APPEAL NO. 002213

On August 14, 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*. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 12th quarter. The appellant (carrier) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. The claimant requests affirmance.

DECISION

Reversed and rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted any impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment 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. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

The claimant testified that he injured his back on _____, while working as an asbestos abatement worker when he fell while using a pry bar. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has an IR of 15% or more; that the claimant did not commute IIBs; that the 12th quarter was from June 19, 2000, through September 17, 2000; and that the qualifying period for the 12th quarter was from March 7, 2000, through June 5, 2000.

Dr. E, the designated doctor, reported in April 1997, that the claimant reached statutory maximum medical improvement on September 1, 1996, with an 18% IR. Dr. E noted that an MRI had shown herniated discs at L4-5 and L5-S1 and that the claimant

subsequently had surgery in July 1995 consisting of a laminectomy and discectomy at L4-5 and L5-S1, a fusion from L4 to S1, and implantation of a bone stimulator. Dr. E further noted that x-rays showed a nonunion at L4-5 and that L5-S1 did not appear solid either.

The claimant testified that Dr. G performed the July 1995 surgery and that Dr. G is his treating doctor. In a 1996 report, Dr. G prescribed medications and recommended that the claimant not work and that he continue with a walking program. In a 1997 report, Dr. G prescribed medications and recommended that the claimant not work, continue with his walking program, and have an epidural steroid injection (ESI). In a January 1999 report, Dr. G noted that the claimant continued to have back symptoms, prescribed medications, and recommended that the claimant not work and continue his walking program. In a March 1999 report, Dr. G noted that the claimant continued to have significant back pain that goes into his legs, prescribed medications, and recommended an ESI. In a September 1999 report, Dr. G noted that an MRI showed arachnoiditis in the lumbosacral spine at L4-5 and L5-S1, prescribed medications, and recommended that the claimant not work and continue his walking program. In a February 2000 report, Dr. G noted that the claimant continued to have back and leg pain, prescribed medications, and recommended that the claimant not work and continue with his walking program. In an April 2000 report, Dr. G noted that the claimant has significant back pain that goes into his legs, prescribed a back brace and medications, and recommended that the claimant not work and continue with his walking program.

Dr. GO examined the claimant at the carrier's request on May 1, 2000, and Dr. GO noted that he reviewed Dr. G's reports and the July 1999 MRI. Dr. GO also noted the type of surgery the claimant had in July 1995. Dr. GO requested that the reader refer to his previous report of August 1998, but he did not state what was in that report and that report is not in evidence. Dr. GO noted the medications and ESI's that Dr. G had prescribed for the claimant and that Dr. G had the claimant on a no-work status. Dr. GO noted that the claimant performs all of his activities of daily living, including light cleaning and cooking, and that the claimant goes to the gym occasionally and also does home exercises. Dr. GO noted that the claimant had improved since his last visit with him, which was apparently in August 1998. Dr. GO noted that he is a board-certified neurologist and a Fellow of the American Academy of Disability Evaluating Physicians. Dr. GO wrote that the MRI showed fusion from L4 to S1 and was suspicious for arachnoiditis at L4-S1. Dr. GO also wrote that the claimant requires no additional surgery, injections, therapy, or manipulations at this time and that while the use of one named medication was appropriate, the use of other narcotics would not be necessary. Dr. GO stated that in his opinion, the claimant is unable to return to his previous work capacity but could return to "light duty sedentary activity" with restrictions of no lifting more than 25 pounds and the ability to change positions. Dr. GO recommended a functional capacity evaluation to determine the claimant's "true work status," but then stated that it is his opinion that the claimant can perform "light duty status."

In a June 2000 report, Dr. G noted that the claimant continued to have significant symptoms of back and bilateral leg pain, right worse than left, with paresthesia; that he told the claimant that he should consider having a posterior segmental instrumentation for his lumbosacral spine with decompressive foraminotomies; that, in his opinion as a board certified orthopedic surgeon and the claimant's treating doctor, the claimant is not able to return to the workforce because he cannot sit for greater than 15 minutes and cannot lift greater than 10 pounds; that the claimant has a positive straight leg raising test; that the claimant has decreased muscle strength in his legs; and that the claimant was going to consider the surgery they discussed. In the recommendations section of the June 2000 report, Dr. G recommended surgery, no work, medications, and a walking program.

In an August 2000 report, Dr. G wrote that he had recommended surgery for the claimant based upon MRI findings which showed disc protrusions at L4-5 and L5-S1 as well as his concern that the claimant has a psuedoarthrosis at L4-5 and L5-S1. Dr. G also wrote that he had reviewed Dr. GO's report and pointed out that Dr. GO is a neurologist and that it is his understanding that Dr. GO does not have surgical training and is not board certified in that area. In another August 2000 report, Dr. G wrote that the claimant's permanent restrictions from his lower back injury are that the claimant cannot sit or stand for greater than 15 minutes at a time and that he cannot lift greater than 10 pounds. Dr. G added that the claimant has significant pain with bending, stooping, crawling, and climbing "which should be restricted as well." Dr. G stated that based upon the claimant's injury, surgery, and future surgery, the claimant will not be able to gain and maintain meaningful employment. Dr. G noted that the MRI showed disc protrusions at L4-5 and L5-S1 with concerns for psuedoarthrosis at those levels, that future surgery would consist of removal of instrumentation and re-fusion at those levels, and that during office visits the claimant had told him of his significant lower back and leg pain with weakness.

