APPEAL NO. 000318

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 25, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the ninth compensable quarter. The appellant (carrier) appeals, contending that the claimant failed to prove that he had a total inability to work and, thus, did not make a good faith effort to obtain and retain employment commensurate with his ability to work. The appeals file contains no response from the claimant.

DECISION

Reversed and remanded.

The claimant sustained a compensable low back injury on _____, as a result of which he underwent two operations, reached maximum medical improvement on January 31, 1997, and was assigned a 15% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The ninth quarter was from December 10, 1999, to March 9, 2000, and the qualifying period was from August 23 to November 26, 1999.

At issue in this case is whether the claimant made the required good faith job search.[1] The claimant made no efforts to obtain employment during the qualifying period and contended that he had no ability to work in any capacity. Rule 130.102(d)(3), in effect at all pertinent times, provides that "[a]n 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 records show that the injured employee is able to return to work . . . ." We have described this rule as "generally more demanding" than the prior rule in what is required of a claimant to establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000.

[1]The finding that his unemployment during the qualifying period was a direct result of his impairment has not been appealed and has become final. Section 410.169.

The claimant's medical evidence in support of his position that he had no ability to work consisted of the reports of Dr. G and Dr. S. Each of these reports uses the phrase "gainful employment." In a letter of September 30, 1999, Dr. G discusses the claimant's compensable injury and his "cardiac status" and concludes that "[b]ased on his overall medical, generally, he is totally impaired from gainful employment." In a series of letters beginning June 21, 1999, Dr. S commented that the claimant has difficulty sitting, standing, or walking and that "[r]ealistically, I do not think he is capable of any gainful employment at this time." He further wrote that the phrase "except for very sedentary activities" he had previously used meant "a job that he could do lying down. In the absence of that, I do not think he is capable of gainful employment." On November 2, 1999, Dr. S wrote that the claimant was still recuperating from a lumbar fusion and was "still not capable of gainful employment" and that "even sedentary is not feasible at this time." On December 16, 1999, he wrote that "I do not think he is capable of gainful employment because he is not able to sustain any position for any length of time. Even a sedentary job is going to be difficult for him to maintain." In another letter of this date, Dr. S wrote that claimant "is still limited in his activities" and was "still not capable of gainful employment, even sedentary is not feasible in the ninth quarter." The carrier introduced the results of a functional capacity evaluation (FCE) on September 7, 1999, signed by Dr. G in which he concluded that the claimant "should be able to perform sedentary work."

The hearing officer considered this evidence and quoted extensively from it in his decision and order. He concluded his discussion with the comment:

> It is unfortunate, in the light of prior [Appeals Panel] Decisions, that the doctors use the term gainful so frequently. However, use of the word is not dispositive or fatal . . . The medical evidence is certainly contradictory; however, after reviewing all of the evidence it appears that the Claimant is "totally unable to work."

He accordingly found that the claimant had no ability to work, Finding of Fact No. 5; made the required good faith job search, Finding of Fact No. 6; and was entitled to ninth quarter SIBS, Conclusion of Law No. 1. The carrier appeals these determinations, contending that the claimant's evidence did not meet the standards set out in Rule 130.102(d)(3).

In a prior case, we noted that this rule establishes three separate elements which must be proved to meet the requirement of a good faith job search by virtue of having a total inability to work and that the hearing officer should make affirmative findings that each element was or was not proved by the claimant by a preponderance of the evidence. *See* Appeal No. 992717, *supra*, and Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000, and cases cited therein. We have also remanded for specific findings on these elements. *See* Texas Workers' Compensation Commission Appeal No. 000310, decided March 23, 2000, and Appeal No. 992629, *supra*, on these elements. *Compare* Texas Workers' Compensation Commission Appeal No. 992595, decided January 3, 2000 (Unpublished).

