

## APPEAL NO. 002196

Following a contested case hearing held on May 15, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 14th quarter, from January 27, 2000, through April 26, 2000. That decision was appealed by the appellant herein (self-insured) and this matter was remanded to the hearing officer in Texas Workers' Compensation Commission Appeal No. 001252, decided July 14, 2000. The Appeals Panel remanded the case to the hearing officer for further consideration of all the evidence and for detailed findings which were to contain specific reasons why other records, which on their face appeared to show an ability to work, did not show such an ability. The hearing officer did not convene a new hearing, but allowed the parties an opportunity to present written arguments. A new decision and order was rendered by the hearing officer on August 23, 2000. In that decision and order, the hearing officer again found that the claimant was entitled to SIBs for the 14th quarter. The self-insured again appeals, asserting that the hearing officer's decision that there are no other records which show an ability to work is against the great weight and preponderance of the record and that the hearing officer's decision that the claimant is entitled to SIBs for the 14th quarter should be reversed and a new decision that the claimant is not entitled to SIBs for the 14th quarter be rendered. There is no response from the claimant in the appeals file.

## DECISION

The decision of the hearing officer is reversed and a new decision is rendered.

The facts of this case are set out in Appeal No. 001252 and will not be set forth herein at length. The primary issue addressed in Appeal No. 001252 was our concern that the hearing officer had simply weighed opinions regarding the claimant's ability to work without making a determination of why certain records, which on their face appeared to establish that the claimant had some ability to work, were not found credible by the hearing officer and did not show an ability to work. In Appeal No. 001252, we directed the hearing officer to a number of records, in particular multiple reports by Dr. T which found that the claimant had some ability to engage in sedentary work if she were to so choose and other records from the claimant's treating doctor, Dr. H, which also appeared to indicate that the claimant had some ability to work. The Appeals Panel directed the hearing officer to review the evidence and make detailed findings on the records, which appeared on their face to show some ability to work, and explain why she found that the records did not show an ability to work.

The hearing officer merely changed a portion of the statement of the evidence, restated her earlier findings of fact, and repeated her earlier decision, ordering the self-insured to pay SIBs for the 14th quarter.

In her earlier decision, the hearing officer had stated:

In comparing the reports of the two (2) 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]. I do not believe that the Claimant was capable of working during the qualifying period for the fourteenth (14th) compensable quarter.

In her most recent decision, the hearing officer revises the foregoing paragraph, stating instead:

In comparing the reports of the two (2) doctors, it appears to me that [Dr. T] is aware of the Claimant's great limitations. Moreover, the Self-Insured Employer has paid [SIBs] for previous quarters based on similar facts. In a similar situation, Appeals Panel No 290 in Appeal No. 001141 [Texas Workers' Compensation Commission Appeal No. 001141, Decided July 5, 2000] made the following comments:

The 1989 Act provides that the Hearing Officer is the sole judge of the weight and credibility of the evidence, §410.165(a). In this case, the Claimant presented evidence tending to demonstrate that she has no ability to work and the Carrier presented evidence tending to demonstrate that the Claimant has some ability to work. The Hearing Officer had to judge the credibility of the evidence before her in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3)] [the version then in effect]. The question of whether another record shows an ability to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions. [Citations omitted.]

Consequently, I decline to change my Decision; I believe that the evidence not only supports my Decision, I also believe that I have the authority to weigh the evidence.

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 her decision, the hearing officer stated that the "new Rules add an additional requirement [to the necessity of a narrative report explaining how the compensable injury

causes a total inability to work]: **no other records created concomitant with the qualifying period show that he or she is able to return to work.** [Emphasis in the original.]" We disagree with the hearing officer's foregoing statement inasmuch as it appears to require that the other record, if any, which shows an ability to work must be created during the qualifying period. See Texas Workers' Compensation Commission Appeal No. 001487, decided August 10, 2000; and Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000. Unless there is evidence of a change of circumstances, such as a change in the claimant's condition, which would otherwise render a record showing an ability to work no longer credible, remote records may show an ability to work during the qualifying period. In the instant case, there are several records which indicate that the claimant has an ability to engage in sedentary work, albeit with accommodations.

The current SIBs rules are demanding and require that the elements of Rule 130.102(d)(4) must be met to establish good faith in a no-ability-to-work situation. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. One of those elements is that "no other records show that the injured employee is able to return to work." We have previously noted in a number of decisions that the requirements under Rule 130.102(d)(4) cannot be discarded without compelling reasons supported in the record. Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000. Here, the reports of Dr. H and some reports from Dr. T would qualify as "other records" showing some ability to work. The hearing officer has provided no explanation as to why she did not find those records credible, nor are we able to discern from the record evidence that indicates they are not credible. In cases such as this, the hearing officer's unsupported determination that the other records are not credible and do not show an ability to work is so against the great weight of the evidence as to be clearly wrong. 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 14th 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).

Accordingly, 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 14th quarter.

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Kenneth A. Huchton  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge