APPEAL NO. 991899

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 2, 1999. With regard to the only issue before her, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 11th compensable quarter.

Claimant appealed, contending that he was entitled to SIBS based on a total inability to work, citing his multiple surgeries and his treating doctor's reports which claimant contends complies with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

There were no stipulations or findings regarding the qualifying period for the 11th quarter; however, it appears undisputed that the qualifying period was under the new Texas Workers' Compensation Commission (Commission) Rules, Rule 130.100, effective January 31, 1999. 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 130.102(b). Pursuant to Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. 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 benefit review conference report identifies the 11th quarter as being from June 2, 1999, through August 31, 1999, so therefore the qualifying period would be the 13 consecutive weeks prior to May 19, 1999.

Unappealed findings established claimant sustained a compensable injury on _____; that claimant has an impairment rating "equal to or greater than fifteen percent"; that claimant "did not fail to cooperate with the Texas Rehabilitation Commission"; that claimant has not returned to work; and that claimant made no search for any type of employment during the qualifying period. The hearing officer's finding that claimant's unemployment was a direct result of his impairment has not been appealed.

Rule 130.102(d)(3) provides that the good faith effort requirement may be met if the employee:

(3) 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.

To this end, claimant offers the report dated March 2, 1999, from claimant's treating doctor, Dr. R, which states that claimant Ahad a bad week last week," reviews x-rays which show a fusion is solid and in good position, and concludes:

> This patient has progressive degenerative disk disease in the segments above the fusion and I think that most of his pain is arising from those levels at the present time. He has to accept that this is the way he will be and he is disabled from gainful employment. I will see him back on a prn. or yearly basis.

In another report dated July 14, 1999, Dr. R notes claimant was seen "for f/u with severe back pain again," notes the medication claimant is taking, and concludes:

> He should continue on the Amitriptyline and this patient despite what I said in the past, obviously has proven that he is disabled from gainful employment. With this amount of pain that he has daily, would be very difficult to go through retraining or even return to work.

Carrier offers a report dated May 19, 1999, from Dr. R in which Dr. R is asked about retraining and a functional capacity evaluation (FCE). Dr. R states that since claimant, who had been a car salesman, basically had a sedentary-type job, "an FCE will not tell us much regarding this patient." Dr. R goes on to say:

> Besides this he was a car salesperson and this person has the ability to walk, stand up, and sit down at their leisure. This does not entail any type of heavy work as long as the person controls lifting activities. I do not think he would like to return to selling cars. This is my impression.

The hearing officer could read this report as saying that while claimant may have the physical ability to do some things, he was not motivated to return to work.

Claimant testified that he had been the customer service manager for an automobile dealership and had injured himself when he tripped over a speed bump in the parking lot. Claimant testified that he has had at least three spinal surgeries, the last of which was in June 1998. Apparently, the second or third surgery involved instrumentation and in evidence is an operative report of January 14, 1999, which involved the removal of an "osteal stimulator." The medical reports indicate claimant is 56 years old. Claimant testified that he has applied for and is receiving Social Security disability benefits. Claimant

testified that he is able to perform the activities of daily living (some with assistance) and that he engages in a home exercise program which includes walking three miles a day, everyday. Claimant explained that the three miles are not necessarily continuous but are done throughout the day over a total of about two hours.

The hearing officer, in her discussion, comments:

> Although it is clear that the impairment caused by Claimant's compensable injury of _____ has significantly reduced his ability to work, Commission Rule 130.102(d)(3) indicates that an inability to work must be supported by a narrative report from a doctor which specifically explains how the injury causes a total inability to work; the Hearing Officer is not of the opinion that the generally phrased, conclusory, reports of Claimant's treating doctor, which simply state that the pain of Claimant's injury has resulted in a total disability from engaging in gainful employment, meet the requirement set forth by the cited Rule. For this reason, it does not appear that Claimant has met his burden of proof to demonstrate a total lack of ability to work in any capacity during the qualifying period preceding the eleventh quarter, and Claimant therefore is not entitled to receive [SIBS] for that quarter.

Claimant, in his appeal, contends that Dr. R's reports of March 2 and July 14, 1999, comply with the requirements of Rule 130.102(d)(3) and that those reports "specifically explain how the injury that [claimant] suffered caused his total inability to work." The hearing officer could believe all, part, or none of the reports presented. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Carrier responds that the medical evidence could be construed as indicating that the claimant simply had no desire to return "to gainful work" and that since claimant was capable of walking three miles a day and doing some basic functions around the house, claimant should be capable of performing some sedentary work on a part-time basis. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

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:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge