APPEAL NO. 010974
FILED JUNE 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on April 13, 2001, the hearing officer resolved the disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the:

1. First quarter, from June 24, 1999, through September 22, 1999;
2. Second quarter, from September 23, 1999, through December 22, 1999;
3. Third quarter, from December 23, 1999, through March 24, 2000;
4. Fourth quarter, from March 25, 2000, through June 23, 2000;
5. Fifth quarter, from June 24, 2000, through September 22, 2000;
6. Sixth quarter, from September 23, 2000, through December 22, 2000; and
7. Seventh quarter, from December 23, 2000, through March 23, 2001.

The claimant has appealed on evidentiary sufficiency grounds and the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the first, second, third, fourth, fifth, sixth and seventh quarters. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Texas Workers' Compensation Commission, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). With regard to the good faith criteria for SIBs, 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 claimant asserts on appeal that functional capacity evaluation (FCE) performed on April 9, 2001, does not apply to all the qualifying quarters. The Appeals Panel has held that while it is desirable that the medical reports be as close to the qualifying period as possible, medical reports generated outside the filing or qualifying periods at issue may be considered. Texas Workers' Compensation Commission Appeal No. 961403, decided August 30, 1996; Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996. The hearing officer determined, based on the FCE, that the claimant did have the ability to work at a sedentary level as she was able to lift 10 pounds on an occasional basis and sit and write for at least up to 30 minutes at a time.

The claimant also asserts that she has not been medically released to return to work, as evidenced by various narrative reports. The absence of evidence of a doctor's release to work is not the equivalent of the narrative report required by Rule 130.102(d)(4). The Appeals Panel has held that the narrative report from the doctor must specifically explain how the compensable injury causes a total inability to work. Texas Workers' Compensation Commission Appeal No. 000835, decided June 5, 2000, and Texas Workers' Compensation Commission Appeal No. 002192, decided October 27, 2000 *See also*, Texas Workers' Compensation Commission Appeal No. 991616, decided September 15, 1999. Appeal No. 000835, *supra*, noted that the good faith through no ability to work provision should be a limited situation and applied only where it is clear that the injured employee cannot return to any type of work because of the compensable injury. There is sufficient evidence in the record from which the hearing officer determined that the medical records do not specifically explain how the injury causes a total inability to work and that there are other records which show some ability to work.

The question of whether or not a claimant has no ability to work is a factual determination of the hearing officer, which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Applying this standard, we find no grounds for reversal as there was conflicting evidence in the record concerning the claimant's ability to work.

The carrier asserts in its response to appeal that the failure of service by claimant should effectively invalidate the claimant's request for review and deprive the Appeals Panel of jurisdiction. We have held that an appellant's failure to serve the respondent is not jurisdictional but does extend the time to respond until 15 days after service is made. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992. Our jurisdiction was invoked by the claimant's having timely filed her request for review pursuant to Section 410.202(a) and TWCC Rule 143.3(c). *See* Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992.

The hearing officer's decision is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine Chaney
Appeals Judge