

APPEAL NO. 021329
FILED JULY 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 April 30, 2002. The hearing officer determined that (1) the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter; and (2) the claimant did not accrue benefits for the second quarter until October 29, 2001, due to a late filing of her Application for [SIBs] (TWCC-52). The appellant (carrier) appeals the determination that the claimant is entitled to SIBs, on sufficiency of the evidence grounds. The claimant urges affirmance.

DECISION

Reversed and rendered.

The hearing officer erred in determining that the claimant is entitled to fourth quarter SIBs. Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work during the qualifying period. 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 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 claimant provided several narrative reports from her treating doctor with the most recent report dated January 29, 2002, two days prior to the close of the qualifying period. The carrier does not dispute the sufficiency of any one of these reports as a narrative. Rather, the carrier argues that other records show that the claimant is able to return to work. The claimant's treating doctor, following his most recent narrative report and in response to written questions from the carrier, indicated that the claimant was capable of "work as a telephone marketing salesperson that requires simply calling on potential customers." The treating doctor noted that the claimant cannot stand for more than short periods; that she cannot repeatedly stand up and sit down; that she does not have the education for clerical work; and that she cannot drive to work due, at least in part, to poor vision from diabetes. The carrier's required medical examination (RME) doctor similarly opined, in a report dated March 10, 1999, that the claimant was capable "at the very most a light-duty work [sic] or maybe possibly only sedentary type work," with restrictions from lifting more than 20 pounds and carrying 10-pound articles frequently. This report is supported by a functional capacity evaluation (FCE) which also found that the claimant was capable of "sedentary" work. Although the FCE report indicates that the claimant could not tolerate bending, squatting, kneeling, reaching overhead, or climbing stairs, it concluded that the claimant could perform sedentary

work. In a later report, dated May 14, 2001, the carrier's RME doctor reiterated that the claimant "would be able to return to work, with restrictions, if one considers only the [compensable] injuries." Only when considering the claimant's compensable injuries in combination with her several, nonwork-related conditions could she be found to be totally disabled. In a record dated March 13, 2002, the carrier's peer review doctor, Dr. C, concurred that the claimant is capable of sedentary work considering only her compensable injuries.

Given the evidence, the hearing officer made the following relevant determinations:

FINDINGS OF FACT

14. No medical report indicates Claimant has an ability to work.
15. The FCE from [Clinic] indicates Claimant could only work a sedentary job if she could work, with NA's in all restrictions.
16. The FCE report states Claimant is not a candidate for retraining or vocational services due to Claimant's condition.
17. The report of Dr. [C] is a peer review and not a "record" as contemplated by Rule 130.102(d)(4).
18. Claimant had no ability to work during the qualifying period for the fourth quarter.
17. [sic] Claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the fourth quarter.

CONCLUSIONS OF LAW

3. Claimant is entitled to [SIBs] for the fourth quarter beginning February 14, 200 and ending May 15, 2002.

The hearing officer committed legal error in determining that the report of Dr. C does not constitute an "other record" as contemplated by Rule 130.102(d)(4). At the CCH, the hearing officer indicated reliance on previous Appeals Panel decisions for this determination, clarifying that a "peer review" is not a medical record, given the absence of an examination, and does not satisfy the requirements of Rule 130.102(d)(4). The hearing officer cited no specific authority on the record or in the decision in this case, nor are we aware of any authority which would support the hearing officer's determination in this regard. To be sure, we have not held, as a matter of law, that the report of a "peer review" doctor is not an "other record" as contemplated by Rule 130.102(d)(4). See Texas Workers' Compensation Commission Appeal No. 012309,

decided November 13, 2001 (where the Appeals Panel expressly declined to endorse a similar statement by this hearing officer in a prior SIBs, no ability to work case). Indeed, we have said that the "other record" need not be a medical record by a doctor. Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000. In the absence of language in the rule limiting the applicability of the term "other record" in the manner suggested by the hearing officer, we hold that Dr. C's report constitutes an "other record" which shows that the claimant had some ability to work during the qualifying period.

The hearing officer erred in determining that the claimant satisfied the good faith job search requirement of Section 408.142(a)(4) through a total inability to work. As indicated above, the hearing officer failed to consider the report of Dr. C, which we hold to be an "other record." Moreover, the treating doctor's response to written questions, the RME doctor's report, and the FCE report appear, on their face, to show that the claimant is capable of sedentary work, when considering only the compensable injuries. In the absence of specific findings that these records are not credible, the claimant is not entitled to fourth quarter SIBs. The hearing officer's determination that the claimant is entitled to fourth quarter SIBs, therefore, 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 (Tex. 1986).

The carrier complains of the hearing officer's reliance on testimony given at a prior CCH, in which entitlement to second and third quarter SIBs was at issue. We note that the hearing officer took no testimony on the issue of entitlement to fourth quarter SIBs at the hearing below. Nonetheless, in the "Statement of the Evidence" portion of the decision, the hearing officer sets out testimony from the claimant on the issue and states, "this testimony is from the prior hearing on the second and third quarters with slight modification—this is a no ability to work case." Although the prior testimony referenced in the "Statement of the Evidence" is not dispositive of the issue on appeal, we believe the reliance on that evidence from prior quarters may have influenced the hearing officer in his decision on the issue of entitlement to fourth quarter SIBs and the hearing officer may not have fully considered the evidence before him in this proceeding.

For the reasons stated above, the decision and order of the hearing officer are reversed and a new decision rendered that the claimant is not entitled to fourth quarter SIBs.

The true corporate name of the carrier is **RCH PROTECT CORP** and the name and address of its registered agent for service of process is

**KEVIN REID
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AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge