APPEAL NO. 000292

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 11, 2000. The hearing officer determined that although the appellant (claimant) possessed the ability to perform light-duty work with restrictions as outlined by Dr. K, the claimant did not make a good faith effort to seek employment commensurate with his abilities during the qualifying period for the 22nd quarter of supplemental income benefits (SIBS) and, thus the claimant is not entitled to SIBS for the 22nd 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, contending that he has a total inability to work; that Dr. P, his treating doctor, who is more familiar with his condition, has opined that he is totally unable to work; and that another doctor did not adequately evaluate him. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

It is undisputed that claimant had sustained a work-related injury on _____, when he slipped and fell on cement. Claimant sustained a low back injury and had spinal surgery at the L4-5 level in January 1993. Subsequently, claimant had additional spinal fusion surgery at the same L4-5 level on February 23, 1998. Claimant's treating doctor and surgeon is Dr. P.

The parties stipulated that claimant sustained a compensable back injury on _____; that claimant has a 15% impairment rating (IR); that impairment income benefits (IIBS) were not commuted; and that the qualifying period for the 22nd quarter began on July 9, 1999, and ended on October 7, 1999. 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. At issue in the case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

Claimant proceeds on a theory that he has a total inability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) addresses the good faith effort requirement of the 1989 Act and 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 "(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 record shows 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. 992717, decided January 20, 2000. 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, e.g.*, Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

After claimant's February 1998 surgery Dr. P, in a report dated March 27, 1998, wrote that claimant was "disabled and unable to work" and that he would be unable to work for the "next nine to twelve months." Other reports in 1998 indicate that claimant remains "disabled" and unable to work. On a Specific and Subsequent Medical Report (TWCC-64) dated January 13, 1999, Dr. P simply put "No" in boxes asking about a return to limited work and full-time work. In a brief "To Whom It May Concern" note dated January 11, 1999, Dr. P wrote claimant "remains disabled and unable to return to any type of gainful employment at this time." In subsequent TWCC-64s, dated July 20 and September 15, 1999, Dr. P just put "No" on return-to-work boxes and commented "[c]onservative treatment, avoid stress to affected area." There was no other explanation for his opinion.

Evidence to the contrary is a report and functional capacity evaluation (FCE) dated August 27, 1999, from Dr. K, an independent medical examination doctor. Dr. K found the fusion stable and "excellent bone fusing the L4-5 level." Dr. K found significant symptom magnification and, contrary to claimant's contention of weakness in his legs and inability to walk without a cane, found "no atrophy of his thighs or his calves. This is not consistent with weakness." Dr. K listed restrictions of standing and walking "for six hours" a day. Dr. K was of the opinion that claimant was able to return to light duty for an eight-hour day.

Although the hearing officer does not reference Rule 130.102(d)(3), she did comment on those elements, finding that claimant "possessed the ability to perform light duty work" (thereby finding claimant was not unable to perform any type of work in any capacity), and stating:

> [T]he SIBS entitlement rules provide that Claimant must provide a narrative report from his treating doctor that details the reasons why Claimant can perform no work at all, and that there must not be any controverting medical evidence or opinions. The evidence established that [Dr. P's] opinion that Claimant possessed no ability to work was not corroborated by detailed medical evidence. Furthermore, the opinion of [Dr. K], an independent medical examiner, was that Claimant was able to perform light duty work with certain restrictions. [Dr. K] based his opinion on his review of Claimant's medical records, a physical examination of Claimant, diagnostic studies, and

Claimant's performance in a[n] [FCE]. [Dr. K's] opinion carried greater weight than that of [Dr. P].

Claimant, in his appeal, contends that one of Dr. K's assistants did his tests and that he relies on Dr. P's "opinion regarding whether I should work or not as he is more familiar with my injuries and my limitations."

The hearing officer made findings regarding the elements of Rule 130.102(d)(3) and those findings are supported by the evidence. The hearing officer determined that claimant did not meet his burden of showing that he had made a good faith effort to obtain employment commensurate with his ability to work by providing evidence to meet the elements of Rule 130.102(d)(3).

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:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge