APPEAL NO. 002309-S

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 September 6, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 12th and 13th quarters (based on the total inability to work) and that the respondent (carrier) had not waived its right to contest the claimant's entitlement to SIBs by failing to timely request a benefit review conference (BRC).

The claimant appeals several of the hearing officer's findings and conclusions, citing some general legal propositions and specifically asserting that his treating doctor's opinion, as supported by a designated doctor's amended report which has presumptive weight, establishes his total inability to work. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier generally urges affirmance.

DECISION

Affirmed.

The claimant had been employed at an amusement park when he slipped and fell getting into a truck, fracturing his right ankle. The parties stipulated that the claimant sustained a compensable right ankle injury, that the claimant has a 15% impairment rating (IR), and that the qualifying period for the 12th quarter was from December 15, 1999, through March 14, 2000, with the qualifying period for the 13th quarter being from March 15 through June 13, 2000.

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. Although the claimant appears to be appealing the direct result finding (that he has "a serious injury with lasting effects . . . ."), that finding was in the claimant's favor and therefore will not be addressed further.

The claimant alleges a total inability to work. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, as amended on November 28, 1999, in Rule 130.102(d). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

(4) 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 claimant's treating doctor is Dr. G, who in several reports notes continued right ankle pain and swelling, and that the claimant is a "[n]o work status." In a report dated July 17, 2000, Dr. G writes:

> [The claimant] has a very difficult time standing and his swelling increases when he stands for any period of time. In his present condition, any work with any period of standing, climbing, bending or stooping as it relates to the right ankle would cause him significant pain and not allow him to maintain that type of activity.

(Apparently no consideration was given for a sitting job.)

Evidence to the contrary includes a report from Dr. J, the carrier's required medical examination doctor, who in a report dated October 18, 1999, states:

> Employment would be therapeutic and [the claimant] can sit, stand and walk throughout the work day with the usual rest periods. He should avoid ladders and scaffolds for the time being but as his subjective strength increases, there should be no permanent limitations. His strength and endurance may be slightly limited for a while since he has not worked since 1995.

Apparently a benefit review officer (BRO) at a BRC referred the claimant to a designated doctor to give an opinion on the claimant's ability to return to work pursuant to Rule 130.110(a) and Dr. B was appointed as the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. B ordered a functional capacity evaluation (FCE) which was apparently performed on June 9, 2000, and in a report dated June 12, 2000, referencing the FCE, Dr. B wrote:

> The patient had a [FCE], and a full report is attached. His [FCE] shows that he can perform in the **light** category in the **unrestricted** work plane, and in the **medium** category in the **restricted** work plane. It is felt that he can function in the competitive level market with accommodations.

The claimant testified that he was very angry about the report and that a couple of months after the FCE he called Dr. B's office and spoke with both Dr. B's staff and Dr. B, complaining that he was unable to walk, stand, or drive. Subsequently, Dr. B issued an "Addendum" report dated August 2, 2000, where he wrote:

> Based on additional information received from [Dr. G's] office, and upon speaking with the patient by phone, the patient is unable to stand for prolonged periods of time, unable to walk for more than a few steps, and he is unable to drive. Therefore, even though the results of the FCE provided the information regarding the patient being able to perform in the **restricted** work plane in the **light** or **medium** category, I do believe that at this time the patient is completely disabled and he is not able to perform neither in the light or medium category.
>
> Please consider this additional information in making decisions regarding the patient's capability of returning to work. The patient should be at no work status, and should continue seeing [Dr. G] for follow-up care.

The claimant contends that this report from the designated doctor has presumptive weight and the other reports do not constitute the great weight of other medical evidence.

> The hearing officer treats Dr. B's reports as other medical reports, stating:
>
> The Commission Rule provides that the presumptive weight starts with the date the Commission receives the designated doctor's report. The Commission received [Dr. B's] report on June 15, 2000, which was after both qualifying periods ended. The interpretation with legal precedent is that [Dr. B's] June 12 report does not have presumptive weight for the qualifying periods of the 12th and 13th quarters. His report and his amended report on August 2 are given the same consideration as other medical reports. Commission Rule 130.102(d)(4) is applicable to this case, not Commission Rule 130.110(a).

We do not endorse the hearing officer's approach. Rule 130.110(a), effective November 28, 1999, provides for a designated doctor to give an opinion on whether the claimant's medical condition, which had prevented him from returning to work in the prior year, had improved sufficiently to allow the claimant to return to work on or after the second anniversary of his initial entitlement to SIBs. None of those conditions were discussed, much less proven. The BRO apparently just appointed Dr. B as the designated doctor. Further, Rule 130.110(a) provides that a designated doctor's report on that issue "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary." In addition, subsection (a) of Rule 130.110 provides that the presumptive weight of the report "shall begin the date the report is received by the Commission" and shall continue "until proven otherwise by the great weight of the other medical evidence" or "until the designated doctor amends his/her report based on newly provided medical or physical evidence." *See* Texas Workers' Compensation Commission Appeal No. 000880, decided June 12, 2000. Consequently, we cannot endorse the hearing officer's approach dismissing Dr. B's reports as being after both qualifying periods. Of greater concern is the claimant's (and Dr. G's) unilateral communications with Dr. B after he rendered his original June 12, 2000, report. Early on, the Appeals Panel expressed concerns about unilateral

contact by one of the parties with the designated doctor. In Texas Workers' Compensation Commission Appeal No. 950748, decided June 23, 1995, we stated:

> The Appeals Panel has consistently deplored unilateral contact between a party and a Commission-selected designated doctor. See our recent Texas Workers' Compensation Commission Appeal No. 950435, decided May 4, 1995, and cases cited therein.

Subsequently, Section 408.125(f) was added to the 1989 Act prescribing who could "communicate with the designated doctor about the case regarding the injured employee's medical condition or history." That provision has been incorporated in Rule 130.110(i), which states:

> (i) To avoid undue influence on a person selected as a designated doctor in accordance with Texas Labor Code, §408.125, only the injured employee or an appropriate member of the staff of the Commission may communicate with the designated doctor about the case regarding the employee's medical condition or history prior to the examination of the employee by the designated doctor. After that examination is completed, communication with the designated doctor regarding the injured employee's medical condition or history may be made only through appropriate Commission staff members. An ombudsman and an ombudsman's assistant are not considered appropriate staff to contact the designated doctor and should communicate with a designated doctor only through appropriate Commission personnel. . . .

We hold the claimant's contact with Dr. B after he had rendered his June 12, 2000, report to be improper and contrary to Rule 130.110(i). Consequently, Dr. B's August 2, 2000, amended report should not be considered and is not to be given presumptive weight. It appears that the hearing officer only considered Dr. B's June 12 report and the August 2 addendum "as other medical reports." Under the circumstances of this case, that was within the hearing officer's discretion.

The claimant's contention that "disability" may be established by the claimant's testimony alone is inapplicable in this case. Disability is defined in Section 401.011(16) and deals with the ability to obtain and retain employment at the preinjury wage and does not equate to the requirement in Rule 130.102(d)(4) that the claimant be "unable to perform any type of work in any capacity."

The claimant appeals the hearing officer's findings regarding the carrier's timely request for a BRC contesting the claimant's entitlement to SIBs but does not specify on what grounds he believes error occurred. The hearing officer on this issue found:

FINDINGS OF FACT

9. On March 21, 2000, the Claimant sent the Carrier by facsimile transceiver his TWCC-52 [Application for SIBs], but not all pages were received by the Carrier. The Carrier notified the Claimant of this on March 22, 2000. On March 29, 2000, the Claimant re-transmitted the TWCC-52 by facsimile transceiver, and the Carrier received all pages of it on that date.

10. On April 4, 2000, seven days after it received the Claimant's [retransmitted] TWCC-52 application, the Carrier filed its TWCC-45 [Request for Benefit Review Conference] with the Commission to dispute the Claimant's entitlement to [SIBs] for the 12th quarter.

We hold the hearing officer's decision on this point supported by the evidence and not incorrect as a matter of law.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCUR IN THE RESULT:

Tommy W. Lueders
Appeals Judge