APPEAL NO. 002327

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 September 14, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 10th, 11th, and 12th quarters. Claimant appealed these determinations on sufficiency grounds. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he is not entitled to SIBs for the 10th, 11th, and12th quarters, asserting that he was unable to work. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying periods is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an employee may be in good faith if the employee: (1) has been unable to perform any type of work in any capacity; (2) has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work; and (3) no other records show that the injured employee is able to return to work. Section 408.151 and Rule 130.110 concern designated doctors selected by the Texas Workers' Compensation Commission (Commission) if a dispute exists regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to SIBS.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) the qualifying period for the 10th quarter was from August 23, 1999, to November 21, 1999; (3) the qualifying period for the 11th quarter was from November 22, 1999, to February 20, 2000; and (4) the qualifying period for the 12th quarter was from February 21, 2000, to May 21, 2000.

A letter from the Commission states that on March 24, 2000, the Commission selected Dr. S to serve as the designated doctor on the question of whether claimant's medical condition, which had prevented him from returning to work in the prior year, had improved sufficiently to allow him to return to work on or after the second anniversary of the initial entitlement to SIBs. Rule 130.110(a) provides that a designated doctor's report on that issue "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary." In addition, the rule provides that the presumptive weight of the report "shall begin the date the report is received by the Commission" and shall continue "until proven otherwise by the great weight of the other medical evidence" or "until the designated doctor amends his/her report based on newly provided medical or physical evidence." The preamble to Rule 130.110 stated, in pertinent part:

> [Rule 130.110] also establishes the starting date of the presumptive weight afforded the designated doctor's report as the date the Commission receives the designated doctor's report and also establishes the time frame that the presumptive status continues. By establishing the starting date of the presumptive weight afforded the doctor's report, the presumptive weight will only be applicable to the qualifying period in which the report was received by the Commission. This process allows the injured employee to react prospectively to a report of the designated doctor rather than to have a retrospective finding have a detrimental impact on the injured employee.

Dr. S's report was written after the qualifying periods for the 10th and 11th quarters. It was written during the qualifying period for the 12th quarter and it is not clear when the Commission received it. We conclude from the record that the hearing officer did not accord it presumptive weight and that the hearing officer considered the report as another record regarding ability to work.

The hearing officer determined that: (1) claimant had some ability to work during the qualifying periods for the 10th, 11th, and 12th quarters; (2) claimant did not look for work during the qualifying periods for the 10th and 12th quarters; (3) claimant made five job searches during the qualifying period for the 11th quarter; and (4) claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods in question.

Claimant had the burden to prove that he had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. We conclude that the hearing officer's determinations regarding claimant's ability to work are not against the great weight and preponderance of the evidence. As found by the hearing officer, claimant did not search for work during the qualifying periods for the 10th and 12th quarters, and it is clear that he did not search for work every week of the qualifying period for the 11th quarter. Accordingly, considering Rule 130.102(d)(4), we conclude that the hearing officer did not err in determining that claimant did not meet his burden of proof regarding the SIBs good faith criterion and that he is not entitled to SIBs. The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We note that when the Commission has appointed a designated doctor to consider whether the employee's medical condition has improved sufficiently to allow the employee to return to work, pursuant to Section 408.151 and Rule 130.110, certain findings of fact should be made, depending on what is raised by the parties. It may be necessary for the hearing officer to specifically determine whether a dispute exists regarding whether an injured employee, whose medical condition prevented the injured employee from returning to work in the prior year, has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to SIBs. See Rule 130.110(a). The hearing officer may also make fact findings regarding: (1) whether the qualifying periods are after "the second anniversary of the injured employee's initial entitlement to [SIBs]"; and (2) the date of the second anniversary of the

injured employee's initial entitlement to [SIBs]. Rule 130.110 indicates that if there is no applicable dispute described in Rule 130.110(a), or if the qualifying period for the quarter in question begins before "the second anniversary of the injured employee's initial entitlement to [SIBs]," then Rule 130.110 cannot be applied.

If the hearing officer determines that the above prerequisites of Rule 130.110 are met regarding the type of dispute involved, the hearing officer should then determine whether to give presumptive weight to the designated doctor's report. The hearing officer should determine "the date the [designated doctor's] report [was] received by the Commission." In this regard, we note that the preamble indicates that presumptive weight will not apply to qualifying periods that already passed before the report was received by the Commission; there is no retrospective presumptive weight. The rule indicates that, to be accorded presumptive weight, the designated doctor's report must have been received by the Commission during or before the qualifying period for the SIBs quarter in question. The hearing officer should then make determinations regarding: (1) whether the "the great weight of the other medical evidence" proves that designated doctor's report should not carry presumptive weight; and (2) whether the designated doctor has amended his or her report based on newly provided medical or physical evidence.

If the hearing officer determines that the designated doctor's report is not entitled to presumptive weight, the hearing officer may consider it just as he or she considers other medical reports in the record. See Texas Workers' Compensation Commission Appeal No. 002309-S, decided November 16, 2000. At that point, the hearing officer should make findings of fact regarding the factors in listed in Rule 130.102(d)(4) regarding the assertion that the claimant had no ability to work. In this particular case, given the hearing officer's discussion and decision, we were able to affirm the hearing officer's determinations. However, to ensure proper review of decisions involving Rule 130.110 in the future, adequate findings of fact are preferred.

We affirm the hearing officer’s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge