

APPEAL NO. 011246
FILED JULY 17, 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 17, 2001. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appealed, citing medical evidence contrary to the hearing officer's decision. The file does not contain a response from the claimant.

DECISION

Reversed and rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an impairment rating of 15% or greater and who has not commuted any impairment income benefits is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work. The hearing officer's finding that the claimant's unemployment during the applicable quarter was a direct result of the impairment from the compensable injury has not been appealed and will not be discussed further.

The parties stipulated to the various jurisdictional elements, including that the qualifying period for the first quarter was from October 12, 2000, to January 10, 2001. At issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work. The claimant proceeds on a total inability to work theory. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with his ability to work if: (1) the employee has been unable to perform any type of work in any capacity; (2) the employee 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.

Neither party makes any reference to Rule 130.102(d)(4). Although the hearing officer does not reference Rule 130.102(d)(4), based on the discussion in the Statement of the Evidence, he clearly referred to the "revised SIBs rules." The hearing officer correctly states that a Work Status Report (TWCC-73) or the lack of a release to return to work does not meet the requirements of a narrative report from a doctor which specifically explains how the injury causes a total inability to work. The hearing officer is also correct in stating that there was "no medical narrative generated during the qualifying period that address Claimant's ability to work."

The claimant had sustained a compensable low back injury on _____. The claimant had fusion spinal surgery in May 1999 at the L4-5 and L5-S1 levels. The claimant was examined by Dr. N, the carrier's independent medical examiner, who, in a report dated August 17, 2000, commented that the claimant probably would require further spinal surgery sometime in the future. Dr. N did not comment on the claimant's ability to work.

The claimant testified that toward the end of September 2000, he had finished a work hardening program which "seemed to help." The claimant apparently underwent a functional capacity evaluation (FCE) on January 10, 2001 (the last day of the qualifying period), and in a report dated January 17, 2001, the claimant was assessed as being unable to return to his preinjury job as a service assistant for a concrete company, but that he meets the "light physical demand level" requirements. The claimant's treating doctor, Dr. H, a chiropractor, on a TWCC-73, released the claimant back to very limited duty on February 5, 2001. In a subsequent narrative report dated March 2, 2001, Dr. H notes that the claimant's fusion sites are "healing very slowly," that the claimant "is incapable of doing any type of job activities at this time until he completely heals from fusion surgery," and that the claimant "continues to experience high levels of pain."

The hearing officer appears to rely on Dr. H's March 2, 2001, letter as the "narrative to support a total inability to work" but appears to reject the January 10, 2001, FCE which found the claimant "able to perform at a light duty level in the evaluation of January 17, 2001 [because it was] after the end of the qualifying period." We hold that the hearing officer's Finding of Fact No. 2 C, that Dr. H provided a narrative explaining how the compensable injury caused a total inability to work, contradictory with Finding of Fact No. 2 D, that "[n]o other medical record [*sic*-Rule 130.102(d)(4) does not specify medical record] showed that Claimant had any ability to work."

If the hearing officer believes that only medical records during the qualifying period can be considered, then there was no medical record to support the requirements of a narrative in Rule 130.102(d)(4). If the hearing officer considers records outside the qualifying period, such as Dr. H's report of March 2, 2001 (almost two months after the qualifying period), he cannot reject the FCE dated one week after the qualifying period as being "after the end of the qualifying period." Under the circumstances, we hold that the hearing officer's finding that no other medical record showed that the claimant had any ability to work to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We reverse the hearing officer's decision as not being supported by the evidence and we render a new decision that the claimant is not entitled to SIBs for the first quarter as the requirements of Rule 130.102(d)(4) have not been met.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCUR IN RESULT:

Robert W. Potts
Appeals Judge