APPEAL NO. 020790
FILED MAY 20, 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 14, 2001. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth quarter. In Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002, the Appeals Panel reversed the hearing officer's decision and remanded the case to the hearing officer because the hearing officer erred in giving presumptive weight to the report of the designated doctor. In his decision on remand, the hearing officer again determined that the claimant is entitled to SIBs for the sixth quarter. The appellant (self-insured) appealed. No response was received from the claimant.

DECISION

The hearing officer's decision on remand is affirmed.

The claimant contended that he had no ability to work during the qualifying period for the sixth quarter as a result of his compensable injury. Thus, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) applies to this case. For the reasons stated in Appeal No. 020041-s, we agree with the self-insured's contention that the hearing officer erred in again finding that the designated doctor's work status report is entitled to presumptive weight. Rule 130.110, entitled "Return to Work Disputes During [SIBs]; Designated Doctor," interprets Section 408.151, and the rule does not provide for giving presumptive weight to the work status report of a designated doctor prior to the second anniversary of the injured employee's initial entitlement to SIBs. However, because the hearing officer made an alternative finding that the claimant had no ability to work even if the designated doctor's report is not entitled to presumptive weight, and there is sufficient evidence to support that finding, we do not find reversible error with regard to the finding that gave presumptive weight to the work status report of the designated doctor.

The self-insured does not assert that there is no narrative report from a doctor which specifically explains how the injury causes a total inability to work, and we note that the treating doctor did provide such a report on June 14, 2001 (the qualifying period was from June 1 through September 4, 2001).

The self-insured does contend that the hearing officer erred in not finding that an "other record" shows that the injured employee is able to return to work. Although the hearing officer did not make a finding of fact regarding whether other records did or did not show that the claimant is able to return to work, it is clear from the hearing officer's discussion of the evidence that he was not persuaded that the two reports of the self-insured's required medical examination (RME) doctor, on which the self-insured relies, were records that showed that the claimant was able to return to work during the relevant qualifying period. In Texas Workers' Compensation Commission Appeal No. 992197,

decided November 18, 1999, the Appeals Panel noted that there was no condition in the SIBs no-ability-to-work rule (formerly Rule 130.102(d)(3); now Rule 130.102(d)(4)) that limits the "other records" as to the time of inception or as to when an examination was conducted. However, Appeal No. 992197 also pointed out that consideration may be given as to whether records are so removed from the qualifying period as to be not relevant, particularly if there has been some intervening event such as surgery for the injury. In the instant case, the RME doctor's first report in January 2000, which noted that the claimant could return to medium work, was dated 17 months before the start of the qualifying period for the sixth quarter and 12 months before the claimant underwent his second cervical surgery for his compensable injury. Considering that the RME doctor's first report did not take into consideration the ramifications of the second surgery, we cannot fault the hearing officer for not finding it to be a record which showed that the claimant was able to return to work in the relevant qualifying period.

The RME doctor's second report was based on an examination of the claimant done during the qualifying period, and in that report the RME doctor noted that he would not suggest that the claimant do anything above a light-work category; however, in answer to a question as to whether the claimant's "current inability to work" is due to the injury, the RME doctor stated "yes" without stating any qualification regarding the claimant's having some current ability to work. The hearing officer noted that the second report had an unexplained contradiction with regard to the claimant's work status and he was thus not persuaded that it was a record that showed that the claimant was able to return to work. In Texas Workers' Compensation Commission Appeal No. 000625, decided May 11, 2000, the Appeals Panel, in commenting on the SIBs no-ability-to-work provision, stated that "[w]hether another record 'shows' an ability to work is a question of fact for the hearing officer to resolve. [Citations omitted.] The question of whether a record 'shows' an ability to work is a different question than the question of whether the record states that the claimant has some ability to work. [Citations omitted.]"

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision that the claimant is entitled to SIBs for the sixth quarter, based on his determination that the claimant had a total inability to work during the qualifying period, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Although the self-insured did not appeal the hearing officer's finding that "[t]he Claimant was satisfactorily participating in a full time program with the Texas Rehabilitation Commission [TRC]," we do not base our affirmance on that finding because the claimant did not contend, nor is there any evidence to indicate, that the claimant had been enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period. The evidence reflects that the claimant applied

for TRC services but the TRC placed the claimant on "hold" regarding training due to potential surgery, although the TRC stated that it was providing counseling and guidance.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

RE
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge