

APPEAL NO. 011480  
FILED AUGUST 01, 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 25, 2001, the hearing officer found that during the qualifying period for the fourth quarter, the respondent (claimant) had a total inability to perform work of any kind; that this inability satisfied the "good faith" criterion for entitlement to supplemental income benefits (SIBs); and that her unemployment during that period was a direct result of her impairment. Based on these findings, the hearing officer concluded that the claimant is entitled to SIBs for the fourth quarter. The appellant (carrier) appeals these determinations on evidentiary sufficiency grounds, asserting that the claimant did not provide a narrative report from a doctor which explained how she could do no work at all during the qualifying period and that other records are in evidence which show that she was able to perform some work. The claimant responded that the evidence is sufficient to support the challenged findings.

DECISION

Reversed and a new decision rendered.

The claimant testified that on \_\_\_\_\_, while working as a salesperson and interior decorator at a home furnishings store, she stumbled over a chair and fell, injuring her right ankle; that she continued working until undergoing surgery on her injured ankle on January 22, 1997; that she developed left foot and low back injuries from having to walk with crutches and bear most of her weight on her left foot; that she had further surgery on the right ankle on March 31, 1999; and that she still sees her surgeon, Dr. B, periodically. The claimant further testified that she lives alone in a two-story townhouse and negotiates the stairs; that she takes care of herself, does her own light house cleaning, drives, and shops; and that she has three years of college and has worked in the financial sales and interior decorating sales fields.

At a prior hearing, another hearing officer determined that, considering the totality of the medical evidence, the claimant had no ability to work and was entitled to SIBs for the first through third quarters. The file reflects that the Appeals Panel failed to reach that case for a decision within 30 days and that the hearing officer's decision thus became final. It was stipulated at the prior hearing that the claimant sustained a compensable right foot, right ankle, right leg, left leg, and low back injury on \_\_\_\_\_, and that her impairment rating (IR) is 15%.

Pertinent to this case, Section 408.142 provides that an employee is entitled to SIBs if the employee has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment, and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Though the carrier lists the finding on "direct result" as one of the findings being appealed, the carrier does not further mention that finding, let alone discuss the basis for its

challenge of that finding. Concerning the “good faith” criterion, Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), which is clearly applicable to this case, 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[.]”

Nowhere in her decision does the hearing officer set out or refer to the provisions of Rule 130.102(d)(4), despite the frequent encouragement of the Appeals Panel to hearing officers to do so. See, e.g., Texas Workers’ Compensation Commission Appeal No. 991973, decided October 25, 1999; Texas Workers’ Compensation Commission Appeal No. 992692, decided January 20, 2000. The hearing officer found that during the fourth quarter qualifying period, the claimant had a total inability to perform work of any kind and that based on such inability, she has satisfied the good faith criterion for SIBs. Concerning the “narrative report” requirement, the hearing officer made no finding identifying the report upon which she relied. The hearing officer simply states in her discussion of the evidence that the claimant, in support of her position that she had a total inability to work, presented the records of Dr. B, the surgeon who performed her ankle surgery, indicating that during the fourth quarter qualifying period the claimant had lifting, pushing, pulling, standing, and sitting restrictions, and that her range of motion (ROM) was limited due to pain which interfered with the claimant’s ability to work safely and increased the possibility of reinjury. The hearing officer is apparently referring to Dr. B’s report of September 8, 2000, which states that the claimant was released from his care on August 10, 1999, with a 17% IR; that she has been “incapacitated during certain periods of time of my treatment, most recently as of 9/1/99”; that she “has been unable to work for the reason of no prolonged standing or sitting capacity due to the fact that [her ROM] is limited due to pain, and the pain interferes with her ability to work safely and also increases the possibility of reinjury”; and that a functional capacity evaluation (FCE) would be required to determine whether she is “permanently and totally disabled for the rest of her life.” Dr. B’s “Off Work Slip” form, signed on September 14, 2000, has three blocks checked to indicate that the claimant has restrictions against pushing and pulling, and prolonged standing and sitting, and that her ROM is limited due to pain which can interfere with her working safely and increase the possibility of reinjury. Dr. B’s report of March 21, 2001, states that he has not seen the claimant since May 23, 2000. Dr. B’s Texas Workers’ Compensation Work Status Report (TWCC-73) dated April 9, 2001, states that from an orthopedic standpoint, the claimant is released to totally sedentary work duty. In a letter of April 16, 2001, to the claimant’s attorney, Dr. B states that he has enclosed an “Off Work Slip” stating that the claimant “was unable to work for the time period . . . 6/11/00 through 9/9/00.”

In our view, none of the records of Dr. B in evidence reasonably proximate to the qualifying period, meet the requirement for a narrative report which specifically explains how the injury causes a total inability to work. They are at best conclusory.

With respect to the “other record” prong of Rule 130.102(d)(4), the hearing officer states in her discussion that the claimant submitted to an FCE on August 28, 2000, which “indicated claimant was capable of performing light duty work.” The FCE report states that the claimant “demonstrated the ability to perform **light** work, as defined by the U.S. Department of Labor’s Dictionary of Occupational Titles, [emphasis in original]” and that her current work level matches the required work level. This report also notes that the claimant seemed to put forth submaximal effort throughout the evaluation; that she refused to complete walking, cardiovascular, squatting, kneeling, forward bending, single leg stand, and trunk rotation tests due to increased low back pain; that she had frequent pain behavior outbursts which were inconsistent; and that her effort throughout the evaluation was also inconsistent. In our view, this FCE report is quite clearly a record “which shows that the injured employee is able to return to work.”

The claimant’s case for entitlement to SIBs for the fourth quarter is grounded on her position that she had no ability to work during the qualifying period. However, her evidence not only does not contain the narrative report required by Rule 130.102(d)(4) but does contain a record which shows an ability to return to work. The hearing officer’s finding that the claimant satisfied the “good faith” requirement and her determination that the claimant is entitled to SIBs for the fourth quarter are against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order are reversed and a new decision is rendered that the claimant is not entitled to SIBs for the fourth quarter.

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Philip F. O’Neill  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Michael B. McShane

Appeals Judge