APPEAL NO. 021989
FILED SEPTEMBER 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on July 2, 2002, the hearing officer found that the appellant (claimant) failed to prove that he made a good faith attempt to obtain employment commensurate with his ability to work during the qualifying period for the second quarter and concluded that he is not entitled to supplemental income benefits (SIBs) for that quarter. The claimant has appealed these determinations on evidentiary sufficiency grounds. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged findings.

DECISION

Reversed and remanded.

The claimant's evidence indicated that in June 1999, he had arthroscopic surgery on his right knee, which was injured on _____, when the claimant, who was apparently doing marketing and sales training work out of his house, struck his knee on the corner of his desk. He received a 21% impairment rating from the designated doctor. The claimant testified that since late 1999 he has been attempting to obtain the approval of the Texas Workers' Compensation Commission (Commission) for the additional knee surgery his surgeon says he needs; that he takes Advil and aspirin for knee pain; and that he sees his treating doctor, Dr. V, approximately every three weeks when Dr. V "inspects" his knee. The claimant further stated that from November 15, 2001, through February 13, 2002, the qualifying period for the second SIBs quarter, he had no ability to work because of his severe knee pain which makes sitting and ambulating difficult; that while he did call several temporary employment agencies, he did not seek employment "in the conventional sense" as he would not be physically capable of doing so; and that he earned no wages. The parties stipulated the facts that the claimant did not seek employment and did not earn wages during the qualifying period at issue. The claimant also testified that he has been in contact with the Texas Rehabilitation Commission (TRC) and in November 2001, commenced a series of 15 counseling sessions so that the TRC can assess and "get to know" him. He acknowledged that he has a high school education, has, since high school, had training courses, has been employed in the telemarketing industry as well as in business consulting and sales training, and that he drove approximately 20 minutes to attend the hearing.

In evidence is the decision and order of another hearing officer which determined that the claimant was not entitled to first quarter SIBs, as well as Texas Workers' Compensation Commission Appeal No. 020918, May 21, 2002, affirming that decision and order. Those documents reflect that the claimant's evidence failed to meet the criteria for proving that, during the first quarter qualifying period, he had no ability to

work. The Appeals Panel decision also states that documents admitted into evidence "reflect that the claimant did not enter into a plan of vocational rehabilitation services with the TRC until after the end of the qualifying period[.]"

The eligibility criteria for entitlement to SIBs are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102 (Rule 130.102). Concerning the two SIBs entitlement criteria which were not stipulated, the hearing officer's findings that the claimant sustained a serious injury with lasting effects on _____, and cannot return to work in his former capacity for the employer, and that his unemployment during the qualifying period is a direct result of the impairment from his compensable injury have not been appealed and have become final by operation of law. Section 410.169.

The remaining SIBs entitlement criterion in issue before the hearing officer was whether the claimant, during the qualifying period, "has attempted in good faith to obtain employment commensurate with [his] ability to work." Section 408.142(a)(4). Rule 130.102(d) provides for five methods by which an injured employee may satisfy the "good faith effort" criterion. Two of the five are relied on by the claimant, namely, Rule 130.102(d)(2) providing that the injured employee "has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program [VRP] sponsored by the [TRC] during the qualifying period," and Rule 130.102(d)(4) providing that the injured 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 claimant's position at the benefit review conference and at the hearing was that he satisfied the "good faith" attempt criterion under both Rule 130.102(d)(2) and Rule 130.102(d)(4).

With regard to the Rule 130.102(d)(2) issue, the hearing officer's sole finding on this issue states that "[a]lthough the Claimant was interacting with the [TRC] during the qualifying period for the second (2nd) quarter, he was not enrolled in a full time retraining program under the auspices of that agency." However, Rule 130.101(8) defines a full time VRP as follows: "[a]ny program provided by the [TRC] . . . for the provision of vocational rehabilitation services designed to assist the injured employee to return to work that includes a [VRP]. A [VRP] includes, at a minimum, an employment goal, any intermediate goals, a description of the services to be provided or arranged, the start and end dates of the described services, and the injured employee's responsibilities for the successful completion of the plan." The claimant introduced his TRC records. These records include a form TRC495 (10/2001) entitled "[TRC] Vocational Rehabilitation Services Individualized Plan for Employment (IPE)," which is dated "11/10/2001" and bears the name of the claimant, as agreeing to the IPE, and that of his TRC counselor, Mr. H, as approving the IPE. The IPE states the employment goal as "Professional/Technical/Managerial Occupation (D.O.T. Code 0/1xx.xxx-xxx) and that "it is expected that the claimant will become employed after completing the services on this IPE." The IPE describes seven steps the claimant agrees to be necessary to achieve his employment goal. His agreement to maintain contact with his

counselor at least every 90 days, a description of certain specific services to be provided either by the TRC or by a purchase order of the TRC, namely, counseling and guidance toward suitable employment by the TRC counselor, up to 15 sessions of psychological or social worker counseling to be purchased, and worker development services to include job quest training, job development, and job placement activities to be purchased. The IPE goes on to state the claimant's specific responsibilities in achieving his employment goal. Introduced with the IPE are TRC invoices reflecting payments for a general battery of tests and for vocational evaluation dated in August and September 2001; various consent forms signed by the claimant; a Vocational Evaluation Report dated September 6, 2001; a Psychological Evaluation dated September 13, 2001; a "Vocational Evaluation" dated October 16, 2001; a Comprehensive Assessment dated November 20, 2001; an IPE Justification dated November 21, 2001; counseling and guidance notes dated in November and December 2001; a record reflecting that in late December 2001, the claimant selected Dr. M for psychological counseling; and various records of counseling from Dr. M through February 14, 2002.

