APPEAL NO. 011577
FILED AUGUST 22, 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 June 1, 2001. The hearing officer determined that for the 12th compensable quarter, the respondent (claimant) had a total inability to work and was entitled to supplemental income benefits (SIBs). The appellant (carrier) urges on appeal that this determination is "clearly wrong" and requests that the decision be reversed and a new decision rendered that the claimant is not entitled to SIBs. The claimant urges affirmance.

DECISION

Reversed and remanded.

We note at the outset that the hearing officer's Finding of Fact No. 1H misstates the qualifying period as commencing on December 1, 2001, when it should read 2000.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provides that an injured employee who has an impairment rating of 15% or greater and who has not commuted any impairment income benefits is entitled to SIBs if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct result of the impairment from the compensable injury and has made a good faith effort to obtain employment commensurate with the employee's ability to work. Rule 130.102(d)(4) states that the "good faith" criterion will be met 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 Appeals Panel has stated that all three prongs of Rule 130.102(d)(4) must be satisfied. Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; and Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000. Section 410.168(a) requires that a written decision include findings of fact and conclusions of law. The Appeals Panel has encouraged hearing officers to make findings on the three prongs when Rule 130.102(d)(4) is applicable. Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999; Appeal No. 992692, *supra*. Because the hearing officer failed to make specific findings of fact identifying which doctor's narrative report that specifically explains how the claimant's injury causes a total in ability to work and explaining why the medical records, which ostensibly

show that the claimant has an ability to work, were discounted, we remand for the hearing officer to make such findings.

First, we address the claimant's assertion in his response that the report of Dr. M, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, should be afforded presumptive weight. Although the record does not actually establish that Dr. M was appointed as the designated doctor, this appears to be the case, as his correspondence to the Commission reflects that the claimant was referred by the Commission. Rule 130.110(a), effective November 28, 1999, provides for a designated doctor to give an opinion on whether the claimant's medical condition, which had prevented him from returning to work in the prior year, had improved sufficiently to allow the claimant to return to work on or after the second anniversary of his initial entitlement to SIBs. Rule 130.110(a) provides that a designated doctor's report on that issue "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary." In addition, the rule provides that the presumptive weight of the report "shall begin the date the report is received by the Commission" and shall continue "until proven otherwise by the great weight of the other medical evidence" or "until the designated doctor amends his/her report based on newly provided medical or physical evidence." The preamble to Rule 130.110, states, in pertinent part:

> [Rule 130.110] also establishes the starting date of the presumptive weight afforded the designated doctor's report as the date the Commission receives the designated doctor's report and also establishes the time frame that the presumptive status continues. By establishing the starting date of the presumptive weight afforded the doctor's report, the presumptive weight will only be applicable to the qualifying period in which the report was received by the Commission. This process allows the injured employee to react prospectively to a report of the designated doctor rather than to have a retrospective finding have a detrimental impact on the injured employee.

Dr. M's report was written after the qualifying period for the 12th quarter and, therefore, assuming that the report specifically explains how the claimant's injury causes a total inability to work, would not be afforded presumptive weight.

The SIBs rules require that the elements of Rule 130.102(d)(4) must be met to establish good faith in a no-ability-to-work situation. Appeal No. 992717, *supra*; Appeal No. 992197, *supra*. One of those elements is that "no other records show that the injured employee is able to return to work." When asserting no ability to work, we have previously held that all requirements of Rule 130.102(d)(4) must be met and cannot be disregarded without compelling reasons supported in the record. Appeal No. 992692, *supra*. The hearing officer made a finding that "no report for the qualifying period stated Claimant could actually work with his restrictions." However, as the hearing officer points out, three different doctor's reports and a functional capacity evaluation indicate that the claimant has an ability to engage in

sedentary work. The hearing officer has provided no explanation as to why he did not find these records credible, nor are we able to discern from the record evidence that indicates they are not credible. A medical record showing an ability to work need not necessarily be created during the qualifying period. *See* Texas Workers' Compensation Commission Appeal No. 001487, decided August 10, 2000; and Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000. Unless there is evidence of a change of circumstances, such as a change in the claimant's condition, which would otherwise render a record showing an ability to work no longer credible, remote records may show an ability to work during the qualifying period.

Additionally, the hearing officer made no finding of fact identifying which doctor's narrative report he relied upon in determining that the claimant had no ability to work. Rule 130.102(d)(4) requires that the claimant provide a narrative report from a doctor which specifically explains how the injury causes a total inability to work. In his discussion of the evidence, the hearing officer refers to the reports of three doctors, which reflect that the claimant has no ability to work. However, upon reviewing these specific reports, as well as all of the additional reports in evidence, we are unable to ascertain which report or reports *specifically explains how the injury causes a total inability to work*. On remand, if the hearing officer determines that the medical records do not establish that the claimant has an ability to work, he should make specific findings explaining the reasons for discounting such records and identify which narrative establishes how the claimant's injury causes a total inability to work.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is

received from the Commission's Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge