APPEAL NO. 032876
FILED DECEMBER 18, 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 was held on September 30, 2003. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second through sixth quarters and that the appellant (self-insured) is relieved from liability for second quarter SIBs for the period from July 19 through October 4, 2002, due to the claimant's failure to timely file the SIBs application. The self-insured appeals the SIBs entitlement determinations. The claimant urges affirmance of the hearing officer's decision. The determination that the carrier is relieved from a portion of second quarter SIBs liability has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed.

Section 408.142 provides that an employee continues to be entitled to SIBs after the compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), applicable in this case, states that the "good faith" criterion will be met 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[.]

At issue in this case is whether there are other records in evidence showing that the claimant has an ability to work. The self-insured contends that the following documents, which were admitted at the hearing, constitute other records showing that the claimant was able to return to work during the qualifying periods in question: (1) the functional capacity evaluation (FCE) dated July 11, 2002; (2) the medical reports of Dr. B dated April 25, 2000, and December 16, 2002; (3) the medical report of Dr. C dated August 29, 2003; and (4) the testimony of the claimant that he looked for work during the third and fourth quarter qualifying periods. The qualifying periods corresponding to the second through sixth SIBs quarters began on April 6, 2002, and ended on July 4, 2003.

In cases where a total inability to work is asserted and there are other records that on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February

28, 2002. However, "[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. In the present case, the hearing officer explained that she did not find the FCE credible because the claimant was unable to complete the testing, yet the evaluator concluded that the claimant could return to sedentary work. Additionally, the hearing officer noted that the evaluator's comments were inconsistent with regard to the claimant's reported versus demonstrated symptomology. Given this explanation and the fact that both Dr. B's and Dr. C's reports are based, in part, on the July 11, 2002, FCE, we cannot agree that the hearing officer erred in determining that no other credible records show that the claimant had an ability to return to work during the qualifying periods in question. While Dr. B and Dr. C also refer to a prior FCE, which apparently was conducted in February 2001, approximately one year prior to the second quarter qualifying period, the results of this FCE were not offered into evidence at the hearing. Contrary to the carrier's assertion on appeal, the fact that a claimant looks for work, while simultaneously asserting that he has no ability to work, does not necessarily constitute a record showing an ability to work.

A finding of no ability to work is a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). Nothing in our review of the record indicates that the hearing officer's SIBs determinations are 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).

The decision and order of the hearing officer are affirmed.

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).

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Chris Cowan
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Robert W. Potts
Appeals Judge