In view of this evidence and given the only finding of fact specifically relating to the Rule 130.102(d)(2) issue, we are compelled to reverse and remand this case for further consideration by the hearing officer and for additional findings of fact specific to Rule 130.102(d)(2). As part of the reconsideration process, the hearing officer should, at a minimum, review our decisions in Texas Workers' Compensation Commission Appeal No. 000001, decided February 16, 2001; Texas Workers' Compensation Commission Appeal No. 010483-s, decided April 20, 2001; Texas Workers' Compensation Commission Appeal No. 010952-s, decided June 20, 2001; and Texas Workers' Compensation Commission Appeal No. 011536-s, decided August 28, 2001.

We next discuss the Rule 130.102(d)(4) issue. Despite the repeated urging of the Appeals Panel following the promulgation of the "new" SIBs rules, the hearing officer failed to make specific findings addressing the Rule 130.102(d)(4) elements including the existence of a "narrative report which specifically explains how the injury causes a total inability to work" and the existence of "other records" showing an ability to return to work. *See* Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000, and cases cited therein. The only finding the hearing officer drafted to address the Rule 130.102(d)(4) criterion is the finding that that the claimant was "capable of working in a sedentary capacity" during the qualifying period. Not only did the hearing officer fail to make specific findings on the elements of Rule 130.102(d)(4), she does not in her discussion of the evidence identify or discuss any of the medical records relied on by the claimant as constituting the required "narrative report" nor does she identify which, if any, records constitute "other records" which show the claimant's ability to return to work. Rather, the hearing officer states that "[b]ecause the Claimant cannot show entitlement to [SIBs] for the second (2nd) quarter and because he cannot show she [sic] sought employment in good faith with the ambition of finding a job, the following discussion is included to assist the Claimant in understanding the requirements that he must meet to qualify for and receive [SIBs]." The hearing officer then delivers herself of a four-page, single-spaced tutorial on the SIBs application

process and entitlement requirements purporting to be stating "black letter" or "bright line" SIBs law but which contain a number of statements which are either overbroad, not entirely accurate, or specific case dependent. For instance, in her discussion relating to Rule 130.102(d)(4) and the proof of an injured employee's total inability to work, the hearing officer flatly states that "[c]onstant pain caused by the compensable injury, for example, does not excuse an injured worker from undertaking a concerted effort to seek employment." We regard this statement as overbroad. The hearing officer also states that "[I]n addition, no other records created concomitant with the qualifying period show that he or she is able to return to work in any capacity." The Appeals Panel decisions have not limited "other records" which show an ability to return to work to only those created during the qualifying period in issue.

Among the numerous records of Dr. V in evidence are a July 18, 2001, report that states as follows: "As of 7-18-01, we are releasing the patient back to light duty work as there is nothing further to do at this time. The patient will be taking this light duty release and going to the [TRC] and applying there for retraining as well as for a job as the company for which he worked is no longer in business." Dr. V wrote on November 14, 2001, that the claimant is "unable to work due to his work-related injury dated _____, as any type of standing, sitting, or even ambulating does produce severe knee discomfort." Dr. V wrote a Commission ombudsman on January 7, 2002, stating, in essence, that the reason he gave the claimant the release to work with restrictions on July 18, 2001, was to help the claimant get retraining by the TRC. However, Dr. V's "SOAP Note" of January 7, 2002, states the following: "Certainly, the patient can be trained in a sedentary type of work and the patient does have the ability to do that. As to the patient being at work, obviously he cannot work under the circumstances unless it is sedentary and unless he is trained for such a task and that was the intent of the 07/18/01 [Work Status Report] TWCC-73 form, which released the patient back to light duty work, that being specifically so that the patient could consult the [TRC]." Dr. V's report of March 7, 2002, reflects that he is taking the claimant back off work "due to his current disheartened condition" and refers to the claimant's depression. The medical records of Dr. M, a psychologist, reflect that the claimant was undergoing counseling for severe depression.

We find it necessary to remand this case to the hearing officer for specific findings, based on the evidence of record, which address the elements of Rule 130.102(d)(4).

The decision and order of the hearing officer are reversed and the case is remanded for such further consideration, findings of fact, and conclusions of law, based on the evidence of record, as are appropriate and consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section

410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CAMDEN FIRE INSURANCE ASSOCIATION** and the name and address of its registered agent for service of process is

C. J. FIELDS
5910 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75206.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Michael B. McShane
Appeals Judge