APPEAL NO. 022445
FILED NOVEMBER 18, 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 August 28, 2002. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th through 15th quarters (April 14, 2001, through July 13, 2002). The appellant (carrier) appeals, asserting that the claimant did not prove that he was unable to work during the qualifying periods for the relevant quarters, that the treating doctor only provided conclusory statements about the claimant's inability to work, and that the treating doctor related the inability to work to the claimant's psychological condition, which is not part of the compensable injury. The claimant responds, urging affirmance.

DECISION

Reversed and remanded.

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 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). There is no dispute that the qualifying periods at issue were from December 31, 2000, through March 30, 2002. 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 hearing officer determined that the claimant "was unable to work in any capacity pursuant to narrative reports and testimony provided by his treating doctor, [Dr. J]" and that the narrative reports specifically explained how the injury caused the claimant's total inability to work during the qualifying periods for the 11th through 15th quarters. While we agree that some of Dr. J's reports and testimony are minimally sufficient to provide the narrative which specifically explains how the injury causes a total inability to work, this case deals with five quarters of SIBs and the evidence pertaining to each quarter needs to be considered independently. The reports differ in quality and content for each quarter, and it does not appear to us that individual differences in the records have been considered. For example, the medical report of Dr. J dated March 14, 2001, states: "We will be referring the patient to the Texas Rehabilitation Commission on 03/21/01 for vocational training so that he may learn new trade skills allowing him to adjust his life-style and work duties to his injuries sustained on the above noted date." This hardly qualifies as a report which "specifically explained how the injury caused the claimant's total inability to work." Since we are remanding

this case primarily on the question of the "other records" that show that the claimant is able to return to work, we direct that the hearing officer identify the narrative reports that specifically explain how the injury causes a total inability to work for each qualifying period.

The record contains a Functional Capacity Evaluation (FCE) dated August 30, 2000, which indicated that the claimant was functioning at a medium physical demand level. The hearing officer discusses the FCE briefly and refers to Dr. J's testimony "that the FCE only looks at one component (lifting and endurance) of a return-to-work analysis," and seems to dismiss the FCE on that basis, without explaining why the FCE, which the claimant was able to complete and on which he showed consistent effort, is not a credible "other record" within the meaning of Rule 130.102(d)(4). More importantly, the hearing officer asserts in her Statement of the Evidence that the opinion of the carrier-selected required medical examination (RME) doctor, Dr. A, "is not credible and is contrary to the other medical evidence in the record." It thus appears that the hearing officer applied a weighing or balancing test as to which record she found to be more persuasive. As we said in Texas Workers' Compensation Commission Appeal No. 021691, decided August 22, 2002:

> Rule 130.102(d)(4) does not provide for such a weighing or balancing test, rather it states that for the claimant to prevail "no other records show that the injured employee is able to return to work." It was error for the hearing officer to apply such a balancing or weighing test. *See* Texas Workers' Compensation Commission Appeal No. 002670, decided January 3, 2001.

We have, in addition, previously discussed an RME doctor's report and the Rule 130.102(d)(4) requirement that no other records show that the injured employee is able to return to work, in Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000, where the Appeals Panel wrote that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record." There are two RME doctor reports in the record from Dr. A; each report appeared to follow a hands-on examination of the claimant and concluded with a statement that the claimant should return to his regular job without restrictions. The hearing officer views this statement as inconsistent with a 24% impairment rating, but that alone is not sufficient as an explanation for her determination that the reports of the RME doctor are not credible. We hold that under the circumstances the determination of the hearing officer that "[n]o other records credibly show that the Claimant could have returned to work between December 31, 2000 and March 30, 2002" is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, that determination is reversed. We must remand for the hearing officer to properly evaluate the "other records" in this case, as well as to have the hearing officer further identify the narrative reports she relied on in making her determinations.

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 Texas Workers' Compensation 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 **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Michael B. McShane
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Veronica Lopez
Appeals Judge