In its appeal, the carrier argues that the various doctors' exclusive qualification of the word "employment" with the word "gainful" meant that they applied an incorrect standard, not the prescribed inability to do "any type of work in any capacity." In the past, we have pointed out the difficulties inherent in the use of the word "gainful" in the context of attempting to establish an inability to work, and that numerous inferences can be drawn from this word contrary to an inference of no ability to work. *See* Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. Just as in the past, we have eschewed the use of so-called "magic words" as a requirement to prove some fact in dispute, we are unwilling to say that the use of "gainful" will forever and under all circumstances defeat as a matter of law an attempt to prove an inability to work for the purposes of establishing a SIBS entitlement. *See* Texas Workers' Compensation Commission Appeal No. 992274, decided November 29, 1999. In all cases, the weight a hearing officer chooses to give this word should derive from the context in which it is used and the other evidence of record. In the case we now consider, the hearing officer was fully aware of the dangers associated with the use of the word gainful, but nonetheless did not find this usage dispositive of the disputed issue. We find no error in this common-sense approach. This leads to the next point of appeal; that is, that the evidence did not establish "a narrative report from a doctor which specifically explains how the injury causes a total inability to work."

The carrier again argues that the use of the word "gainful" is at best ambiguous and vague, especially when considered in light of further comments that sedentary work would be "difficult" or "not feasible." It also contends that the statements of Dr. G and Dr. S were conclusory in nature and did not constitute a narrative explaining how the injury caused the inability to work. Clearly, this evidence was subject to varying inferences. However, the hearing officer properly considered it in the context of the undisputed evidence about the nature of the claimant's injury (reflected in an operative report), the limitations on the claimant's ability to maintain any one position in comfort, and Dr. S's comment that sedentary, at best, meant a job "lying down" and concluded that the various reports constituted a sufficient narrative explaining how the claimant's injury caused a total inability to work. Whether the claimant had no ability to work was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12 1995. 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). While clearly another hearing officer may have found otherwise in what is admittedly a close call, we decline to find that the hearing officer's determination that this evidence was sufficient to satisfy the requirement that the claimant prove by a narrative report of a doctor how his injury caused an inability to work is against the great weight of the evidence.

While the claimant's evidence, considered in itself, was sufficient to meet the second element of Rule 130.102(d)(3), there remains the third element; that is, whether there were "no other records" showing an ability to work. At least on its face, the FCE report was such a record. The hearing officer appears to have simply thrown this record into the balance in

arriving at his finding of no ability to work. Such a process is not contemplated by the regulation. If another record exists that shows an ability to work, that ends the inquiry and the claimant has not met his burden of proving a total inability to work. The question then becomes whether the FCE report "shows" an inability to work. Texas Workers' Compensation Commission Appeal No. 000154, decided March 9, 2000. The existence of this reportfurther underlines the criticality of making express findings on each element of Rule 130.102(d)(3). Because the hearing officer appears to have impermissibly simply weighed the FCE report with all the other evidence in reaching his dispositive finding of no ability to work, we reverse his determination and the conclusion that the claimant is entitled to ninth quarter SIBS and remand this case for further express findings as to whether the FCE report, which clearly is an "other record," shows the claimant is unable to work. If he finds it is, then the claimant has not met his burden of proving no ability to work. In this regard, we note that "stating" there is an inability to work is not necessarily synonymous with "showing" an inability to work. *See* Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I agree that the hearing officer needs to address the factual question of whether or not the functional capacity evaluation (FCE) showed that the claimant had an ability to work. I think the hearing officer's thoughtful consideration of how the law applied to the facts in this case might lead to us to be imply that the hearing officer considered the FCE to have simply failed to show an ability to work. I thought this particularly possible in light of

the fact that Dr. G wrote both the FCE and the letter stating the claimant was unable to work. Thus, the hearing officer may have given the FCE no weight based upon the fact that it was impeached by the doctor's later letter, which could even have been viewed as a change in opinion or recission of the opinion expressed in the FCE. For these reasons, I considered dissenting and arguing that the decision of the hearing officer should be affirmed.

Upon further reflection, I have decided that it would be better for the hearing officer to address the question of whether or not the FCE showed that the claimant had an ability to work. This is clearly a factual determination for a hearing officer, but one that it is far easier to review if explicitly addressed by the hearing officer as was done, for example, in Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

Just as aside, I would note that in my own opinion the use of the word "gainful" is not as significant as some Appeals Panel decisions seem to indicate. Also, I would note that by concurring in the well-written and thoughtful majority decision, I am not indicating my agreement with all the cases cited by the majority.

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Gary L. Kilgore
Appeals Judge