

APPEAL NO. 001252

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 May 15, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 14th quarter. The appellant (self-insured) appealed, contending that this determination is against the great weight of the evidence. The claimant replies that the decision is correct and should be affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable injury on _____, for which she was assigned a 37% impairment rating. 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 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 14th quarter was from January 27 to April 26, 2000, and the qualifying period was from October 15, 1999, to January 13, 2000.

The claimant did not look for employment during the qualifying period and contended that she had no ability to work in any capacity. The version of Rule 130.102(d)(3) in effect at all pertinent times, provided that "[a]n 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" We have described this rule as "generally more demanding" than the prior rule in what is required of a claimant to establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000.

In a series of reports beginning on July 1, 1997, Dr. H, the treating doctor, reviewed the claimant's medical condition and concluded she was "totally and completely disabled from any type of gainful employment . . . and will remain that way for the foreseeable future." Letter of January 26, 1998. This view was premised on cervical herniation, chronic pain, and difficulty in moving and has remained fairly consistent. Dr. H's reports do, however, contain some contrary opinions to the effect that the claimant could do minimal sedentary work and it would be "impossible" to find a job that she could do "on a regular basis." The most current report of Dr. H in evidence, dated February 11, 2000, references

the claimant's chronic pain and inability to stand, sit, walk or use her arms or legs for any significant length of time or for repetitive activities. He again concluded that she is "completely and totally disabled from any type of gainful employment. . . ." The hearing officer found that these reports provided a narrative as set out in Rule 130.102(d)(3). The self-insured appealed this determination, pointing out Dr. H's use of the word "gainful" and that the hearing officer ignored those parts of Dr. H's records that seem to say the claimant has some ability to work.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We have noted in the past that the use of the word "gainful" in describing the employment a claimant could do was problematic in the context of the SIBs notion of no ability to work. See Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. However, it was up to the hearing officer to consider this word in the context of the reports where it appears and determine whether the doctor's use of this word really is meant to convey no ability to work at all. In this case, we do not find Dr. H's use of this word dispositive of the issue of no ability to work or subject only to one interpretation. Given the role of the hearing officer as fact finder, we find no merit in the self-insured's contention that her finding of a narrative establishing no ability to work is against the great weight of the evidence.

What is of greater concern is the analysis of the evidence on the matter of whether other records show an ability to work. In evidence were approximately 30 pages of reports of Dr. T, who examined the claimant on more than one occasion. On March 6, 1998, Dr. T noted symptom magnification in a functional capacity evaluation (FCE) done a year earlier. He also stated that there "is not a medical condition that would preclude this patient from returning to the workforce in the sense that this patient is capable of traveling to and from work, to be at work, and to perform assigned tasks and duties for which the employer is willing to pay wages. . . . The problem in this patient is not necessarily whether she can work or not, it is trying to figure out what type of job she can perform. . . . Based on the evaluation today she would have to be returned to the workforce in a sedentary category. . . ." On November 19, 1998, Dr T wrote that the claimant was "theoretically" capable of returning to the workforce, but it would be "difficult if not impossible to have her return to the workforce and to have her accommodated as pointed out in my last report of March 1998." On August 26, 1999, Dr. T wrote that the claimant "is undoubtedly capable of returning to the workforce in a sedentary category if she so chooses. Unfortunately, she complains of pain and states that she is unable to perform any significant level of activity due to the development of pain." The self-insured informed the claimant at the beginning of the qualifying period that she had to seek work based on this report, but she did not do so.

In her discussion of the evidence, the hearing officer quoted from Dr. T's report of August 26, 1999, and from Dr. H's letter of November 5, 1999, and commented:

In comparing the reports of the two . . . doctors, it appears to me that [Dr. T] is aware of the Claimant's great limitations. I do not find his report as persuasive as that of [Dr. H].

In Texas Workers' Compensation Commission Appeal No. 000318, decided March 29, 2000, we questioned whether the hearing officer simply balanced an FCE report showing a sedentary work ability against a narrative showing an inability to work in arriving at the finding of no ability to work. We said that "[s]uch a process is not contemplated by the regulation. If another record exists that shows an ability to work, that ends the inquiry and the claimant has not met his burden of proving a total inability to work. The question then becomes whether the FCE report 'shows' an ability to work. We reversed and remanded.

In the case we now consider, to the extent the hearing officer simply weighed Dr. T's report against Dr. H's in arriving at a conclusion that the claimant had no ability to work, we cannot endorse this approach. If Dr. T's report is considered to show an ability to work, it is irrelevant that another narrative makes a stronger case for an inability to work. In Finding of Fact No. 4, the hearing officer expressly found that Dr. T's record "lacked credibility." From this we conclude that the hearing officer did not simply weigh Dr. T's report against Dr. H's, but instead found that this particular record of Dr. T did not show an ability to work.

Finding of Fact No. 4 in its entirety reads:

FINDING OF FACT

4. One medical record in evidence posited that the Claimant might be capable of working in a sedentary capacity during the qualifying period for the fourteenth (14th) compensable quarter, but that record lacked credibility. [Emphasis added.]

As noted above, this "one record" is the August 26, 1999, report of Dr. T. Whether that report which expressly stated that the claimant "is undoubtedly capable of returning to the workforce in a sedentary category if she so chooses" is properly found to posit "that the Claimant might be capable of working in a sedentary capacity" raises questions about whether the finding is against the great weight of the evidence. In any case, the greater problem arises from the statement that "one" record might show an ability to work, when there are numerous other records of Dr. T and even portions of Dr. H's records which on their face, at least, appear to state that the claimant has some ability to work. The hearing officer provided no reason why she excluded these records from her analysis, and only stated that the one report of Dr. T was not credible. For these reasons, we reverse her finding that no record showed an ability to work. We remand for further consideration of all the evidence and for detailed findings which contain specific reasons why other records, which on their face appear to show an ability to work, do not show this ability. This simple statement that such a record lacks credibility is not sufficient to support an ultimate finding that no other records "show an ability to work."

The self-insured also appeals the finding that the claimant's unemployment during the qualifying period was a direct result of her impairment from the compensable injury. We find the evidence of a significant injury with lasting effects and of the claimant's inability to return to her preinjury employment sufficient to support this finding. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996 (Unpublished).

For the foregoing reasons, we reverse the determination that the claimant was entitled to 14th quarter SIBs and remand this issue for further proceedings based on the existing evidence. On remand, the hearing officer should address all the medical evidence in arriving at findings of whether another record showed an ability to work.

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.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge