APPEAL NO. 000178

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 3, 2000, a hearing was held. The hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 10th compensable quarter which began on July 27, 1999. Claimant asserts that he is unable to do any work, citing medical evidence and stating that respondent's (carrier) medical evidence should not control. In addition, some job inquiries were made and claimant states that carrier should not contest SIBS for the 10th quarter because of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(a) (Rule 130.108(a)). Carrier replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. The medical records do not make clear how his injury occurred. The record does show that he has had multiple spinal surgeries to both the cervical and lumbar spine. His most recent surgery involved insertion of a morphine pump in March 1998 and subsequent adjustment of it in May 1998. Claimant testified that the morphine pump has not operated well.

The parties stipulated that claimant was compensably injured; that he has an impairment rating of 25%; that he commuted no benefits; and that the qualifying period for the 10th quarter began on April 13, 1999. With the qualifying period beginning in April 1999, this SIBS quarter was subject to the new, 1999 SIBS rules.

Claimant stated that during the relevant quarter, his treating doctor was Dr. K. Claimant's opening argument referred to Dr. K as the physician who said that claimant should not work. Similarly, claimant's appeal refers to a letter of Dr. K dated August 25, 1999, in arguing that there is no ability to work. While that letter is dated outside the qualifying period, the facts of the case do not show it to be irrelevant to the qualifying period. Dr. K said he was treating claimant's "major depressive disorder" and pain which has "both physical and psychological factors." Dr. K's opinion cited Dr. S recommendation that claimant "not return to work, as this would likely worsen his injury." Dr. K then went on to say, "[h]eavy lifting, repetitive bending or twisting would likely worsen his situation." Dr. K listed several medications claimant is taking and said that two of them "may cause . . . drowsiness and difficulty with concentration . . . ." Dr. K then said that he did not believe claimant was "capable of working, secondary to both his depression and back injury, as well as the effect of the medications . . . ." Dr. K then spoke of allowing claimant's back an "optimal chance of healing . . ." but did not say how long that would be or why it had not healed in 1999 when claimant's last surgery, other than that dealing with a morphine pump, was in 1997.

This was claimant's first SIBS quarter that is governed by the new, 1999 rules. When there is an issue of inability to work, Rule 130.102(d)(4) (before November 1999 Rule 130.102(d)(4) was Rule 130.102(d)(3)) provides that a good faith effort to find work has been made when the claimant "has been unable to perform any type of work in any capacity" and has provided a doctor's narrative which "specifically explains" how "the injury causes a total inability to work" and "no other records show" that claimant is able to return to work. (Emphasis added.) When these new, 1999 rules are applicable, it would be appropriate for the fact finder to make findings of fact addressing each applicable requirement.

While the hearing officer's Statement of Evidence addresses the opinion of Dr. K indicating that claimant could not work, she refers more extensively to the carrier's (not claimant's as is stated in the Statement of Evidence) report of Dr. O, provided on April 21, 1999, within the qualifying period. While Dr. O used the term "theoretically" in saying that claimant could do light work, he also said that only "heavy maintenance work" was ruled out. In addition, the hearing officer pointed out comments by Dr. O about claimant's use of his cane, how claimant walked differently when examined by Dr. O than he had walked as reported by Dr. P two months earlier, and that Dr. O thought claimant could do some work. The hearing officer also commented about an MRI performed in February 1999 which showed no recurrent disc herniation, spinal stenosis or appreciable neural foramina narrowing. She then found that claimant had some ability to work.

With a finding of fact that claimant had some ability to work, claimant has not fulfilled the first of the three factors listed in Rule 130.102(d)(4)--"has been unable to perform any type of work in any capacity"--so there is no necessity to remand for findings regarding whether a narrative specifically explains how the injury causes an inability to work and whether any other records "show" (not merely "state") that claimant is able to return to work. The finding of some ability to work is sufficiently supported by the opinion of Dr. O; while that opinion is contradicted by Dr. K as to its conclusion, Dr. K's opinion relies somewhat on the opinion of Dr. S, who is quoted as saying that a return to work "would likely worsen his injury," but Dr. K only says that "heavy lifting, repetitive bending or twisting would likely worsen his situation," which may be interpreted to mean that sedentary work would not worsen claimant's condition. In addition, since Dr. K relied in part on Dr. S's opinion, the hearing officer could question why Dr. S's opinion was not provided for consideration. The hearing officer questioned claimant about Dr. K and was told that Dr. K just provides medication for him.

Claimant also provided evidence of four job inquiries. He testified that he "applied for so many--I don't remember" when asked if he could specify other employers he contacted. At any rate, with the new, 1999 SIBS rules requiring a claimant to look for work "every week" of the qualifying period and to provide "sufficient documentation," the evidence sufficiently supports the determination that claimant's job search did not constitute a good faith effort. *See* Rule 130.102(e).

Finally, claimant refers to Rule 130.108(a) which tells a carrier not to pursue a dispute of SIBS without a "factual or legal basis"; that rule also tells a carrier to consider a comparison between the "factual situation" of the previous qualifying period with the "factual situation" of the current qualifying period. There was no issue as to this point at the hearing. Even if there were, we would note that the "factual situation" for the current qualifying period could be "considered" to be different based on Dr. O's opinion provided in the current qualifying period, and may also be "considered" to be factually different when weighed under the somewhat different criteria of the new, 1999 rules. This point presents no basis for reversal.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge