

APPEAL NO. 041027  
FILED JUNE 15, 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 was held on April 7, 2004. With respect to the issues before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 9th and 11th quarters under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.02(d)(4) (Rule 130.102(d)(4)), because she had no ability to work in the qualifying periods for the 9th and 11th quarters. In its appeal, the appellant (self-insured) argues that the hearing officer erred in determining that the claimant had satisfied the requirements of Rule 130.102(d)(4), more specifically in determining that no other record shows an ability to work, and in determining that the claimant is entitled to SIBs for the 9th and 11th quarters. In her response to the self-insured's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The requirements for entitlement to SIBs are set out in Section 408.142 and in Rule 130.102. The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that she reached maximum medical improvement on August 8, 2000, with an impairment rating of 18%; that she did not commute her impairment income benefits; that the 9th quarter of SIBs ran from August 20 through November 18, 2003, with a corresponding qualifying period of May 6 through August 6, 2003; and that the 11th quarter of SIBs ran from February 18 through May 18, 2004, with a corresponding qualifying period of November 6, 2003, through February 4, 2004. With regard to the required "good faith" requirement, the hearing officer was satisfied that the claimant proved that she had no ability to work during the qualifying periods for the 9th and 11th quarters of SIBs. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established (Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The hearing officer was persuaded that the March 31, 2003, and March 23, 2004, reports from Dr. E were sufficient to satisfy the requirement of Rule 130.102(d)(4) that the claimant provide a narrative report from a doctor specifically explaining how the claimant's injury caused a total inability to work. The hearing officer was acting within her province as the fact finder in so finding. We find no merit in the self-insured's assertion that Dr. E's use of the phrase "gainful employment" demonstrates, as a matter of law, that he failed to consider all work in determining that the claimant had no ability to work. From reading Dr. E's narratives, the hearing officer determined that he specifically explained how the compensable injury caused the claimant to be unable to work in any capacity. That determination is a reasonable interpretation of those reports and nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight and

preponderance of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to reverse the determination that the claimant satisfied the narrative requirement of Rule 130.102(d)(4) on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We similarly reject the self-insured's argument that the hearing officer erred in determining that no other records show an ability to work. The carrier introduced two functional capacity evaluations (FCE), dated December 17, 2002, and October 6, 2003, respectively, as purported other records that show an ability to work. The December 17, 2002, FCE report states that the claimant can occasionally bend/stoop, squat, sit, stand, and walk. In addition, the report states that "[t]he FCE data suggests that based upon the amount of force that the patient exerted this date during material handling tasks, this would correlate with approximately the lower range of **MEDIUM** physical demand level, as defined by the dictionary of Occupational Titles regarding the patient's strength factor." (Emphasis in original.) However, the October 6, 2003, FCE states that the claimant "is lifting no greater than at a light physical demand of 20 pounds", that she had a "noted decreased tolerance to standing and stooping", and a "low level of arousal during testing, and almost fell asleep during a rest break." The report concluded "[s]uccessful return to work is questionable at this time due to pain and work level ability" and that "[a] return to work exercise program may be a good starting point with progression into a work-conditioning program if her pain can be managed." The hearing officer was free to consider that the later FCE demonstrated continuing deterioration in the claimant's condition. She was acting within her province as the fact finder in determining that the October 6, 2003, FCE did not show an ability to work in that it concluded that return to work was "questionable" and recommended that an exercise program and work hardening were needed to get the claimant to the point of being able to return to work. The determination that no other records show an ability to work was a reasonable interpretation of the evidence. Our review of the record does not demonstrate that the hearing officer's determination that no other record shows an ability to work is so contrary to the great weight of the evidence as to compel its reversal on appeal. Cain, supra.

Having affirmed the hearing officer's determinations that the claimant satisfied the requirements of Rule 130.102(d)(4), we likewise affirm the determinations that the claimant is entitled to SIBs for the 9th and 11th quarters. The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR  
STATE OFFICE OF RISK MANAGEMENT  
300 W. 15TH STREET  
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR  
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR  
STATE OFFICE OF RISK MANAGEMENT  
P.O. BOX 13777  
AUSTIN, TEXAS 78711-3777.**

---

Elaine M. Chaney  
Appeals Judge

CONCUR:

---

Judy L. S. Barnes  
Appeals Judge

---

Margaret L. Turner  
Appeals Judge