APPEAL NO. 002129

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 August 23, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the third quarter from May 9, 2000, through August 7, 2000. The appellant (self-insured) appealed the adverse determination on the grounds of sufficiency of the evidence. The claimant replied that the decision was correct and should be affirmed.

DECISION

Reversed and rendered that the claimant is not entitled to SIBs for the third quarter from May 9, 2000, through August 7, 2000.

The claimant sustained a compensable injury to her cervical and lumbar spine on _____, for which she was assigned a 29% 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 qualifying period for the third quarter began on January 26, 2000, and ended on April 25, 2000.

The claimant did not look for employment during the qualifying period and contended at the hearing that she had no ability to work in any capacity. Rule 130.102(d)(4), the version in effect for all pertinent times, provides 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: . . . (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 previously held this rule to be "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; Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000.

The claimant testified that she sustained an injury to her cervical and lumbar spine and underwent cervical spinal surgery in 1996 and lumbar spinal surgery in 1999. She testified that as a result of her injury she had difficulty in performing daily activities such as bathing, that her household cleaning had suffered and that she was in constant pain and

was depressed. She also testified that she was able to walk for about one mile in order to exercise but would thereafter have to rest, that she could drive for up to two hours at a time, that she did her own grocery shopping and was limited in her cooking, cleaning and laundry. The claimant testified she sometimes went out to eat and often went to her sister's home where she was provided meals.

The carrier offered a report from Dr. C, who, by letter dated March 2, 2000, stated that he had examined the claimant and had reviewed the claimant's medical history. Dr. C reported that the claimant told him that she had difficulty with activities of daily living and needed assistance with housework, dressing, walking, bathing and driving and that she complained of emotional upset including tenseness and lack of concentration. Dr. C noted during the examination that the claimant's motions were markedly inconsistent with observed motions throughout the interview or other portions of the examination. He found that on neurological testing, there was no objective and measurable evidence of motor or sensory deficits. He found the claimant's condition was compatible with a release to work at a sedentary- to light-duty level with no repetitive lifting greater than 15 to 20 pounds. He believed that a functional capacity evaluation (FCE) would assist in determining the claimant's capacity to work because her examination with him had demonstrated marked invalidity.

An FCE was performed on March 23, 2000, at the request of Dr. GV, the claimant's treating doctor. The evaluator found that the claimant was not able to complete all the test activities due to a combination of symptom response increases with that of mechanical and strength deficits and therefore no assessment could be made. The claimant was found to have demonstrated an inconsistent effort in the FCE. It was recommended that the FCE be performed again.

The claimant offered two letters from Dr. GV, her treating doctor, who, by letter dated April 18, 2000, acknowledged that an FCE had been performed and that the claimant had left groin pain after this testing. Dr. GV wrote that the claimant continued to have symptoms of myelopathy, L5 radiculopathy on the right, decreased range of motion in both shoulders, intrinsic atrophy of the right hand compared to the left and a mild residual foot drop on the right. He included in his letter that the claimant was "still permanently and totally disabled." Dr. GV also wrote, "[please] note I am simply indicating what the patient says, but I do have to treat her because her exam is abnormal." He noted that the FCE was a mixture of invalid and incomplete results so it was being repeated. No second FCE was offered by either party.

By letter dated June 16, 2000, Dr. GV noted that the claimant continued to have complaints of groin pain, low back pain, radiation of pain into the left leg, neck pain radiating into both shoulders and pain in the thoracic area. Dr. GV wrote that "due to the symptoms of severe pain and discomfort with positive examination the claimant was unable to maintain gainful employment at this time and in the future." He noted that the claimant was unable to sit, stand or walk for any prolonged period of time without severe pain and stiffness and that sitting in one position for more than 20 minutes caused severe neck and

shoulder pain. Dr. GV wrote that the claimant was unable to lift, push or pull and that she "was unable to perform sedentary work on a consistent basis and was impaired to the point where I do not think she is employable in the job market."

The hearing officer apparently concluded that the letters from Dr. GV dated April 18 and June 16, 2000, provided a "narrative report" as set out in Rule 130.102(d)(4), although there was no specific finding as to such report in the decision and order. To be considered a "narrative report" under this rule, the report must be from (1) a doctor as defined in Section 401.011(17) of the 1989 Act; (2) contain information giving the nature of the compensable injurious condition; and (3) explain why it causes the injured worker to be unable to work.

The hearing officer also failed to make any finding as to whether there were any other records which "showed" that the claimant was able to return to work. In determining whether an "other record" such as Dr. C's medical report "shows" that the injured employee is able to return to work, some of the following factors (which we do not limit herein) may be considered: does the other record explain why there is an ability to return to work; is there a worsening in the medical condition after the other record was made; did the author of the record fail to consider medications prescribed and taken during the qualifying period; did the author of the record failure to consider the entire injury in preparing the other record; what are the qualifications of the person who prepared the other record to credibly make such an evaluation; whether the person making the other record personally examined the injured worker; and, when the other record was prepared in relation to the qualifying period.

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." The hearing officer in the present case failed to state why Dr. C's report, which is otherwise credible on its face, did not "show" an ability to work. To the extent the hearing officer simply weighed Dr. GV's letters against the report of Dr. C in arriving at her conclusion that the claimant had no ability to work, we cannot endorse this approach. If Dr. C'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 Appeal No. 002196, *supra*, we stated:

> While we agree that the hearing officer is the trier of fact and not only has the authority but the obligation to weigh the evidence presented, in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record.

In the present case, the report of Dr. C is an "other" record showing some ability to work. The hearing officer has provided no explanation as to whether she did or did not find this record to be credible and the basis therefor, nor do we discern from the record that the document is not credible. The evidence fails to meet the requirements of Rule 130.102(d)(4) for establishing good faith, and the hearing officer's determination that the claimant is entitled to SIBs for the third 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).

We reverse the decision and order of the hearing officer and render a new decision that the claimant is not entitled to SIBs for the third quarter beginning May 9, 2000, and ending August 7, 2000.

Kathleen C. Decker
Appeals Judge

CONCUR:

Kenneth A. Hutchton
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge