computer; and that she would not meet the demands of a secretary who would be required to type and would not be capable of performing other activities associated with that job. Dr. E concluded that "[i]t is [his] opinion that [claimant] is not capable of gainful employment at any level."

On a "Disability Claim Information" form of the same carrier dated "2/17/00," Dr. H stated that claimant will never be able to return to either part-time or full-time work and has been totally disabled "from 4/95 to permanent." Dr. H also wrote to the Commission on "1/5/00" stating that claimant is medically unable to work because she has severe RSD "with marked hypesthesia requir[ing] strong analgesics which affect her ability to work." Dr. H also commented on the report of Dr. B, stating that he thinks it would be hard for claimant to work

eight-hour days on her current medications and that phone work requires repetitive neck movements.

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.

The parties stipulated that claimant's IR was 18% and that she did not commute IIBs. The carrier disputes the hearing officer's findings that during the 10th quarter filing period claimant was unemployed as a direct result of her impairment; that she had no ability to work; and that her requirement to attempt in good faith to obtain employment commensurate with her ability to work was satisfied because she had no ability to work.

Concerning the finding that claimant was unemployed as a direct result of her impairment, the hearing officer's discussion of the evidence states that the testimony and medical evidence support claimant's position that she suffered a serious injury with lasting effects; that she can no longer reasonably perform the duties of her previous job; and that she has thus met her burden of proving that she was unemployed during the qualifying period as a direct result of her impairment. It is well-established that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury." Texas Workers=Compensation Commission Appeal No. 960028, decided February 15, 1996. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that this finding is sufficiently supported by the evidence.

Given the starting date of the qualifying period, this a "new SIBs rules" case. Texas Workers=Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). Concerning the findings that claimant had no ability to work and that claimant's requirement to attempt in good faith to obtain employment commensurate with her ability to work being satisfied because she had no ability to work, we note that the "new" SIBs rule on the "good faith" requirement was in effect. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)) in effect during the qualifying period in this case provides that an injured employee has 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 records show that the injured employee is able to return to work; . . . ."

The Appeals Panel has said that all three prongs of Rule 130.102(d)(3) must be satisfied. Texas Workers= Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers= Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); Texas Workers= Compensation Commission Appeal No. 992717, decided January 20, 2000; and Texas Workers= Compensation Commission Appeal No. 992692, decided January 20, 2000. Section 410.168(a) requires that a written decision include findings of fact and conclusions of law. The hearing officer failed to make specific findings on each of the three elements of Rule 130.102(d)(3). The Appeals Panel has encouraged hearing officers to do so when that rule is applicable. Texas Workers= Compensation Commission Appeal No. 991973, decided October 25, 1999; Appeal No. 992692, *supra*. However, the hearing officer does address the elements of Rule 130.102(d)(3) in her Statement of the Evidence.

In her discussion of the evidence, the hearing officer states that the report of Dr. E shows that claimant is unable to perform any type of work in any capacity and specifically explains how the injury causes a total inability to work. This statement is, in effect, a finding of fact and we are satisfied that it is not against the great weight of the evidence.

The hearing officer further comments that while the carrier asserted that Dr. B's report constituted a record which shows that claimant is able to work, "upon careful review of that record, and the narrative of [Dr. E], that is not the case"; that Dr. B clearly states that unless claimant had a "highly selected" work position, she would be disabled; that Dr. E's report clearly shows why claimant could not perform any of the job duties outlined by Dr. B; and thus "no other record shows that Claimant is able to return to work."

The carrier's main point on appeal is that claimant failed to prove that "no other records show that [she] is able to return to work," contending that Dr. B's report does constitute such a record. Whether Dr. B's report constitutes a record showing that claimant has an ability to work is a fact question for the hearing officer to resolve and the Appeals Panel will not reverse such a finding unless it is against the great weight of the evidence. However, the hearing officer must make that determination based on the content of the record itself and not by relating it to the content of another record. In other words, the question is not whether the record is successfully rebutted by other evidence but whether the record itself shows an ability to work. The majority opinion in Appeal No. 992692, *supra*, stated as follows:

While the content of all the medical records the hearing officer finds relevant are considered when determining whether the first prong of Rule 130.102(d)(3) has been satisfied by claimant, we do not read the rule as providing that a record

that may show an ability to return to work is trumped by other records that show the contrary. To state this proposition another way for clarity's sake, the records should be evaluated to determine if a record, or records, "show that the injured employee is able to return to work," the third prong of Rule 130.102 (d)(3). The narrative reports should be evaluated to determine if a narrative report "specifically explains how the injury causes a total inability to work," the second prong of the rule. All of the evidence should be evaluated to determine whether the claimant "has been unable to perform any type of work in any capacity," the first prong of the rule. As previously stated, all three criteria of Rule 130.102(d)(3) must be satisfied by a claimant seeking SIBS under a "no ability" to work theory. Further, also as previously stated, the hearing officer should make specific findings of fact on each of the three criteria of Rule 130.102(d)(3).

We view as supportive of this interpretation of Rule 130.102(d)(3) the following comment and response from the preamble for Adoption of New ' ' 130.100 - 130.108:

Comment: Commenters requested additional information on what might constitute "detailed medical records." It was suggested that the language in subsection (d)(3) be changed to ensure that the information is not limited to the treating doctor's opinion, that an injured employee must seek work if any doctor's opinion is provided that identifies the capability to work, and that the inability to work be the "total" inability to work.

Response: The Commission agrees. Subsection (d)(3) has been changed to: "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. . .

24 Tex. Reg. at 406 (1999) (to be codified at 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Tex. Workers' Comp. Comm'n).

Accordingly, we disregard the hearing officer's relating Dr. B's report to Dr. E's report, in effect using Dr. E's report to rebut any suggestion of ability to work in Dr. B's report, examine the content of Dr. B's report, and determine that based on the content of Dr. B's report, the hearing officer could find that it did not show an ability to work. Such finding is not against the great weight of the evidence.

Finally, we note that at the hearing claimant contended that Section 408.151(b) and Rule 130.110 were implicated in this case and the hearing officer took pains to explain why

she did not regard these provisions as applicable in a SIBs case. Since the issue is not before us on appeal, we will refrain from discussing it.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill  
Appeals Judge

CONCURRING OPINION:

I agree with the main opinion in its result, but do not fully agree with its reasoning. I specifically disagree with its reliance on the majority opinion in Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000. I agree with Judge Chaney's well-reasoned dissenting opinion in that case.

Gary L. Kilgore  
Appeals Judge

Judy L. Stephens  
Appeals Judge