The claimant testified that he cannot return to his former job, that the carrier paid him SIBs for the first through the 11th quarter, that an MRI found a failed fusion, that he has lost more feeling in his right leg, that his pain has increased, that he takes three types of medication daily (he identified one as a muscle relaxant and another as a sleeping aide, apparently a third type is for pain), that the medications make him agitated, that he cannot drive when he takes the medications, that he cannot concentrate for a long period of time because of his pain and the effect of his medications, that he sometimes takes double doses of his medications, and that the ESIs relieved his pain for a while and then wore off.

The claimant further testified that he is unable to do any type of work, that Dr. G has told him not to work, that he is willing to have surgery, that Dr. G has recommended putting another type of instrumentation in his back for a re-fusion surgery, that the surgery recommendation is in the spinal surgery process, that Dr. G disagrees with Dr. GO's opinion, and that he was a passenger during the four- to five-hour drive to the CCH and stopped for four breaks to walk around. The claimant said that he spends his days lying down at home watching television and walking around the house. He said he has pain if he sits for 10 to 15 minutes. The claimant did not testify about a job search. On his Application for SIBs (TWCC-52) for the 12th quarter he noted that he did not earn any

wages during the qualifying period, that he is not able to work in any capacity, that he is not enrolled in a full-time vocational program sponsored by the Texas Rehabilitation Commission, and that his doctor has documented that he cannot do any type of work in any capacity. The claimant did not list any job contacts on the TWCC-52.

The carrier appears to appeal the hearing officer's finding in favor of the claimant on the direct result criterion for SIBs. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that that portion of the hearing officer's finding on the direct result criterion for SIBs which finds that during the qualifying period for the 12th quarter, the claimant's inability to earn 80% of his AWW is a direct result of his impairment due to his compensable injury is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer made no findings in the Findings of Fact portion of his decision as to whether a doctor provided a narrative report which specifically explains how the injury causes a total inability to work and whether other records show that the claimant is able to return to work. The hearing officer made a finding of fact that during the qualifying period for the 12th quarter, the claimant "was unable to work." The hearing officer made no finding that the claimant was unable to perform any type of work in any capacity, nor did he make a finding that the claimant made a good faith effort to obtain employment commensurate with his ability to work. The carrier appeals the hearing officer's finding that the claimant was unable to work during the qualifying period, contending that Dr. G's reports do not provide the type of information necessary to establish an inability to work; that Dr. GO's report, which was during the qualifying period, constitutes another record that shows that the claimant has an ability to return to work; and that the limitations set out by Dr. G are contradicted by the claimant's admission of having been driven to the CCH because he can sit for periods of greater than 15 minutes.

In the Statement of the Evidence and Discussion portion of his decision, the hearing officer stated that "[Dr. GO's] report is refuted by Claimant's doctors." But then the hearing officer states: "Looking at [Dr. GO's] report, as well as some of the Claimant's doctors reports, I find that the Claimant has some very limited ability to perform very sedentary work."

In Texas Workers' Compensation Commission Appeal No. 002095, decided October 18, 2000, the Appeals Panel stated:

> 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.

In the instant case, Dr. GO examined the claimant during the qualifying period and reported that the claimant can perform light-duty work and in his discussion of the evidence the hearing officer stated that he found that the claimant has some ability to work based on Dr. GO's report and on some of the reports of the claimant's doctor. We conclude that Dr. GO's report is another record that shows that the claimant is able to return to work. The evidence failed to meet the requirements of Rule 130.102(d)(4) for establishing good faith. We, therefore, reverse the hearing officer's decision that the claimant was unable to work during the qualifying period and that the claimant is entitled to SIBs for the 12th quarter and we render a decision that the claimant is not entitled to SIBs for the 12th quarter.

The carrier also appeals the hearing officer's finding that the carrier "pursued a dispute on entitlement for the 12th SIBs quarter without considering a comparison of the factual situation of the 11th qualifying period, with the factual situation of the 12th qualifying period." The hearing officer noted in his discussion of the evidence that he was applying Rule 130.108(a) which states in part that the carrier "shall not dispute entitlement to a subsequent quarter without considering a comparison of the factual situation of the qualifying period for the previous quarter with the factual situation of the current qualifying period." Since there was no issue before the hearing officer with regard to Rule 130.108(a), no evidence was developed on whether a comparison was made by the carrier. The claimant merely testified that the carrier paid him SIBs for the first 11 quarters. The carrier points out in its appeal that Dr. GO examined the claimant during the qualifying period and reported during that period that the claimant could work light duty. The carrier states in its appeal that it did compare the evidence pertaining to the 12th quarter and prior quarters. Dr. GO's 1998 report was not in evidence. We conclude that the hearing officer's finding that the carrier did not compare the factual situation of the 11th qualifying period with the factual situation of the 12th qualifying period is supported by no evidence and we reverse that finding.

The hearing officer's decision that the claimant is entitled to SIBs for the 12th quarter is reversed and a decision is rendered that the claimant is not entitled to SIBs for the 12th quarter.

Robert W. Potts
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Philip F. O'Neill
Appeals Judge