APPEAL NO. 000334

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 January 19, 2000. The hearing officer determined that the appellant (claimant) "meets three eligibility criteria" for supplemental income benefits (SIBS); however, the claimant did not show by a preponderance of the evidence that he made a good faith effort to seek employment during the second quarter qualifying period and, therefore, was not entitled to SIBS for the second quarter. The hearing officer's finding on direct result has not been appealed and has become final.

Claimant's appeal emphasizes an alleged total inability to work under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) based on the treating doctor's reports, and pain as the major contributing factor that keeps claimant from seeking or obtaining employment commensurate with his ability to work. Claimant alleges that his medications "leave him in a state of sedation." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The medical evidence indicates that claimant was employed as a maintenance man and on _____, sustained a compensable injury to his right arm, neck, shoulder and upper back pulling a five-gallon bucket of paint. Claimant was initially seen by a chiropractor who referred him to Dr. B, who performed cervical surgery in 1996. Subsequently, claimant retained an attorney who referred claimant to Dr. G, who has become claimant's treating doctor. Dr. G apparently did cervical fusion on March 25, 1998.

The parties stipulated that carrier accepted liability for claimant's _____, injury; that claimant has an impairment rating (IR) of 15% or greater; and that impairment income benefits (IIBS) have not been commuted. The hearing officer found in an unappealed finding of fact that the qualifying period for the second compensable quarter was "from June 11, 1999 [apparently July 11, 1999] through October 9, 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 this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. In evidence is a benefit review conference agreement of September 3, 1999 (which was during the qualifying period for the

second quarter) in which the carrier agreed that claimant was entitled to SIBS for the first quarter and "claimant agrees to make a good faith effort to obtain employment commensurate with his ability to work as of today." (We note that claimant only agreed to do what he was statutorily obligated to do anyway.)

Claimant, at the CCH, proceeded on a hybrid theory of both a total inability to work as evidenced by reports from Dr. G and that contrary to Dr. G's recommendations he had made a good faith effort to seek employment, citing several job contacts. On appeal, claimant stresses the total inability to work. The hearing officer, in the Discussion portion of his decision, quotes Rule 130.102 verbatim in its entirety.

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 had 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.

In evidence is a narrative report dated August 2, 1999, from Dr. G which states:

> Specific Restrictions: Patient is unable to do lifting, pushing, pulling of more than 5lbs and is unable to any type of gainful employment. Patient is to remain off work from 04/24/99 to 07/23/99.
>
> The patient has been given prescription medications for pain relief and muscle relaxation. These medications have been proven to cause drowsiness and dizziness to a majority of the patients that take these medications. Therefore, while the patient is taking these medications, this situation would pose a potential threat to the patient, as will [sic] as others, especially if the course of the patient's duties place the patient in a potentially hazardous environment. These medications also impair a patient's judgement, which would disallow the patient from participating in any type of activity that requires concentration and attention.
>
> Due to the combination of the ongoing medical treatment, the ongoing disability, and the above mentioned problems with medications, I do not feel

> that it is practical for this patient at this time to be considered a vocational candidate.

In another report dated December 20, 1999, Dr. G verbatim restates the August 2nd report omitting the "Specific Restrictions" paragraph. Evidence to the contrary includes functional capacity evaluation (FCE) performed on October 2, 1998 (well before the qualifying period) which indicates claimant cannot return to his preinjury job, establishes restrictions on standing and walking to six hours, stooping for four hours, and other restrictions including a 20-pound weight lifting restriction and comments that claimant was "testing safely at a sedentary to light strength level." Also in evidence is a detailed 12-page report dated February 3, 1999, from Dr. D that reviews claimant's history and medical reports, details his examination and testing and concludes:

> In my opinion, the examinee is not in need of any further surgery. His major complaint is his limitation of motion of his neck, which is understandable since he has cervical plates, both anterior and posterior, which would definitely limit the motion.
>
> It is my opinion, as stated in the report of the [FCE], that the examinee is capable of returning to work in a position that would not require lifting or carrying of more than 20 pounds on an occasional basis. The examinee's medication is appropriate and reasonable.

The hearing officer, in challenged Finding of Fact No. 6, after reciting Dr. G's restrictions, finds that the restrictions "do not disqualify Claimant from any kind of employment in any capacity. Claimant is physically capable of performing some work activities at a sedentary level." However, in challenged Conclusion of Law No. 4, after reciting the statutory requirements (IR of 15% or greater, IIBS not commuted) the hearing officer concludes that claimant "meets three eligibility criteria" but he has not shown a good faith effort to seek employment and is not entitled to SIBS for the second quarter. Claimant challenges those findings, citing Rule 130.102(d)(3) and Dr. G's reports, claimant's restrictions, claimant's testimony about his pain, stressing the "severity of Claimant's injury" and that claimant's medications "leave him in a state of sedation" and totally unable to work.

On the first element of Rule 130.102(d)(3), that claimant is unable to perform any type of work in any capacity, the hearing officer, in Finding of Fact No. 6 finds claimant has some ability to work in a sedentary capacity and that finding is supported by the evidence. The hearing officer makes no specific finding on the second element, a narrative report from a doctor which specifically explains how the injury causes a total inability to work; however, we can infer from the hearing officer's comment in Finding of Fact No. 6 that Dr. G's restrictions do not disqualify claimant from any kind of employment to mean that Dr. G's reports do not meet the second element. The hearing officer makes no findings whether the FCE and Dr. D's report are such other records which show an ability to return to work.

Although not specifically appealed, we will note that the requirements of Rule 130.102(e), which provide that if claimant "is able to return to work in any capacity" (which the hearing officer found) he "shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." Although not specifically addressed on appeal, we hold that the hearing officer's finding that claimant's limited job search ("no more than ten employers for positions for which he may not be physically qualified") does not meet the requirements of Rule 130.102(e).

Accordingly, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge