APPEAL NO. 000210

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 February 15, 2000. With regard to the only issue before him, the hearing officer determined that appellant (claimant) had some ability to work; and that claimant did not make a good faith effort to obtain employment commensurate with his ability and, therefore, was not entitled to supplemental income benefits (SIBs) for the fourth compensable quarter. The hearing officer's finding that claimant's unemployment was a direct result of his impairment has not been appealed and will not be addressed further.

Claimant appeals, asserting that four doctors plus the Social Security Administration have stated that he is "totally disabled & unable to work." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a truck driver and he testified how, on _____, he was putting tire chains on his truck in deep snow; he slipped, twisted his ankle; and fell forward into a corner of the trailer, injuring his right knee and shoulder. Claimant reported his injury, although trivializing it, and subsequently, on another trip, developed a blood clot due to the compensable injury. Claimant testified how he developed an allergic reaction to some medication which lead to further blood clotting. The testimony developed that claimant had sustained another injury in _____ which also resulted in some blood clotting. Claimant apparently had a vena cava filter implanted to strain out blood clots before they reach the heart or brain. Claimant's current problems deal with continued blood clots. Claimant's treating doctor is Dr. H. Claimant testified that he is 64 years old and is currently receiving $1,260.00 a month in Social Security disability benefits in addition to SIBs (there has apparently been no offset). Claimant submitted his case on a total inability to work theory, although the Application for Supplemental Income Benefits (TWCC-52) claimant submitted lists some 14 job contacts. Claimant testified that he began making job contacts after the benefit review conference (BRC), where he was told that he would have to look for employment in order to qualify for SIBs.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating (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. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement "with at least a 35% IR"; that IIBs were not commuted; and that the qualifying period was from August 12 through November 11, 1999.

It is undisputed that the "new" SIBs rules (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 *et seq*. (Rule 130.102 *et seq*.)) were in effect during the applicable qualifying period. Rule 130.102(d) deals with the good faith effort requirement. Although claimant submitted his case at the CCH and on appeal, asserting a total inability to work, the hearing officer made findings regarding, and we will briefly address, claimant's job contacts. Rule 130.102(e) provides that if an injured employee is able to return to work, the employee "shall look for employment commensurate with his or her ability to work every week of the qualifying period. . . ." The qualifying period began on August 12, 1999; claimant attended a BRC on October 20, 1999, where he was told he had to look for work to qualify for SIBs; and claimant's first job contact is documented as being October 27, 1999. The hearing officer found that claimant had some ability to work and "did not make documented job search efforts every week of the qualifying period." The hearing officer's findings are supported by the evidence and claimant did not meet the requirements of a good faith job search under Rule 130.102(e).

In regard to the theory that claimant has a total inability to work, Rule 130.102(d)(3) (the version then in effect) 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 "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." The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992712, decided January 18, 2000 (Unpublished). The Appeals Panel has also encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999. Regarding the elements of Rule 130.102(d)(3), Dr. H, in a brief note dated August 13, 1999, comments that claimant has "recurrent pulmonary emboli and recurrent deep vein thrombosis," that claimant "is totally disabled due to these conditions" and "is unable to look for work." Dr. H, in a report dated December 15, 1999, repeats his diagnoses, which also includes hypertension (which is problematically related to the compensable injury) and post thrombophlebitic syndrome and explains:

> Because of these diagnoses, he has some significant risks. He requires long term anticoagulation. Due to this he must be in positions where, he would not be at risk for cuts or bruises as these could cause significant complications for him. He must be where he can avoid sharp edges of desks

> and furniture as well. If he is up for long periods of time, he will have increased swelling of his lower extremities, which is not desirable. He must keep his feet elevated for at least two hours throughout the day. Due to the sleep apnea, he will have periods of drowsiness which could interfere with gainful employment.

In a September 1995 report, Dr. J commented that he believed claimant "is totally and permanently disabled because of chronic post-phlebitic syndrome complicated by an allergy to Heparin." Dr. J does not explain how that is so. Similarly, Dr. S, in a report of December 1995, comments:

> It is my opinion that he continues to be totally and permanently disabled, and will of course, require long term follow-up of his recurrent DVT, pulmonary emboli, post phlebitic syndrome, and chronic Coumadin therapy.

Carrier offers the report, dated February 25th, and functional capacity evaluation (FCE) performed on February 11, 1999, by Dr. O, where Dr. O comments:

> He can occasionally bend, stoop, squat and kneel. I would not have him doing any job that required frequent use of bending, stooping, long-term walking or long term standing on his feet. Although he does show the strength and under the ADA [Americans With Disability Act] you could not turn him down if he wanted to go higher than this, but I think based on the findings today there is no reason that he could not do sedentary, light and even up to medium work based on the *Dictionary of Occupational Titles* without too much further risk. I think that under ADA, as I said, you could not turn him down but I think he would be at considerable risk if he tried to return to heavy work.

The hearing officer found that claimant had some ability to work during the qualifying period, apparently based on the medical reports. That finding on the first element of Rule 130.102(d)(3) is dispositive and is supported by the evidence. We would note that only Dr. H's December 15, 1999, report purports to be a narrative report "which specifically explains how the injury causes a total inability to work" and even that report could be read as merely outlining claimant's restrictions for some limited work. Dr. O's report and FCE could be considered for the third element.

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:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge