APPEAL NO. 012090
FILED OCTOBER 8, 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 (CCH) was held on August 1, 2001. The hearing officer resolved the disputed issues by determining that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the 8th through 10th quarters, and that the claimant is entitled to SIBs for the 11th through 13th quarters. The claimant appealed the determination that she is not entitled to SIBs for the 8th through 10th quarters based on a failure to make a good faith job search, arguing a total inability to work. The respondent/cross-appellant (self-insured) appealed the determination that the claimant is entitled to SIBs for the 11th through 13th quarters.

DECISION

Reversed and remanded.

It was undisputed that the claimant had not searched for work in any of the qualifying periods for the six quarters under review, taking the position that she was totally unable to work. The qualifying periods for the quarters in issue covered the period from November 3, 1999, through May 1, 2001. She had injury to her lower back and left knee as a result of a slip-and-fall injury in _____, and had no rehabilitation since the end of 1995. The carrier also accepted a psychological component to the claimant's injury. When asked why she did not seek a job where she could sit and stand as needed, she stated that she did not trust or like people and could not be around them.

In November 1998, Dr. B examined the claimant for the carrier and pronounced her a symptom magnifier; although he questioned her motivation to return to work, a fair reading of the letter shows that it stops short of assessing whether the claimant actually can work. However, another doctor for the carrier, Dr. K, examined the claimant three times, in January and October 1999 and then October 2000. In the first report, he agreed that she could not work and recommended evaluation for knee surgery. He found no need to have her undergo a functional capacity evaluation (FCE) at that time. In his October 1999 report, Dr. K wrote that an FCE should be done to assess the claimant's ability to perform office work. Any opinion on ability to work was framed in terms of what the average person with such an injury would be able to do (office work). He offered to do an addendum report once the FCE results were forwarded, but the record does not contain a copy of any addendum report. However, the November 1999 FCE concluded that "her results were so poor that she would have a difficult time performing any job that required any activity at all." It should be noted that the FCE reported symptom magnification.

By contrast, in October 2000, Dr. K was more definite in assessing the claimant as being a candidate for office work and did not make this opinion conditional on an FCE. He stated that her ability to work would, due to severe instability of her knee, be limited only

to office work.

Records that have been supplied from her treating doctor, Dr. W, and a treating psychologist, indicate continuing problems, both physically and psychologically, throughout the qualifying periods in issue, as well as the opinion that the claimant could not work. Although there appears to have been no dispute that her condition involved a psychological aspect, Dr. W recorded in 1999 and 2000 that her care and medication by a psychiatrist had been stopped.

The record does not explain why any of the earlier quarters were not resolved prior to April 30, 2001, when the Texas Workers' Compensation Commission (Commission) appointed a designated doctor to opine whether the claimant had the ability to work. The designated doctor held that she did not, and his report was dated May 15, 2001. It is unclear when this report was received by the Commission.

WHETHER Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110(a) (RULE 130.110(a)) APPLIES TO GIVE PRESUMPTIVE WEIGHT TO THE DESIGNATED DOCTOR'S REPORT

The hearing officer erred in giving retroactive presumptive weight to the report of the designated doctor in this case. We reverse his determination that it applies and render the decision that it does not.

Effective September 1, 1999, Section 410.151(b) of the 1989 Act provides that if a dispute exists over whether a claimant has improved sufficiently to return to work, the Commission may appoint a designated doctor to evaluate the claimant. That report is given presumptive weight absent a great weight of evidence to the contrary.

Rule 130.110 was promulgated by the Commission to implement the statute. While much of the rule tracks the statute, Rule 130.110(a) 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." Several previous Appeals Panel decisions have reiterated that the report has prospective presumptive weight only and cannot be applied to quarters prior to its receipt by the Commission. Texas Workers' Compensation Commission Appeal No. 000659, decided May 16, 2000; Texas Workers' Compensation Commission Appeal No. 002327, decided November 20, 2000; Texas Workers' Compensation Commission Appeal No. 002788, decided January 10, 2001; and Texas Workers' Compensation Commission Appeal No. 000880, decided August 21, 2001.

The basis upon which the hearing officer determined to give retroactive effect to the rule was his reasoning that the rule was at odds with the statute. The hearing officer is, however, without authority to decline to apply a duly promulgated rule of the Commission. Nor can we agree with his analysis that the time frames set forth in the rule represent an

irreconcilable conflict with Section 410.158. A fair reading of that statute and the quoted language from the bill analysis (a copy of which is not in evidence) is that prospective application of the designated doctor's report is not antagonistic to either. While it is unfortunate that the Commission did not appoint a designated doctor when the dispute first arose after the second anniversary of SIBs entitlement, a simple finding that a designated doctor was appointed ancillary to "a dispute" does not authorize a failure to follow the express language of the rule. Because the designated doctor's report was not received until all qualifying periods were over, Rule 130.110 does not apply and it cannot be given presumptive weight as to inability to work.

WHETHER THE CLAIMANT MADE A GOOD FAITH SEARCH FOR EMPLOYMENT AS REQUIRED BY RULE 130.102(d)

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[.]

Because the opinion was almost entirely devoted to a discussion of the applicability of Rule 130.110, which we have found is not applicable, there was little or no discussion of the application of Rule 130.102(d)(4) to the facts of the case. There is one brief statement in the discussion that the claimant would not meet the good faith test because there were "other records" showing an ability to work, which were not identified. There are no findings of fact on the elements of Rule 130.102(d(4), which we have in the past encouraged hearing officers to make. Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

Even though six quarters were combined in this hearing, this does not mean that each quarter is not evaluated on its own merits. As to whether there are other records that "show" for a period of time pertinent to these quarters any ability to work, a fair reading of Dr. K's reports indicates that it was not until October 2000 that he determined that the claimant herself had office work ability. Dr. B's 1998 report is not only dated a year prior to the earliest quarter in issue but was essentially reversed by Dr. K's first report, which could negate Dr. B's report as a record showing an ability to work. There appear to be several documents, dated at different times, that could serve the function of a "narrative." However, the Appeals Panel is not a first tier fact finder, and it is the responsibility of the hearing officer, on remand, to set aside Rule 130.110 as a factor in this case, and to

evaluate for each quarter the evidence concerning whether the claimant has met the good faith test under Rule 130.102(d)(4). The fact that the designated doctor's report cannot be given presumptive weight does not mean it cannot be considered as a medical record applicable to the question of whether the claimant has the ability to work.

REGISTERED AGENT INFORMATION

Pursuant to Texas Labor Code § 410.164(c), the self-insured is responsible for filing with the hearing officer and delivering to the claimant information concerning the true corporate name of the carrier and the name and address of the registered agent for service of process. The agent's address was given as a post office box. We remand for the further purpose of obtaining and delivering the street address of the registered agent.

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 Texas Workers' Compensation 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.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge