

APPEAL NO. 021439
FILED JULY 24, 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 May 10, 2002. The hearing officer resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 12th and 13th compensable quarters. On appeal, the claimant contends that this determination is against the great weight and preponderance of the evidence. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the qualifying periods corresponding to the 12th and 13th compensable quarters were from August 16 through November 14, 2001, and from November 15, 2001, through February 13, 2002, respectively. On October 29, 2001, the Texas Workers' Compensation Commission (Commission) sent a letter to Dr. L appointing him as the designated doctor for purposes of determining whether the claimant's condition had improved sufficiently to allow him to return to work. On November 19, 2001, Dr. L examined the claimant and opined in a report received by the Commission on December 6, 2001, that, with his education, training, and experience, the claimant was not capable of performing any job in a light or sedentary capacity and that his impairment was permanent and total. On January 21, 2002, a functional capacity evaluation (FCE) was performed. The results of the FCE indicated that the claimant was capable of working in a sedentary capacity. The Commission forwarded the FCE results to Dr. L, asking him whether his opinion regarding the claimant's ability to work would change in light of the results and asking him to clarify whether the claimant could perform work irrespective of his educational level and training. Dr. L did not provide clarification as to the latter request, but did reply, in a letter dated March 18, 2002, that, as indicated by the FCE results, the claimant was capable of performing sedentary work. There is no indication when the Commission received this letter, however, as it was written after the expiration of the qualifying periods in question; it was undoubtedly received after them as well.

Effective September 1, 1999, Section 408.151(b) of the 1989 Act provides that if a dispute exists over whether a claimant has improved sufficiently to return to work, the Commission may appoint a designated doctor to evaluate the claimant. The designated doctor's report is given presumptive weight absent a great weight of evidence to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110) implements Section 408.151 and provides, in pertinent part:

- (a) This section only applies to disputes regarding whether an injured employee whose medical condition prevented the injured employee

from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to [SIBs]. Upon request by the injured employee or insurance carrier, or upon its own motion, the Commission shall appoint a designated doctor to resolve the dispute. The report of the designated doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the Commission and shall continue:

- (1) until proven otherwise by the great weight of the other medical evidence; or
- (2) until the designated doctor amends his/her report based on newly provided medical or physical evidence.

Had Dr. L's first report simply stated whether, due to the compensable injury, the claimant had an ability to perform any type of work during the qualifying periods, the issue would have been easily resolved. However, Dr. L qualified his opinion that the claimant could not perform any job in a light or sedentary capacity by adding, "especially in light of his training [and] experience." Because of this, his opinion could not be afforded presumptive weight. Dr. L's clarification letter, drafted and, presumably received by the Commission after the expiration of the 13th quarter qualifying period, clearly states that, given the results of the FCE, which had not been performed at the time of his initial examination, the claimant could return to work in a sedentary capacity.

Under Rule 130.110(a)(2), the amended opinion was not afforded presumptive weight until it was received by the Commission, and it could not have been received until on or after March 18, 2001, which was outside of the qualifying periods in question. Although the amended report was not afforded presumptive weight, it was evidence that the hearing officer could consider in making his determination. The hearing officer, not having the benefit of a designated doctor's report entitled to presumptive weight, relied on Rule 130.102(d)(4) which provides that the "good faith" criterion for SIBs entitlement will be met if the claimant 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 hearing officer found that the claimant's treating doctor provided a sufficient narrative, but that the FCE and Dr. L's amended report constituted records showing an ability to work and, consequently, the claimant is not entitled to SIBs for the 12th and 13th quarters. We believe that under the particular facts of the present case, the hearing officer properly analyzed the facts, and nothing in our review of the record indicates that his decision is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, the decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge