APPEAL NO. 032112
FILED SEPTEMBER 19, 2003

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 commenced on May 12, 2003, and concluded on July 7, 2003. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first quarter.

The claimant appealed, contending that two doctors support her position that she has an inability to work and that she was not satisfied with her representation. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The requirement of eligibility for SIBs at issue is whether the claimant has made a good faith effort to obtain employment commensurate with her ability to work pursuant to Section 408.142(a)(4) and Rule 130.102(b)(2). The hearing officer's determination that the claimant's unemployment was a direct result of her impairment has not been appealed.

The parties stipulated that the claimant, a water meter reader, sustained a compensable low back injury on _____, and that the qualifying period for the first quarter was from October 30, 2002, through January 28, 2003. It is undisputed that the claimant had spinal surgery on October 16, 2001, and January 8, 2002.

The claimant seeks to show that she made a good faith effort to obtain employment commensurate with her ability to work because she had a total inability to work. 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 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 carefully reviewed, and quoted from the medical records in evidence. The hearing officer cites a report dated April 8, 2003, from Dr. Ca as giving "a specific explanation of how in [Dr. Ca's] mind, the injury causes a total inability to work"; however, in his factual determinations, the hearing officer found that Dr. Ca's "opinion that the claimant has no ability to work in any capacity is not credible."

The self-insured contends that a report dated February 12, 2003, from Dr. S is "an other" record that shows an ability to return to work. The hearing officer disagrees with that contention because he believed Dr. S's opinion was premised on a functional

capacity evaluation (FCE) which Dr. S thought was invalid. What Dr. S actually stated was:

> Based upon the history and physical examination and review of the medical records in this case, return to work duty status can resume at a Light duty capacity allowing occasional lifting of 20 pounds and frequent lifting of 10 pounds. In all medical probability this would allow return to work at [the claimant's] pre-injury occupational level, as she is not restricted from walking or standing.

The hearing officer, however, found a report dated January 8, 2002, from Dr. Ch, the claimant's surgeon, where he stated that the claimant "may start retraining at this point" to be a record which shows that the claimant had the ability to return to work in some capacity as of January 8, 2002.

We will uphold the decision of a hearing officer if it can be sustained on any reasonable basis supported by the evidence Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). Consequently, we affirm the hearing officer's decision that the medical records in evidence do not meet the requirements of Rule 130.102(d)(4).

The claimant also appeals that she was "misrepresented" at the CCH and would like an ombudsman. The Appeals Panel does not have jurisdiction to pass on the adequacy of counsel or someone representing a party in the case.

We have reviewed the case and conclude that there is no reversible error and that the hearing officer's determinations are not 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, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

_____
Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would reverse and render the hearing officer's decision. The hearing officer determined that the claimant provided a sufficient narrative which specifically explains how the compensable injury causes a total inability to work. The hearing officer found, however, that such narrative was not credible in view of an "other record" from Dr. Ch. In his report, Dr. Ch states:

> We discussed the progress of a patient who has made satisfactory course after her spinal reconstruction. She has been given instructions to start her therapy. The patient has not been gainfully employed for the past two years. I have explained that the patient may start retraining at this point and she will be seen in follow-up after her physiotherapy.

The hearing officer found that Dr. Ch's report constituted an "other record," based on the comment that the claimant could start physical therapy and that the claimant "made satisfactory course after her spinal reconstruction." We have said that "other records" must show that the claimant "is able to return to work," not merely state a physical functioning capability. Texas Workers' Compensation Commission Appeal No. 000154,

decided March 9, 2000. Dr. Ch's report does not meet that standard. While there were additional records indicating that the claimant had some ability to work including an FCE and report from Dr. S, the hearing officer specifically explained why he discredited those reports. Accordingly, I would reverse and render a decision that the claimant is entitled to first quarter SIBs.

_____

Edward Vilano
Appeals Judge