APPEAL NO. 013197
FILED FEBRUARY 19, 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 December 4, 2001. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter, August 14, 2001, through November 12, 2001. The appellant (carrier) appealed, arguing that the hearing officer erred in determining that the claimant was entitled to SIBs for the second quarter, and that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant did not file a response.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he injured his back on _____. The claimant had spinal laminectomy with a fusion on February 3, 1999, but the claimant continued to have back pain. The qualifying period for the second quarter of SIBs was May 2 through July 31, 2001.

The claimant testified that he was unable to work due to his compensable injury. In January 2000, the treating doctor released the claimant to light duty, but took the claimant off work after a few weeks when the claimant complained of back pain. At the request of the carrier, a functional capacity evaluation (FCE) was performed by a physical therapist on August 7, 2000, which stated that the claimant was able to perform medium-duty work. On September 4, 2001, Dr. L opined that the claimant was 100% disabled and was unable to work because of his back pain and symptoms. He stated in this letter that this had been true since the date of injury.

Sections 408.142 and 408.143 provide, in pertinent part, that an employee continues to be entitled to SIBs after the first compensable quarter if the employee has in good faith sought employment commensurate with his ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (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 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 bases of the carrier's appeal in this case are that the claimant did not provide a narrative report showing an inability to work and that the claimant failed to co-operate with the carrier's vocational rehabilitation service. The hearing officer in his decision points to Dr. L's narrative of September 4, 2001, as showing that the claimant was unable to work

due to his compensable injury. We have held that the determination as to whether a narrative report shows an inability to work is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. This finding by the hearing officer is not contrary to the great weight and preponderance of the evidence. In light of the hearing officer's finding that the claimant was totally unable to work during the filing period, we find no basis to reverse the decision of the hearing officer based upon the carrier's argument that the claimant failed to co-operate with its vocational rehabilitation service in seeking employment.

The carrier does not specifically argue on appeal that the hearing officer's decision should be reversed because another record showed the claimant had an ability to work. However, we have held that the question of whether or not another record shows an ability to work is a question of fact for the hearing officer and the mere existence of a record stating a claimant can work does not necessarily establish the record shows an inability to work. Appeal No. 000302, supra. In the present case, it is apparent that the hearing officer found the FCE unpersuasive. The hearing officer specifically points to the fact that the FCE was performed by a physical therapist. The source of the other record is certainly the hearing officer may consider in determining whether or not the record shows an ability to work. In light of this and the additional factors, such as the fact the FCE was performed outside the qualifying period (particularly relevant in light of indications in the medical records that the claimant's condition was subject to fluctuation) and the fact that it did not reference the effects of medication the claimant was taking on his ability to work or epidural injections on his ability to perform during the FCE, we cannot say that the hearing officer's failure to find that another record showed an ability to work is contrary to the great weight and preponderance of the evidence.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 N. BRAZOS, SUITE 750
COMMODORE I
AUSTIN, TEXAS 78701.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I dissent, and would reverse and render, because there are plainly other records that show an ability to work which have not been given the effect by the hearing officer that is warranted under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)).

In this case, the vocational counselor has gone to somewhat extraordinary lengths to find part-time sedentary employment that is within the claimant's restrictions. The treating doctor was sent copies of each job description, and although he has seldom replied (according to this record), there is at least one reply stating that the job was within the claimant's restrictions. Furthermore, there is a perfectly good, comprehensive functional capacity evaluation (FCE); the fact that it was administered by a physical therapist, as a great majority of FCEs are, is not a valid basis for rejecting this as an "other record" that shows an ability to work. The hearing officer has indicated no other basis for rejecting the record that shows on its face an ability to work nor did he state that the FCE does not credibly assess the claimant's ability to work. Because the statute does not provide a vehicle for a "no ability to work" exception to the job search requirement, Rule 130.102(d)(4) has imposed necessary requirements to ensure that findings of such inability

are few and far between and are soundly grounded in the objective evidence rather than subjective interpretation of the evidence.

Susan M. Kelley
Appeals Judge