APPEAL NO. 061738
FILED NOVEMBER 21, 2006

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 July 31, 2006. The hearing officer determined that the compensable injury of _____, extends to urinary incontinence and cystocele, that the appellant/cross-respondent's (claimant) impairment rating (IR) is 20% and that the claimant is not entitled to the first quarter supplemental income benefits (SIBs).

The claimant appeals the SIBs determination asserting that other records showing the claimant was able to work were long before the qualifying period at issue and were before the claimant's surgery. The claimant also appeals the IR, contending that the IR should be 28% as assessed by the designated doctor's most recent report. The respondent/cross-appellant (carrier) cross-appeals, contending that the hearing officer erred in his determination on the extent-of-injury issue and that the claimant's IR should be 5% as assessed by a required medical examination doctor. The carrier also asserts that a narrative report relied on by the claimant and hearing officer fails to specifically explain how the claimant's injury causes a total inability to work. The carrier responds, urging affirmance on the issues on which it prevailed. The file does not contain a response to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement (MMI) on February 20, 2005; and that Dr. D was appointed as the designated doctor. The claimant testified that she sustained a low back injury while lifting a box. The claimant testified, and the medical records support, that she has had three spinal surgeries, the first being on April 13, 2004, at L4-5; the second on October 8, 2004, at L5-S1; and the last after MMI on October 5, 2005.

EXTENT OF INJURY

The carrier appeals the extent-of-injury issue asserting that the claimant's alleged urinary incontinence and cystocele were not related to the compensable injury. The hearing officer's determination that the claimant's compensable injury extends to urinary incontinence and cystocele is supported by the evidence and is affirmed.

THE IR

The hearing officer's determination that the claimant's IR is 20% is supported by the evidence and is affirmed.

SIBS

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states the [Texas Department of Insurance, Division of Workers' Compensation] (Division) Commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until the new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payments of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

Documents in evidence indicate that the qualifying period for the first quarter of SIBs began on January 3, 2006, and ended on April 3, 2006. Rule 130.102(b)(2) provides that to be eligible for SIBs the employee has made a good faith effort to obtain employment commensurate with the employee's ability to work. The claimant seeks to meet that requirement by showing she had a total inability to work in any capacity. 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 hearing officer references a letter dated April 12, 2006, from the treating doctor and makes a finding that the treating doctor's narrative report specifically explains how the injury causes a total inability to work. That determination is sufficiently supported by the evidence.

The hearing officer also makes a finding that there are other records that show the claimant was able to return to work. The hearing officer does not indicate what records he is referring to. The claimant appeals that finding contending the records which show the claimant had an ability to work are dated prior to the claimant's last surgery and did not take into consideration her urinary incontinence and medication. We agree with the claimant's contention. The only record which purports to show the claimant's ability to return to work is a report from Dr. O and a functional capacity evaluation (FCE) both dated January 5, 2004, two years prior to the qualifying period at issue. The report does state that the claimant has an ability to do medium work based on Table 9, page 163 of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) and that she can lift up to 50 pounds with frequent lifting of 25 pounds. Since that report the claimant has had three spinal surgeries (April 13, 2004, October 8, 2004, and October 5, 2005) which include a 360° anterior fusion. The claimant in her appeal refers to a "note dated in November of 2005 from [Dr. D] referred to by the Hearing Officer refers to an examination date that

was prior to the 360 degree fusion surgery." Our review of the record indicates there is no November 2005 report from Dr. D. There is a letter report dated November 7, 2005, from Dr. O in evidence, (Carrier's Exhibit F) which is a report that corrects Dr. O's MMI date and explains Dr. O's IR without comment on the claimant's ability to return to work.

In Appeals Panel Decision 001055, decided June 28, 2000, 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. In the instant case Dr. O's report and the accompanying FCE, both dated January 5, 2004, were prior to the claimant's three surgeries and were two years prior to the qualifying period. We hold that Dr. O's evaluation report and the accompanying FCE both dated January 5, 2004, prior to the claimant's three surgeries, are not probative of the claimant's conditions during the qualifying period to constitute another record which shows the claimant was able to return to work during the qualifying period. The hearing officer's determination that there are other records that show the claimant was able to return to work (during the qualifying period) is not supported by the evidence. Accordingly, we reverse the hearing officer's determination that the claimant is not entitled to the first quarter SIBs and render a new decision that the claimant is entitled to the first quarter of SIBs. We affirm the hearing officer's extent of injury and IR determinations.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge