APPEAL NO. 042251
FILED OCTOBER 29, 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 August 4, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth quarter; is entitled to SIBs for the seventh quarter; and that the carrier is not relieved of liability for any portion of the seventh quarter SIBs because the claimant did not fail to timely file an Application for [SIBs] (TWCC-52) for the seventh quarter. The appellant (carrier) appealed, disputing the determination of SIBs entitlement for the sixth and seventh quarters as well as the determination that the claimant timely filed a TWCC-52 for seventh quarter SIBs. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on August 21, 2001, with a 21% impairment rating; that the claimant has not commuted any impairment income benefits; that the qualifying period for the sixth quarter was from October 23, 2003, through January 21, 2004; that the qualifying period for the seventh quarter was from January 22 through April 21, 2004; that the sixth SIBs quarter was from February 4 through May 4, 2004; and that the seventh SIBs quarter was from May 5 through August 3, 2004.

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. Although he searched for work in both the sixth and seventh quarters, the claimant contended that he met the good faith job search requirement of Section 408.142(a)(4) by showing that he had a total inability to work during the qualifying period for the first quarter. 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 carrier contends on appeal that there is not one report pertinent in time to the qualifying periods in issue that constitutes the required narrative. The Appeals Panel has held that medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying period. Texas Workers' Compensation Commission Appeal No. 001055, decided June

28, 2000. In Texas Workers' Compensation Commission Appeal No. 011152, decided July 16, 2001, the Appeals Panel held that Rule 130.102(d)(4) does not contemplate the combining of reports from more than one doctor to somehow fashion a combination narrative report. However, in Texas Workers' Compensation Appeal No. 002724, decided January 5, 2001, the concurring opinion stated that in determining whether the requirements of Rule 130.102(d)(4) for a doctor's narrative report are met, the following will be considered: amendments; supplements, including CCH testimony from the doctor; information incorporated in the report by reference; or information from a doctor's medical records in evidence that can be reasonably incorporated in the doctor's narrative report by inference based on some connection between the report and the information in the medical records.

The hearing officer was persuaded that the medical records of Dr. G constitute a medical narrative which specifically explained how the claimant's compensable injury caused a total inability to work in each qualifying period in issue in terms of pain levels and effects of pain relief medication. There is sufficient evidence to support this determination.

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 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. The hearing officer acknowledged that there were other records in evidence that purported to show the claimant had an ability to work but determined that none did so, with an explanation that was supported in the record.

The carrier argues the hearing officer erred in refusing to consider all the evidence in light of Rule 130.102(d)(4). This argument was based on the notation in the Background Information section of the decision, that the carrier did not argue that the actual TWCC-52s in evidence showed an ability to return to work by virtue of the physical efforts reflected in accomplishing the job contacts listed on the TWCC-52s and that without the carrier asserting this position the hearing officer "refuse[d] to adopt it sua sponte." Parties are allowed to argue alternative theories as to how they met the criteria established by statute and by the rules to prove entitlement of SIBs. 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. Texas Workers' Compensation Commission Appeal No. 032876, decided December 18, 2003. We perceive no reversible error.

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. We conclude that the hearing officer's determinations that the claimant is entitled to SIBs for the sixth and seventh quarters 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, 176 (Tex. 1986).

The carrier argues that the hearing officer erred in finding the TWCC-52 for the seventh quarter was timely filed because the claimant failed to sign the TWCC-52 for the seventh quarter until May 18, 2004. The carrier did not dispute that it received the TWCC-52 earlier on April 27, 2004, by the deadline, but argues that the fact it was unsigned upon its initial receipt precludes a finding that it was timely filed. The carrier points to other circumstances which require Texas Workers' Compensation Commission forms to be signed. The carrier argues that the Appeals Panel has previously held that Report of Medical Evaluations (TWCC-69) that are unsigned are not valid. However, Rule 130.1(d)(1)(A) provides specifically that the TWCC-69 must be signed by the certifying doctor.

The carrier additionally argues that "there is controlling authority for the importance of signatures on SIBs-related forms" citing Texas Workers' Compensation Commission Appeal No. 972512, decided January 20, 1998. That argument was previously rejected in Texas Workers' Compensation Commission Appeal No. 992605, decided January 6, 2000. We perceive no error in the hearing officer's finding that the claimant filed a complete TWCC-52 for the seventh quarter SIBs which was received by the carrier on April 27, 2004, and concluded the carrier is not relieved of liability for any portion of the seventh quarter SIBs because the claimant did not timely fail to file a TWCC-52 for seventh quarter SIBs.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Robert W. Potts
Appeals Judge