

APPEAL NO. 040337
FILED APRIL 6, 2004

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 held on December 16, 2003, with the record closing on December 23, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter. The appellant (carrier) appeals, contending that the hearing officer's decision is supported by insufficient evidence and is against the great weight and preponderance of the evidence. The claimant asserts that sufficient evidence supports the hearing officer's decision.

DECISION

Affirmed as reformed herein.

We reform the hearing officer's decision to reflect that the claimant contended that she had no ability to work as a result of the impairment from her compensable injury to her cervical and thoracic spine (not her lumbar spine). We also reform the hearing officer's decision to reflect that the carrier's required medical examination (RME) doctor evaluated the claimant on November 24, 2003 (not December 8, 2003, which was the date of his report).

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 parties stipulated that the claimant has a 15% impairment rating (IR). The designated doctor assigned the 15% IR for impairment of the claimant's cervicothoracic spine. The parties stipulated that the qualifying period for the first quarter of SIBs was from May 7 through August 5, 2003. The carrier appeals the hearing officer's findings in favor of the claimant on the direct result and good faith criteria for SIBs entitlement. It is undisputed that the claimant did not work or look for work during the qualifying period. She contended that she had no ability to work during the qualifying period as a result of her compensable injury.

Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. 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.

In the instant case, the hearing officer determined that the treating doctor provided a narrative report, which specifically explained how the injury caused a total inability to work. In addition, the hearing officer provided an adequate explanation for why she did not find the carrier's peer review doctor's report and the carrier's RME doctor's report as being credible records showing an ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's findings in favor of the claimant on the good faith and direct result criteria for SIBs entitlement and her determination that the claimant is entitled to SIBs for the first quarter are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

At the claimant's request, the CCH record was left open until December 23, 2003, in order for the claimant to obtain and to submit into evidence a copy of the functional capacity evaluation (FCE) that was performed on November 25, 2003. The carrier did not object to this procedure. The hearing officer instructed the claimant's attorney to provide a copy of the FCE report to the carrier's attorney and advised the parties that they could file "arguments" with regard to the FCE report. According to the claimant's attorney, the FCE was performed at the request of the carrier, and the carrier does not say differently. Why the carrier did not have a copy of the FCE at the CCH was not explained. A hearing officer's exhibit reflects that the claimant's attorney sent a copy of the FCE to the hearing officer on December 18, 2003 (two days after the CCH), and that the claimant's attorney represented in the cover sheet that she was faxing a copy to the carrier's attorney, although the physical therapist who performed the FCE had told the claimant's attorney that the FCE report had been sent to the adjustor no later than 48 hours after the FCE was done. The physical therapist, identified as the "evaluator" in the FCE report, concluded that the results of the FCE indicate that the claimant is not able to work at this time. The carrier's attorney states in the appeal that she did not have the benefit of reviewing the FCE report prior to the closing of the CCH record. The claimant's attorney states in the response that the FCE report was faxed to the hearing officer and to the carrier's attorney within two days of the CCH. To the extent that the carrier's appeal may be contending some error regarding consideration of the FCE report, we cannot conclude that any reversible error has been shown in the hearing officer's admitting the FCE report into evidence and in considering that report.

As reformed herein, we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge