

APPEAL NO. 042679
FILED DECEMBER 8, 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 October 7, 2004. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fifth quarter, May 4 to August 2, 2004. The appellant (carrier) appealed, disputing the determination of SIBs entitlement. The appeal file did not contain a response from the claimant.

DECISION

Reversed and a new decision rendered that the claimant is not entitled to fifth quarter SIBs.

The parties stipulated that the claimant sustained a compensable injury on _____, that resulted in an impairment rating of 15% or greater; that the claimant did not commute any portion of the impairment income benefits; and that the qualifying period for the fifth quarter is from January 21 to April 20, 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. At issue in this case is whether the claimant 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 relevant qualifying period. 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.

Assuming, without deciding, that the report dated from June 3, 2004, from Dr. Z satisfies the requirement of Rule 130.102(d)(4) that the claimant provide a narrative report from a doctor that specifically explains how the compensable injury causes a total inability to work, the question remains as to whether another record shows that the claimant had some ability to work. The carrier offered both a functional capacity evaluation (FCE) dated May 10, 2004, and a report from a carrier-selected required medical examination doctor, Dr. P as such records. In a report dated June 24, 2004, Dr. P opined that "it is reasonable to conclude that [the claimant] is capable of performing at least what is described in his last [FCE] report of June 2, 2004, that is 30 pounds lifting from floor to knuckle and knuckle to shoulder and 20 pounds from shoulder to overhead." Dr. P additionally noted that during the examination the claimant presented with normal muscle function to both his upper and lower extremities and that the claimant presented with adequate range of motion both to his neck and back and

that there is clinical evidence of some limitation. The FCE in evidence dated May 10, 2004, concluded that the claimant could perform “at the light category.”

In Texas Workers’ Compensation Commission Appeal No. 030823, decided May 22, 2003, the Appeals Panel noted 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, and that in determining whether another record shows that the injured employee is able to return to work, factors such as a worsening of the employee’s medical condition and when the other record was prepared in relation to the qualifying period could be considered.

The hearing officer noted that Dr. Z explains why the FCE does not show a real ability to work and that since the FCE was performed after the end of the qualifying period and its validity is doubtful, it does not prove ineligibility for the fifth quarter. In a letter dated June 30, 2004, Dr. Z, stated the work-related injury led to having a significant negative impact on his daily living activities, “[t]his is why the FCE’s result that he could physically perform at the Light Duty level, does not signify that this could actually be done at a day to day functioning, no matter at what feasible level of employment he would return to.” Additionally, Dr. Z noted that surgery to the cervical spine is again being contemplated to improve his present condition.

Although the hearing officer notes that the FCE was performed outside the qualifying period, he does not indicate that he believes it does not represent the claimant’s condition as it existed during the qualifying period nor does he indicate why the validity of the FCE was doubtful. The FCE in evidence was performed less than a month after the end of the fifth quarter qualifying period.

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.” However, in the instant case, we cannot agree that no other record showed that the claimant had an ability to work during the relevant time period. The test is not whether the claimant can obtain and retain gainful employment or full-time employment. Texas Workers’ Compensation Commission Appeal No. 031089, decided June 23, 2003.

The hearing officer wholly failed to articulate a rational basis for rejecting Dr. P’s report as another record showing that the claimant had some ability to work in the qualifying period for the fifth quarter. Nor do we agree that the hearing officer’s attempt to explain a rational basis for rejecting the FCE as another record which shows on its face that the claimant had an ability to work, was sufficiently supported by the record. In the absence of such explanations, we believe that his determination that the claimant

satisfied the good faith requirements of Rule 130.102(d)(4) is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, that determination, and the determination that the claimant is entitled to SIBs for the fifth quarter, are reversed and a new decision rendered that the claimant is not entitled to fifth quarter SIBs.

The hearing officer's determination that the claimant is entitled to SIBs for the fifth quarter is reversed and a new decision rendered that the claimant is not entitled to those benefits.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge