APPEAL NO. 991555

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 23, 1999, a contested case hearing was held. With regard to the only issue before him, the hearing officer determined that respondent's (claimant) unemployment was a direct result of his compensable impairment, that claimant was "totally unable to work" (met the requirement that claimant made a good faith effort to obtain employment commensurate with the employee's ability to work, Section 408.143) and that claimant was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter.

Appellant (carrier) appeals, contending that the treating doctor's reports "are undetailed and conclusory," that claimant has failed to follow prescribed treatment (to lose weight, exercise and stop smoking), that claimant has refused additional surgery and that a functional capacity evaluation (FCE), which carrier contends shows an ability to work, constitutes such "other record" contemplated in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties and the hearing officer agreed that this case is "a new SIBS case" (Rules 130.101 through 130.108 and 130.110 were repealed and new Rules 130.100 through 130.108, with no change in Rule 130.109, were adopted effective January 31, 1999). The hearing officer recited a stipulation that the eighth quarter started May 6, 1999, and will end August 4, 1999. On the record, the parties stipulated that "the first day of the qualifying period and/or filing period" was January 22, 1999. However, the hearing officer, in his recitation of the stipulations, identified the "qualifying period" as being from February 4 through May 5, 1999.

Whether the new SIBS rules or SIBS rules in effect before January 31, 1999, apply presents something of a dichotomy in this case. If the qualifying period for the eighth quarter is moved back 14 days, as provided in Rule 130.101(1)(D)(4), the SIBS rules effective January 31, 1999, do not apply (and results in the qualifying (filing) period beginning on January 22, 1999). On the other hand, if we apply the rules in effect before January 31, 1999, the qualifying period would begin on February 4, 1999, and the new SIBS rules would apply. In Texas Workers' Compensation Commission Appeal No. 991402, decided August 16, 1999 (Unpublished), a similar situation arose and the Appeals Panel applied Rule 130.101(1)(D)(4), which resulted in moving the qualifying period back under the SIBS rules effective prior to January 31, 1999 (the "old" SIBS rules). In order to be consistent, we do so again in this case and hold that the first day of the qualifying/filing

period was January 22, 1999, as stipulated to by the parties on the record and that the old SIBS rules apply.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Rule 130.104. Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable low back injury on _____, that claimant reached maximum medical improvement with a 22% impairment rating, that impairment income benefits were not commuted and the dates of the qualifying period mentioned previously. Claimant testified that he has had three spinal surgeries, the last being in April 1996, that his condition has worsened since then, that he is in constant pain, and that he is afraid additional surgery will leave him paralyzed or in a wheelchair. Claimant proceeds under a total inability to work theory.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra.* To this end, claimant submits a number of office progress notes beginning June 24, 1996, from the treating doctor, Dr. F. Many of these notes have a passing reference to claimant's being "totally disabled" without giving specifics, other than an inability to do prolonged "standing, sitting, bending, lifting, walking, etc." A note dated December 7, 1998, states that Dr. F wants claimant "to lose weight," "discussed various diets" and advised him "to get onto a strict formal exercise program comprised of walking for about an hour every day." Dr. F referred claimant to an FCE which was performed on December 31, 1998.

After noting that claimant "is scared" further surgery will make him worse, the FCE concludes:

> ASSESSMENT
>
> Most of his limitations in the clinic were due to poor Positional Tolerances. No greater capability could be inferred into the Frequent or Constant categories. His strength has ranked him only into the Sedentary category, indicating that he is only capable of lifting 10 pounds occasionally. Even though his strength has rated him in the Sedentary category, I tend to believe that this gentleman is unemployable at this time due to his lack of positional tolerances. It will be very hard to obtain a job that will allow frequent unscheduled breaks to lie down and relieve his muscle complaints, only a typical 8½-minute sitting time, 5 and 9-minute standing time.

The FCE is signed by a licensed physical therapist. In a subsequent report dated May 15, 1999, Dr. F comments:

> Although, he is a candidate for another redo surgery on decompression nerve root, he has elected over the years not to do that because of the multiple surgeries he has already had. I refilled his Ambien, Paxil, Xanax and Parafon Forte DSC. We have changed Tylenol $'s to Talwin NX at his request. I have been asked to address his work status. An FCE in December showed him capable of sedentary work. Although this is a valid test, I've felt that he is incapable of returning to any kind of gainful employment and for multiple reasons. Firstly, he presents with significant and ongoing pain, but in addition also takes multiple medications to manage his pain condition. This too, in my opinion, renders him incapable of holding down any kind of job.

The hearing officer, in his Statement of the Evidence, also cites the above quoted portions of the December 1998 FCE and Dr. F's May 1999 report and concludes "[a]fter reviewing all the evidence it appears that the Claimant is 'totally unable to work' and therefore was not required to seek employment." While we have in the past taken issue that one is "not required to seek employment" we interpret the hearing officer's comment to mean that claimant's inability to work met the required good faith requirement of Section 408.143(a)(3).

Carrier appeals on a number of grounds: first that Dr. F's "reports are undetailed and conclusory" and do not specifically explain how the injury causes a total inability to work. While some of Dr. F's earlier office notes could have been found to be in that category, conversely the hearing officer could, and apparently did, find that Dr. F's May 15, 1999, report had the sufficiently specific explanations. We do not agree that the hearing officer's inferential finding on this point is against the great weight and preponderance of the evidence. Carrier next contends that claimant "has steadfastly failed and refused to comply with his doctor's orders" to lose weight, exercise and stop smoking, and that Dr. F (and

another doctor) have recommended "redo" surgery which claimant has refused. Although carrier's position is that additional surgery will result in relieving claimant's pain and inability to return to work, only the fact that claimant might benefit from the surgery is evident from the records. It is up to the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) to determine the reasonableness of claimant's refusal for further surgery which claimant fears will leave him wheelchair bound. Similarly, the effect of claimant's failure to lose weight, exercise and stop smoking are factors for the hearing officer to consider and we will reverse the hearing officer's decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We do not so find. Carrier also cites Judge Kelley's concurring opinion in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996. We do not necessarily disagree with that comment, having cited it a number of times; however, those comments were just general guidance and do not establish any new nonstatutory requirements. *See* Texas Workers' Compensation Commission Appeal No. 991411, decided August 13, 1999 (Unpublished).

Carrier also cites Rule 130.102(d)(3) and contends that the FCE shows that claimant "was capable of performing at the sedentary level." When the hearing officer asked carrier to show him just where in the FCE it said claimant had an ability to work at the sedentary level, carrier referred to Dr. F's May 15, 1999, report containing Dr. F's interpretation of what the FCE said. The FCE and Dr. F's report were in evidence, the hearing officer very clearly considered those reports in the context of Rule 130.102(d)(3) and apparently concluded that neither the FCE nor Dr. F's May 15th report was such a document that showed claimant "is able to return to work." The parties and the hearing officer clearly considered Rule 130.102(d)(3), which we noted at the beginning of this opinion not to be applicable; however, even applying the provisions of Rule 130.102(d)(3) concerning ability to work, it likely would not have changed the results reached in this decision.

Upon review of the record submitted, we find no reversible error and 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

DISSENTING OPINION:

I write separately to express my dissent from the principle opinion that the evidence sufficiently supports the determination that claimant had no ability to work during the pertinent filing period. I also wish to express my disagreement with the notion in the principle opinion that were the evidence in this case evaluated under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) effective January 31, 1999, such evidence would establish that "no other records show that the injured employee is able to return to work; . . ." Rule 130.102(d)(3). Having carefully reviewed the medical evidence in this case, it is my opinion that not only is the determination that claimant had no ability to work against the great weight of the evidence, but it is also my opinion that the functional capacity evaluation (FCE) report of December 31, 1998, would indeed constitute an "other record" showing that claimant is able to return to work were we applying Rule 130.102(d)(3).

To put the FCE report in context, I first note that in his October 12, 1994, psychological evaluation report, Dr. A, stated that claimant's Wahler Physical Symptoms Inventory score is higher than those of most chronic pain patients and suggests the likelihood of magnification and somatic fixation; that claimant is a poor candidate for elective spinal surgery; and that the likelihood is high that the physician will have difficulty trusting claimant's subjective reports of pain. Dr. A further reported on November 14, 1994, that there is a significant likelihood that claimant has a Somatization Disorder; that he is "incredibly suggestible and can develop physical symptomatology to include complaints of pain with the subtlest of suggestions"; and that he "demonstrates very poor motivation

towards wellness and his symptoms are also maintained by likely motives for secondary gain."

The December 31, 1998, FCE report states that claimant "says he has no other job in his plans because he is now applying for Social Security and VA benefits for disability." The report also notes that claimant was observed ambulating without a cane and demonstrating walking 1.3 mph for about 75 feet while walking into the facility for the FCE with no mention of an antalgic gait.

As for the results of the FCE, Dr. F, the treating doctor, reported on December 7, 1998, that he wants claimant to lose weight, that he wants claimant "to get onto a strict and formal exercise program comprised of walking for about an hour every day," and that claimant has agreed to do so. Dr. F reported on January 6, 1999, that he reviewed the FCE report with claimant and that "[b]asically he is found to be capable of work classified as sedentary." Dr. F then goes on to say that in his opinion, claimant "is totally unable to return to any type of gainful employment as substantiated by the most recent FCE [emphasis supplied]." On May 19, 1999, Dr. F wrote as follows: "An FCE in December showed him capable of sedentary work. Although this is a valid test, I've felt that he is incapable of returning to any kind of gainful employment and for multiple reasons [emphasis supplied]."

In my opinion, the great weight of the medical evidence establishes that claimant had the ability to work, at least part time, at a sedentary job where he could change positions at will and thus he was obligated to look for such work notwithstanding the difficulty or likelihood of finding such a job. I would further note that Rule 130.102(d)(3) speaks to the inability "to perform any type of work in any capacity" and "total inability to work" and not to such other concepts as "gainful employment" and "employability." The latter terms may be a part of the standards for other Federal or state disability programs but they are not the standard for supplemental income benefits.

_____

Philip F. O'Neill
Appeals Judge