

APPEAL NO. 012999
FILED JANUARY 28, 2002

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 November 8, 2001. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 13th compensable quarter. The appellant (carrier) urges on appeal that this determination is not supported by sufficient evidence. The claimant urges affirmance.

DECISION

Affirmed as modified.

At issue in this case is whether the hearing officer erred in determining that the claimant is entitled to SIBs for the 13th compensable quarter, which began on July 20, 2001, and ended on October 18, 2001, with a corresponding qualifying period of April 7, 2001, through July 6, 2001. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110(a) (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 her 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 her initial entitlement to SIBs. The rule further provides that the designated doctor's report "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary," and that the presumptive weight "shall begin the date the report is received by the Commission [Texas Workers' Compensation 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 hearing officer determined that the report of the designated doctor, Dr. H, is entitled to presumptive weight under TEX. LAB. CODE ANN. § 408.151, the statutory counterpart to Rule 130.110. Dr. H examined the claimant on September 11, 2001, and determined that she is unable to work due to posturing restrictions and the effects of her prescribed narcotic medication. The Commission received this report on September 19, 2001, which was several months after the qualifying period had ended, and, consequently, the hearing officer was incorrect in determining that it is entitled to presumptive weight for the 13th quarter qualifying period. See Texas Workers' Compensation Commission Appeal No. 002309-S, decided November 16, 2000. The hearing officer's decision is reformed to delete the determination that Dr. H's report is entitled to presumptive weight.

While Rule 130.110(a) is not applicable in this case, the report of the designated doctor can be considered under Rule 130.102(d)(4) in determining SIBs entitlement. 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 average

weekly 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[.]

We have emphasized that a finding of no ability to work is a factual determination for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Nothing in our review of the record indicates that the hearing officer's determination that the claimant is entitled to 13th quarter SIBs, based on having no ability to work as defined in Rule 130.102(d)(4), is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed as modified.

The true corporate name of the carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SYSTEMS
800 BRAZOS
AUSTIN, TEXAS 78701.**

Chris Cowan
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge