

## APPEAL NO. 002192

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 August 22, 2000. With respect to the single issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 17th quarter. In its appeal, the appellant (self-insured) argues that the hearing officer's determinations that the claimant had no ability to work in the qualifying period and that she is entitled to SIBs for the 17th quarter are against the great weight of the evidence. In her response to the self-insured's appeal, the claimant urges affirmance.

### DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that she was assigned an impairment rating of 16%; that the claimant did not commute her impairment income benefits; and that the 17th quarter of SIBs ran from June 15 to September 14, 2000. The parties did not stipulate to the dates of the qualifying period; however, it was identified without objection as the period from March 1 to May 31, 2000.<sup>1</sup> The claimant testified that she was working as a cafeteria monitor in one of the self-insured's schools on \_\_\_\_\_, and that she injured her neck and right shoulder lifting a table on that date.

The claimant's treating doctor is Dr. C. Dr. C has performed surgery on the claimant's right shoulder as a result of the compensable injury. Dr. C has diagnosed the claimant with severe cervical degenerative arthritis and multilevel spondylotic change; right shoulder chronic subacromial impingement with partial thickness rotator cuff tear; right shoulder AC joint arthropathy; right cubital tunnel syndrome; right carpal tunnel syndrome; right elbow compression ulnar neuropathy; severely deconditioned right upper extremity; asthma; chest pain; Parkinson's disease; and chronic pain syndrome. In a letter of April 30, 1998, Dr. C opined the conditions "directly attributed to [the claimant's] on the job injury are an aggravation of her severe cervical degenerative arthritis and multilevel spondylotic disease; right shoulder chronic subacromial impingement with partial thickness rotator cuff tear and AC joint arthropathy; and severely deconditioned right upper extremity." In a report of April 4, 2000, Dr. C noted that the claimant complained that her neck and shoulder are still very painful and that she is not able to use her arm for any significant tasks. Dr. C repeated the lengthy list of diagnoses and opined that the claimant "is unable to work as a result of her on-the-job injuries. It is also my opinion that she will never return to productive employment."

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<sup>1</sup>Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) states that the qualifying period "ends on the fourteenth day before the beginning date of the quarter and consists of the 13 previous consecutive weeks." Thus, it appears that the qualifying period in this case was actually comprised of the period from March 3 to June 1, 2000.

Dr. C referred the claimant to Dr. S for a functional capacity evaluation (FCE). On July 14, 2000, Dr. S examined the claimant and performed an FCE. In a report of July 30, 2000, Dr. S noted that the claimant had a "tendency toward symptom magnification" and that the claimant did not give maximal effort of testing. He noted that her failure to do so is due to "symptom magnification and pain avoidant behavior. This is not due directly to her injury, but is more of a behavioral issue." On the issue of the claimant's work ability, Dr. S stated:

In regard to return to work, this is quite a complicated case. Certainly, I believe that this examinee is strong enough to at least perform duties in the [Dictionary of Occupational Titles ] DOT Categories of Sedentary and Light. Light lifting is defined in the [DOT] as occasional lifts of up to 20 pounds, with frequent lifts of up to 10 pounds. Certainly, she could perform Sedentary work. This is true even despite the fact that she does not test out at those levels since she was clearly giving less than maximal effort on all tests. However, there is a significant psychological overlay on her condition, some of which is most likely premorbid. This psychological overlay is certainly compromising her ability to recover any significant function. There is an additional problem with her Parkinson's disease, which is most certainly not work related, but is definitely interfering with her ability to work. I do not see anywhere in the file where this examinee has been to the Texas Rehabilitation Commission. I feel that she should meet with them, and that possibly they could help her return to some type of useful function in the workplace. I do not believe that this examinee is immediately employable at this time but if she is given some assistance and works diligently, I do believe she could be employable in the next 3 to 6 months. This may or may not require some psychological or even psychiatric intervention to get her some appropriate medications to treat her behavioral disorder. Certainly, not all of her current disability is work related. A significant part of her disability is psychological or behavioral in nature, and there is a good amount of her disability due to Parkinson's disease.

The claimant's entitlement to SIBs in the quarter at issue is to be determined in accordance with the new SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to look for work commensurate with the employee's 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 return to work." The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before her and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As an appeals body,

we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer determined that the claimant is entitled to SIBs for the 17th quarter because she had no ability to work in the qualifying period. In support of that determination, the hearing officer found that “[Dr. S] provided a report explaining how Claimant’s injury caused a total inability to work, and no other records relevant to the qualifying period show Claimant was able to return to work.” The evidence is sufficient to support the hearing officer’s interpretation of Dr. S’s report that it states that the claimant is not currently able to work. That does not end inquiry in this case. As noted above, Rule 130.102(d)(4) provides that the claimant must provide “a narrative report from a doctor which specifically explains how the injury causes a total inability to work . . .” (Emphasis added.) It is in this sense that the evidence from Dr. S falls short. Dr. S states that a “significant part of [the claimant’s] disability is psychological or behavioral in nature, and there is a good amount of her disability due to Parkinson’s disease.” Neither the claimant’s psychological problems nor her Parkinson’s disease are part of the compensable injury. If the discussion of those conditions is therefore not considered as part of the narrative report from Dr. S, it simply does not contain an adequate explanation of how the claimant’s compensable injury causes a total inability to work. The evidence from Dr. C is likewise deficient in this respect because he details significant problems which are not part of the compensable injury and does not explain how the problems from the compensable injury, the neck and right shoulder injuries, cause the total inability to work. The hearing officer’s determination that the claimant provided a narrative that specifically explains how the compensable injury causes a total inability to work is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse that determination and the hearing officer’s determination that the claimant is entitled to SIBs for the 17<sup>th</sup> quarter and render a new decision that the claimant is not entitled to those benefits.

The hearing officer's determination that the claimant is entitled to SIBs for the 17<sup>th</sup> quarter is reversed and a new decision rendered that she is not entitled to 17<sup>th</sup> quarter SIBs.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Kenneth A. Huchton  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge