APPEAL NO. 000160

Following a contested case hearing held on December 28, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that during the qualifying period for the third quarter of supplemental income benefits (SIBS), the appellant (claimant) had some ability to work, made no effort to look for work, and thus failed to make a good faith effort to obtain employment commensurate with her ability to work. Claimant challenges the ability to work and no good faith findings for evidentiary insufficiency, asserting that at no time during the qualifying period did her treating doctor return her to any level of work and that no other doctor stated that she had an ability to work. The respondent (carrier) states in response that medical records do in fact reflect that claimant had some ability to work during the qualifying period, albeit with restrictions limiting her to sedentary work, and that she herself conceded that she had the ability to drive.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, reached maximum medical improvement with an impairment rating (IR) of 31%, and did not commute any portion of her impairment income benefits (IIBS); that the third SIBS quarter ran from September 11 through December 10, 1999; and that the qualifying period for that quarter ran from May 30 through August 28, 1999.

Claimant testified that she was injured on _____, while driving an 18-wheel truck for the employer when she drove over some rough road surface just before crossing a bridge and was bounced in the truck seat with her head hitting the cab ceiling and her body bouncing up and down about six times, getting, as she put it, "six jolts." Claimant said she had immediate pain in her shoulders and low back, that her neck was also injured, and that she later had surgery on her right shoulder for a torn rotator cuff. The May 11, 1999, consultation report of Dr. C states that claimant underwent an anterior cervical fusion at C6-7 and that the surgeon looked at but decided against fusion at C5-6 where there is a small disk bulge. Dr. C further states that he advised claimant to raise the question of whether or not her shoulder needs surgery.

Claimant further testified that on May 21, 1999, Dr. W, her current treating doctor, assigned her certain functional restrictions and that these restrictions have not changed. Claimant further stated that for several weeks during the filing period and concluding in late July, she underwent prolotherapy injection treatment which she said consisted of up to 56 injections over a one-hour period with the effects of the injections wearing off in periods of as little as three days to as much as two weeks. She said that the prolotherapy helped her neck pain but not her shoulder pain; that she took certain medications for pain and muscle relaxation; and that she has not looked for work during the qualifying period. She also said

she drives a four wheel drive pickup truck. Claimant does not challenge a finding that during the qualifying period she did not seek employment.

Dr. W's May 21, 1999, report states that concerning functional restrictions, claimant cannot sit, stand or walk for greater than 20 minutes; cannot lift greater than five pounds; cannot use her right upper extremity for any repetitive use; and cannot bend, stoop, crawl or climb. Dr. W also stated that these restrictions are mostly due to claimant's symptomatic shoulder, neck, and right arm pain and that her increasing low back pain has also compromised her ability for functional activities.

A June 2, 1999, letter from the Texas Rehabilitation Commission (TRC) states that claimant has followed through with TRC services, that she is currently in "eligibility" status, and that the TRC is considering her current therapy and doctor's care in developing a plan for employment.

The June 3, 1999, report of Dr. M, a prolotherapist, states that he commenced the course of prolotherapy injections approximately six weeks earlier; that four sessions have reduced claimant's neck and shoulder pain by 50% to 60%; and that after the remaining two sessions, claimant should achieve an 80% to 90% improvement. Dr. M recommended that claimant not return to work at this time to avoid reinjuring the soft tissue of the posterior neck and right shoulder.

Dr. W's July 26, 1999, report states that he has treated claimant since March 12, 1998, at which time he gave her a "no work" status; that she has been on a "no work" status with the most recent being given on July 26, 1999; that "[t]he reason for her being on a no work status could be defined for any one of her defined problems"; that she has a diagnosis of cervical segmental instability and discogenic pain with radiculopathy into her right upper extremity; that she has a diagnosis of a double crush neuropraxia in her right upper extremity and also a right subacromial impingement and supraspinatus tendonopathy; and that she also complains of her lower back and right leg dysesthesia which is undiagnosed. Dr. W further reported that claimant has recently been receiving solerotic prolotherapy and that with completion of that treatment she can undergo a functional capacity evaluation (FCE). Claimant testified that Dr. W gave her an "informal" FCE in August 1999 and that in November 1999 she underwent an FCE by a carrier doctor. No FCE report is in evidence.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (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 "(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; . . . ."

Claimant had the burden to prove that she made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer, in discussing the evidence, states that she finds the medical evidence insufficient to prove by a preponderance of the evidence that claimant had no ability to work. The hearing officer did not make findings on the remaining elements of Rule 130.102(d)(4). While not error in this case, hearing officers are encouraged to do so. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge