

APPEAL NO. 001241

On February 11, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* In Texas Workers' Compensation Commission Appeal No. 000581, decided May 1, 2000, the Appeals Panel: 1) reversed the hearing officer's decision that appellant (carrier) waived its right to contest respondent's (claimant) entitlement to supplemental income benefits (SIBs) for the seventh quarter and rendered a decision that carrier did not waive its right to contest SIBs for the seventh quarter; and 2) reversed the hearing officer's decision that claimant is entitled to SIBs for the sixth and seventh quarters and remanded the case to the hearing officer for the hearing officer to make findings of fact which address all the elements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) regarding no ability to work (Rule 130.102(d)(3) became Rule 130.102(d)(4) as amended effective November 28, 1999).

The hearing officer found in her decision and order on remand that the narrative reports of Dr. M and Dr. E specifically explain how claimant's injury causes a total inability to work and show that claimant was unable to perform any type of work in any capacity during the relevant qualifying periods; that the records of Dr. S and Dr. K, and the April 1999 functional capacity evaluation (FCE) are not credible as other records which show that claimant is able to return to work; that during the qualifying periods for the sixth and seventh quarters 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 was satisfied because claimant had no ability to work. The hearing officer decided in her decision and order on remand that claimant is entitled to SIBs for the sixth and seventh quarters. Carrier appeals the hearing officer's decision, contending that the April 1999 FCE report and Dr. K's report are records which show that claimant has an ability to work and that claimant is not entitled to SIBs for the quarters in issue. Claimant requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

Appeal No. 000581 summarizes the evidence in this case and that summary will not be repeated herein. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). In Texas Workers' Compensation Commission Appeal No. 000625, decided May 11, 2000, the Appeals Panel stated that whether another record "shows" an ability to work is a question of fact for the hearing officer to resolve and 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. It is clear from the hearing officer's Statement of the Evidence portion of her decision and her fact findings on remand that she was not persuaded that the April 1999 FCE report and Dr. K's report show that claimant is able to return to work. We conclude that the hearing officer's decision on remand that claimant is entitled to SIBs for the sixth and seventh quarters is

supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order on remand are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Thomas A. Knapp
Appeals Judge