APPEAL NO. 002670

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A decision and order after remand was rendered by the hearing officer with no additional hearing or argument and without the presence of the parties.

In Texas Workers' Compensation Commission Appeal No. 001487, decided August 10, 2000, the Appeals Panel remanded this supplemental income benefits (SIBs) case back to the hearing officer for application of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d))as written, expressing concern that the hearing officer had shifted the burden of proof.

The hearing officer, apparently without further consultation with the parties, issued a three-page discussion of her opinion on what this law is, or should be, and again applied exceptions to Rule 130.102(d)(4) and found the respondent (claimant) entitled to SIBs for the first through fourth compensable quarters on the same basis that was applied in Appeal No. 001487.

The appellant (carrier) appeals, asserting that the hearing officer had applied exceptions to Rule 130.102(d)(4) and that the hearing officer "believes her subjective application of the law trumps the plain language of the law." The carrier requests that we reverse the hearing officer's decision and render a decision that the claimant is not entitled to SIBs for the first through fourth quarters.

DECISION

Reversed and rendered.

The facts and statutory requirements are set out in Appeal No. 001487 and will not be repeated here. The claimant asserts that he is entitled to SIBs for the applicable periods based on a total inability to work. The applicable rule is Rule 130.102(d)(4), which provides that the good faith requirement of Section 408.142(a) may be met 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[,]

In Appeal No. 001487 we expressed concern that the hearing officer said that Rule 130.104(d)(4) adds an additional requirement that: "**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 pointed out that Rule 130.102(d)(4) states: "and no other records show that the injured employee is able to return to work." There is no requirement that the records be "created concomitant with the qualifying period." The hearing officer,

in this case, has just changed the qualifier "concomitant" for "performed contemporaneously."

In Appeal No. 001487, *supra*, we specifically remanded the case "for the hearing officer to apply the proper standard of proof and to specifically address the April 1999 Physical Capacity Checklist" (PCC) as it applies to Rule 130.102(d)(4). The phrase in Rule 130.102(d)(4) "no other records show that the injured employee is able to return to work" does not require a medical report by a medical doctor and need not be "performed contemporaneously" with the qualifying period, although that is a factor that the hearing officer may consider. *See* Texas Workers' Compensation Commission Appeal No. 000096, decided February 29, 2000, and Appeal No. 001487, *supra*.

Regarding our remand for the hearing officer to consider the PCC as it applies to Rule 1340.102(d)(4), the hearing officer writes:

> I did not find the results of the [FCE] persuasive when compared with the other medical records in evidence . . . .

Rather clearly, the hearing officer applied a balancing test as to which record she found more persuasive. Rule 130.102(d)(4) does not provide for such a balancing test; rather, it states that for the claimant to prevail, "no other records show that the injured employee is able to return to work." It was error for the hearing officer to apply such a balancing test.

The hearing officer determined the PCC was not credible, but gave no reasons for reaching that conclusion. Our review of the evidence discloses no reason for not finding the PCC credible. Because the hearing officer did not properly apply Rule 130.102(d)(4) with respect to the PCC as an other record and because the evidence discloses no reason to conclude the PCC is not credible, we hold the hearing officers decision is 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).

Accordingly, the hearing officer's decision and order are reversed and we render a new decision that the claimant is not entitled to SIBs for the first through fourth compensable quarters.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur in the result but do not agree with the all of the discussion and the application of the law in this case, particularly the discussion regarding “balancing” of the evidence. However, I agree to reverse and render that claimant is not entitled to supplemental income benefits in this case. A determination that “no other records show that the injured employee is able to return to work,” in this case, is 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). Given the reversal of that determination, the claimant is not entitled to supplemental income benefits. I agree that the decision should be reversed and rendered against the claimant

I write separately to emphasize that the Appeals Panel has stated that the issue of whether another record "shows" a claimant has an ability to work constitutes a question of fact for the hearing officer to resolve. The question of whether a record "shows" an ability to work is a different question than the question of whether the record states that the claimant has some ability to work. Texas Workers' Compensation Commission Appeal No. 000625, decided May 11, 2000. A hearing officer considers whether another record shows that a claimant has an ability to work and decides whether the record is credible. *See* Texas Workers’ Compensation Commission Appeal No. 001241, decided July 11, 2000. That determination is then reviewable by the Appeals Panel to see whether it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Judy L. Stephens
Appeals Judge