APPEAL NO. 020342
FILED APRIL 16, 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 (CCH) was held on February 19, 2002. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 14th quarter.

The appellant (carrier) appealed, contending that the medical reports are insufficient to support the hearing officer's decision; that the claimant's unemployment was not a direct result of her impairment; that the designated doctor's report should not have been given presumptive weight; and that the hearing officer abused his discretion in admitting one of the claimant's exhibits. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and regulatory requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work as set out in Rule 130.102(d)(4) and whether the claimant's unemployment was a direct result of her impairment.

The claimant sustained a compensable low back lifting injury on _____, and has had several spinal surgeries. The parties stipulated to the jurisdictional elements and that the qualifying period was from July 7 through October 5, 2001. It appears undisputed that the claimant received SIBs for the first 12 quarters and that the carrier challenged entitlement for the 13th quarter, which resulted in a CCH and Texas Workers' Compensation Commission Appeal No. 012999, decided January 28, 2002, where the Appeals Panel affirmed the hearing officer's decision awarding SIBs for the 13th quarter.

Rule 130.102(d)(4) 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. One of the appealed matters is whether a note dated August 28, 2001, and a narrative report dated January 29, 2002, from Dr. B, the treating doctor, meet the requirement of a narrative "which specifically explains how the injury causes a total inability to work." The August 28 note is on a prescription pad and simply states that the claimant "is disabled and is unable to work." We hold that note is insufficient to meet the requirement of Rule 130.102(d)(4). In the January 29, 2002, letter report, Dr. B explains that the claimant "is a long standing patient" and is "unable to work due to her difficulties with severe pain and post-laminectomy syndrome." Dr. B goes on to explain:

> She has severe ambulatory difficulties requiring the use of a wheeled walker for ambulation. She receives regular treatment with OxyContin and Ritalin for severe pain. . . . She has tenderness upon palpation of the para spinal muscles in the mid to lower lumbar segment. Her lumbar range of motion is limited. [Claimant] has decreased motor strength in the distribution of L4/5 and S1.

A hearing officer finding that this report would meet the element of a narrative that specifically explains how the injury causes a total inability to work would not be against the great weight and preponderance of the evidence.

In this case, Dr. H, a designated doctor, was appointed pursuant to Section 408.151 and Rule 130.110 to resolve an ability to return to work in a SIBs dispute. Dr. H's report of a September 11, 2001, examination, after a thorough discussion of the claimant's condition and medical history, concludes:

> **DISCUSSION**: I would make a firm statement at this time that she is unable to carry out any work due to not having any ability to maintain any type of constant posturing. She is on morphine medication including narcotics which would alter her ability to function, along with the distraction of the chronic pain.
>
> Her symptoms all appear to be related to her compensable injury and I accept her history and symptoms as legitimate based on examination of the medical records.

However, after making this fairly definitive statement, Dr. H goes on to state:

> [Claimant] feels that she would like to train as a medical transcriptionist as she can type and can use her UE's. She has a home computer and would use that at home doing the work at her own pace, which I am in agreement with. She would like training for that, returning to . . . College.
>
> [Functional capacity evaluation] will not be done due to obvious restrictions and non-use and sedentary type things related to her back problems.

The hearing officer makes findings that Dr. H's report was received by the Texas Workers' Compensation Commission (Commission) on September 19, 2001, and the report is entitled to presumptive weight. The carrier in this case, and apparently the prior case involving the 13th quarter of SIBs, cites Dr. H's follow-on comments as an "other record" which shows the claimant could return to work.

In a letter dated January 22, 2002, the ombudsman, assisting the claimant, wrote directly to the designated doctor requesting clarification and posing the following questions:

> Is it your medical opinion that she is able to do work, such as a transcriptionist at the time of the exam?
>
> Does [sic] your notes indicate whether she stated she could do this work, or if she had the *desire* to do this type of work? [Emphasis in the original.]
>
> If you feel she could do this type of work, do you feel she was physically able to go through training, whether in a classroom or on-the-job, to learn these duties, based on her condition?

Dr. H replied by letter dated January 29, 2002, stating "I still feel that basically she is unable to do any type of work" and then discusses possibilities of retraining "at this time or sometime in the future." The carrier objected to this report and sought its exclusion (as well as other unstated actions against the ombudsman) pursuant to Rule 130.110(i), which states, in part:

> (i) To avoid undue influence on a person selected as a designated doctor in accordance with Texas Labor Code, §408.125, only the injured employee or an appropriate member of the staff of the commission may communicate with the designated doctor about the case regarding the employee's medical condition or history prior to the examination of the employee by the designated doctor. After that examination is completed, communication with the designated doctor regarding the injury employee's medical condition or history may be made only through appropriate commission staff members. An ombudsman and an ombudsman's assistant are not considered appropriate staff to contact the designated doctor and should communicate with a designated doctor only through appropriate commission personnel. [Emphasis added.]

The ombudsman, on being queried about his actions, really had no effective response other than to state that he had consulted others in the office. There was some discussion about the reference to Section 408.125 in Rule 130.110(i) and then the hearing officer held Rule 130.110(i) applicable to this case and asked the carrier what it believed the appropriate remedy to be. The carrier cited Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994 (a case dealing with contact with a maximum medical improvement/impairment rating designated doctor). In that case, and others, the Appeals Panel has held that unilateral contact with a designated doctor by one of the parties does not "per se" either disqualify the doctor "or require that the report of that designated doctor be disregarded solely on the basis of the unilateral contact." Instead, the hearing officer should evaluate the unilateral contact for prejudice to the opposing party, bias, improper influence "or at least the perception of improper influence stemming from that communication." Texas Workers' Compensation Commission Appeal No. 012238, decided November 7, 2001. In this case, the hearing officer made no finding or comment but rather admitted the report over the carrier's objection. The carrier, in its

appeal, asserts that the hearing officer "abused his discretion and committed harmful error" in the admission of Dr. H's January 2002 clarification, and alleges it "was prejudiced by the Ombudsman's unilateral contact with the designated doctor." We disagree. Contrary to the carrier's allegations, we will infer that the hearing officer found that the ombudsman's questions to the designated doctor to be fairly open-ended and not exerting either actual or the perception of improper influence on the designated doctor.

The hearing officer did not err in giving Dr. H's September 2001 report presumptive weight beginning September 19, 2001 (the last two weeks or so of the qualifying period), and inferentially finding that either Dr. B's January 2002 report, which references treatment during the entire qualifying period, or Dr. H's report, after September 19, 2001, satisfied the requirements of Rule 130.102(d)(4). The hearing officer did not err in inferentially finding that neither of those reports, nor Dr. H's clarification, constituted an "other record" which showed that the claimant had an ability to return to work.

The carrier also contends that the claimant's unemployment is not a direct result of her impairment because a large part of the claimant's failure to seek employment is because of the effects of her prescription medication. The carrier contends that the claimant "was abusing medications to the extent that one of her physicians refused to continue to treat her." Although there was some reference to this incident, which apparently occurred in some prior quarter (the ombudsman refers to it as "ancient history") there is little or no evidence that such abuse, if any, occurred during the applicable qualifying period. The carrier also contends that the claimant had some sort of unrelated "heart condition" which precluded the claimant from working. Dr. B addressed this contention in her January 29, 2002, report, stating that the claimant's "condition would remain the same regardless of a heart problem." The designated doctor does not reference the heart condition. The hearing officer did not err in finding that the claimant's unemployment was a direct result of her impairment.

The hearing officer's decision is not 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). Accordingly, the hearing officer's decision and order are affirmed.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge