

APPEAL NO. 010459

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 7, 2001. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 10th quarter because she had a total inability to work in any capacity.

The appellant (carrier) appealed, contending that the claimant's 35 job contacts and certain other medical evidence indicated some ability to work and that the claimant had not made a good faith job search "every week of the qualifying period" and had failed to document a job search in at least one week of the qualifying period. The claimant responds, urging affirmance.

DECISION

Reversed and rendered.

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provide the statutory and regulatory requirements for entitlement to SIBs. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The hearing officer's determination that the claimant's unemployment during the qualifying period for the 10th SIBs quarter was a direct result of her impairment from the compensable injury has not been appealed and will not be addressed further.

The parties stipulated that the claimant sustained a compensable injury on _____; that impairment income benefits were not commuted; that the claimant has an impairment rating of 15% or greater; and that the qualifying period for the 10th quarter was from October 8, 1999, through January 6, 2000. The parties stipulated that the claimant had no earnings during the relevant filing period.

At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The claimant proceeded on the basis that she had made 38 job contacts (only 35 were during the qualifying period at issue). The entire CCH was spent discussing the nature and quality of the job contacts. The carrier presented the testimony of its adjuster, who had done a verification check of the claimant's claimed job search efforts and who testified that many of the potential employers the claimant had allegedly contacted did not have job openings. During its closing argument, the carrier, for the first time, asserted that even if the claimant's testimony was to be believed the claimant had failed to document any job search during the last week of the qualifying period (from December 31, 1999, through January 6, 2000). The claimant did not respond to that argument in rebuttal. The hearing officer decided the case on a total inability to work theory, not an argument advanced by the claimant at the CCH.

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(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.

The hearing officer, in her Statement of the Evidence, commented:

The claimant's testimony was credible that she actually sought those jobs as described, but the TWCC 52 [Application for Supplemental Income Benefits] revealed that the claimant did not seek employment during the last week of the qualifying period from 12/31/99 to 1/6/00 and, as such, she would not have met the requirements of [Rule] 130.102(e) if that had been the appropriate criteria.

The hearing officer's comment is correct and is supported by the evidence.

The hearing officer then goes on to make findings on a total inability to work, finding that the claimant was unable to perform any type of work during the qualifying period (Finding of Fact No. 7), that a functional capacity evaluation (FCE) and April 1999 report from Dr. H "sufficed as a narrative reports [sic] explaining how the claimant was unable to work as a result of her impairment" (Finding of Fact No. 6), and referencing FCEs performed in September 1998 and January 1999 finding that "there were no additional medical records which indicated that the claimant could work." (Finding of Fact No. 3.)

The FCE and Dr. H's report dated April 17, 1999, does state that the claimant "was classified at a 'Less than Sedentary Physical Demand Level.'" However, that same report goes on to comment on the claimant's ability to work stating:

According to the results of the FCE performed on January 21, 1999, [claimant] is capable of returning to restricted work duty as defined by the results of the FCE, specifically pages 4 & 5 of the FCE report. Whether or not [employer] or any other employer has work available under these restrictions, I cannot answer that question.

A January 1999 FCE, referenced by the hearing officer, classifies the claimant at "a Medium Physical Demand Level" and in a September 17, 1998, FCE the evaluator recommends that the claimant "would greatly benefit from a work conditioning program . . . [and] from a work hardening program." Further, the carrier points out that "the claimant's testimony about her job search efforts showed that she made attempts to seek work in sedentary clerical positions."

Even if, arguably, the January 1999 FCE and Dr. H's April 17, 1999, comment did constitute "a narrative report from a doctor which specifically explains how the injury causes a total inability to work," other FCEs, medical records, and the claimant's testimony show that the injured employee is able to return to work in some limited restricted capacity. Accordingly, we reverse the hearing officer's decision as not being supported by the evidence and render a new decision that the claimant is not entitled to SIBs for the 10th quarter as not having met the requirements of either Rule 130.102(e) or Rule 130.102(d)(4).

Regarding the claimant's argument in her response that she is not "prohibited from arguing alternative work abilities in order to qualify for [SIBs]," we agree with that proposition. However, we note that the claimant did not assert alternative work abilities at the CCH but limited herself to arguing a good faith job search under Rule 130.102(e). Even so, we have addressed the issue of when a combination of rules are asserted to meet the requirements for SIBs in Texas Workers' Compensation Commission Appeal No. 001877, decided September 19, 2000, and Texas Workers' Compensation Commission Appeal No. 002428, decided December 1, 2000, where we held that a claimant could satisfy the good faith requirement by demonstrating that he or she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period. However, in order to prevail, the claimant must produce evidence that established the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted and evidence that meets the criteria of Rule 130.102(e) for that period of time wherein a good faith job search was claimed.

We reverse the hearing officer's decision and render a new decision that the claimant is not entitled to SIBs for the 10th quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

I agree, but would add that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) quite obviously requires a narrative that speaks to inability during the qualifying period. A functional capacity evaluation report over a year old does not do that, and for this reason could not support the hearing officer's finding.

Susan M. Kelley
Appeals Judge