APPEAL NO. 011145
FILED JULY 03, 2001

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 May 1, 2001. The hearing officer determined that the respondent (claimant) was entitled to the third quarter of supplemental income benefits (SIBs) and had no ability to work. The hearing officer determined that "the records" of the treating doctor constituted a narrative report showing inability to work, and that contrary records were not credible as showing an ability to work.

The appellant (self-insured) appeals and asserts multiple errors in the hearing officer's analysis of the evidence in light of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Section 130.102(d) (Rule 130.102(d)). Specifically, the self-insured points out that there was no basis for rejecting other records which showed that the claimant was able, for the qualifying period under review, to return to work. The claimant responds that the decision was supported by the evidence.

DECISION

Reversed and rendered that the claimant was not entitled to SIBs because he failed to prove that he made a good faith search for employment as set forth in Rule 130.102(d).

Rule 130.102(d)(4), the applicable provision given that the hearing officer found that the claimant had no ability to work, states that the claimant has made a good faith effort if during if the employee:

> (4) 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 qualifying period under review ran from July 30 through October 28, 2000. The claimant had sustained an injury on _____, while employed by the self-insured. The claimant had cervical surgery prior in December 1999. He did not look for work during the qualifying period. His treating doctor was Dr. J. There are numerous treatment reports in evidence from Dr. J, most of which are dated after the qualifying period. A statement dated March 28, 2001, stated that at that time the reason the claimant could not work was due to pending left shoulder and lumbar surgery. The claimant was in a chronic pain management program during some portion of the qualifying period which he said lasted from 9:00 until 2:00, five days a week. By November 21, 2000, he was assessed by a program doctor has having pain only a five on a 10 scale with improved endurance and physical conditioning.

The records from Dr. J which comment on the ability to work during the qualifying period include a July 31, 2000, Work Status Report (TWCC-73), which states that the claimant could not work for the upcoming month because of severe pain and inability to sit for a prolonged period of time. There is a short unsigned report dated November 20, 2000, which states that the claimant is entitled to SIBs due to persistent pain, describes his treatment and upcoming tests, and ends with the short statement that he "is unable to work at this time." There is a letter dated November 22, 2000, that states that the claimant is unable, due to constant pain, to walk, stand, or sit for more than ten minutes at a time. He is noted to ambulate with a cane due to increased lower extremity weakness, and change positions frequently when sitting or lying down. Dr. J noted that the claimant's prescribed medications precluded him from looking for or performing work because of drowsiness, sleepiness, and forgetfulness. There was no evidence offered that, during the qualifying period, the claimant had surgery scheduled.

We have stated that a narrative cannot be constructed from a patchwork of several records and notes. *See* Texas Workers' Compensation Commission Appeal No. 000041, decided February 22, 2000; Texas Workers' Compensation Commission Appeal No. 010787, decided May 9, 2001. Although the hearing officer was inartful in grouping all of Dr. J's reports together, Dr. J's November 22, 2000, report would support the finding of a "narrative" as set out in Rule 130.102(d)(4).

The claimant was examined by a doctor for the self-insured, Dr. N, on September 21, 2000. He wrote a 12-page detailed report; however, he had not been supplied with records regarding the claimant's surgery or any imaging or radiographic studies. Dr. N noted that the claimant appeared comfortable during taking of his history and arose without support or hesitation. He did not have a cane. He walked with a limp to the right. Dr. N concluded that the claimant required no further medical care and was capable of working at the medium-duty level. Dr. N based his conclusion on his examination along with a results of a physical performance test performed by a clinic on the same date. This clinic's report stated that the claimant could work at a restricted medium-duty level and an unrestricted light-duty level. The hearing officer concluded that these records did not "show" that the claimant was able to work because of the "totality of the circumstances and their questionable credibility." He found that Dr. N's statement that the claimant needed no further medical care "make his entire report suspect." The hearing officer did not comment on the clinic's physical assessment and the numerous test measurements therein.

When there are records that state on their face an ability to work, a hearing officer is not free to simply reject such records as not credible without an explanation as to why they are not. Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000. In reviewing the hearing officer's decision, no finding is made to assail the credibility of the clinic's physical performance test. We cannot agree that Dr. N's observation that no further medical care is needed is of such magnitude to overcome the objective clinical observations he made which are detailed in the other 11 pages of his report. Nor may these records simply be weighed against other records to arrive at the

conclusion that they do not show such ability. Regardless of whether Dr. N may have had all of the claimant's past medical records, his assessment and that of the clinic as to the claimant's physical abilities were based upon their actual examinations.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The fact that the claimant may have had his time largely taken up with pain management cannot obviate the need to seek employment when his time is not so occupied. Accordingly, because there is another record which "shows" that the claimant is able to return to work (which need only be commensurate with this ability to work, and not what he did at the time of his injury), we reverse the decision of the hearing officer and render a decision that the claimant was not entitled to SIBs for his third quarter of eligibility.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge