APPEAL NO. 000005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 7, 1999. With respect to the only issue before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 14th compensable quarter because he had not attempted in good faith to obtain employment commensurate with his ability to work. The hearing officer's finding that claimant's unemployment was a direct result of his impairment was not appealed and will not be addressed further.

Claimant appeals, contending that the treating doctor "has recommended that [he] remain off work," commented on the circumstances that brought about the use of a spinal cord stimulator, and listed the various medications and dosages that he was taking. Claimant also expresses concern about medical records being sent to the wrong address and examples of what claimant considers are a breach of "ethical practices" by respondent (carrier). Those factors were not issues at the CCH and are outside of our jurisdiction to consider. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, urging affirmance, and points out "several documents" attached to claimant's appeal were offered for the first time on appeal.

DECISION

Affirmed.

Regarding the additional documentation attached to claimant's appeal, some of which is contained in records admitted at the CCH and others not, there is no evidence why some of those records were presented for the first time on appeal or that they are so material that it would probably produce a different result. *See* standard for remand in Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993, and Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

This is a SIBS case for the 14th compensable quarter based on a total inability to work. Although not specifically referenced, the "new" SIBS rules effective January 31, 1999, were in effect. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 *et seq.* (Rule 130.102 *et seq.*). The parties stipulated that claimant sustained a compensable injury (apparently to the right wrist, upper extremity, neck, and head) on _____; that claimant has an impairment rating of 15% or greater; that impairment income benefits have not been commuted; that the qualifying period at issue was from June 30 through September 28, 1999; and that claimant had made no job search during the qualifying period.

Claimant testified that he had been a painter at a construction site, had tripped over a wire, and had fallen. Claimant had cervical surgery in October 1992 and had several

other surgeries to his right wrist. Claimant's current treating doctor is Dr. D, who began seeing claimant on January 26, 1999. Claimant's prior treating doctors were Dr. K and Dr. C, who was one of the surgeons. Claimant testified that he has severe neck pain, spasms, and headaches; that the medications he takes cause him to be drowsy and sleepy; and that because of this, he is totally unable to work. Claimant testified that, initially, he had a temporary dorsal column stimulator implanted and that about one and one-half months prior to the beginning of the qualifying period, a permanent dorsal column stimulator was surgically implanted. It was claimant's opinion that the stimulator alone would have prevented him from working during the qualifying period. Claimant was instructed that he could use the stimulator up to five times a day for 20 minutes each while sitting or lying down. Claimant said that the stimulator helps ease the pain, at least temporarily. At the same time, claimant conceded, on cross-examination, that he has answered the telephone in his wife's trailer business, that he can and does drive a vehicle, and that he helps clean around the house for brief periods of time.

Rule 130.102(d)(3) provides that an employee has made a good faith effort to obtain employment commensurate with his ability to work 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[.]

In evidence is a progress note dated July 2, 1999, from Dr. D who referenced a fall by the claimant while using the stimulator which caused claimant to "break a foot" and that claimant "was told that he is not to use his stimulator more than five times a day for 20 minutes and that he is only to use his stimulator when he is in sitting or lying down position and not active in any way, shape or form." That note does not address ability to work. On a form letter dated September 8, 1999, to claimant's ombudsman, Dr. D marks "no" on a question whether claimant was "able to work during January 1999 to present." In a progress note dated September 20, 1999, Dr. D writes that claimant's "wounds are well healed," that claimant has a cast on his ankle, and comments:

> IMPRESSION:
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> Chronic neck, shoulder, and upper extremity pain on the right side.
>
> PLAN: This patient is to continue using the stimulator for control of some of the pain that he is experiencing. This patient is disabled. He cannot work due to chronic neck pain, upper extremity pain and weakness as well as fracture of the ankle. I have encouraged him to reapply for social security disability. The patient is also quite depressed at this point. I will have him re-evaluated by [Dr. V], [a psychiatrist].

In evidence, but not referenced by the hearing officer, is a surveillance videotape of claimant made at various times in June 1998 and January 1999, well before the qualifying period, which shows claimant performing a number of tasks and moving without apparent pain. This videotape was shown to Dr. K, claimant's former treating doctor, who, in a report dated August 20, 1998, commented, in part:

> As I viewed the video tape, [claimant] seemed to be a different person. For approximately one-third to one-half of the tape I observed [claimant] carrying building materials. He was moving his neck freely; using a skil saw and doing a lot of drilling, using his right hand. He bent into many awkward positions with his back and neck. Not once did he so much as rub his neck or appear to have difficulty straightening up after having bent over.
>
> * * * *
>
> During this video, [claimant] never once dropped a tool or building materials as you would expect from the complaints he has voiced to me.
>
> * * * *
>
> I am going to discharge [claimant] from my practice because I do not find him credible and therefore, I cannot continue to treat him. I do not feel that he has dealt with me in good faith therefore, that is viewed as a patient breech of the Doctor-Patient relationship. He will be advised to find a new doctor.

The hearing officer, in his Statement of the Evidence, cites the language from Dr. D's September 20, 1999, report and comments:

> Claimant has testified that he has been unable to perform any type of work in any capacity; however, the documented medical evidence is not sufficient to qualify as a narrative report from a doctor which specifically explains how the injury causes a total inability to work.
>
> The evidence presented is insufficient to establish that, during the qualifying period at issue[,] Claimant was unable to perform any type of work in any capacity.

We hold that the hearing officer's decision is supported by sufficient evidence.

The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer's finding that Dr. D's September 20, 1999, report does not meet the requirements of Rule 130.102(d)(3) is not against the great weight and preponderance of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex.

1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge