APPEAL NO. 000384

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 24, 2000. The claimant (respondent) is _____. At issue was her entitlement to supplemental income benefits (SIBS) for her seventh and eighth quarters. The claimant asserted a complete inability to work. The hearing officer agreed and found that claimant met the requirements for SIBS; that is, that she made a good faith search for employment commensurate with her ability to work and that her unemployment was the direct result of her impairment.

The appellant (carrier) appeals, arguing that according to the new SIBS rules, the claimant does not meet the requirements of proving a total inability to work. The carrier points out that one doctor assessed that she had the ability to do sedentary work, albeit "extremely restricted," on a part-time basis, and she was therefore required to seek this type of employment. The claimant responds that she produced evidence to prove her inability to work.

DECISION

Affirmed based on our standard of review.

The hearing officer has comprehensively summarized the evidence and we will only briefly summarize here. The claimant injured her back on _____. She has had five lumbar surgeries. The periods under review ran from May 2 through July 31, 1999, and from August 1 through October 30, 1999.[1] The claimant did not seek employment during these periods. The claimant was in her mid-40s at the time under review.

Her doctors at the time under review were Dr. F and Dr. A, with the latter treating her for persistent pain. As stated by the hearing officer, Dr. F has written several long letters stating that although the claimant's spinal fusion appears solid, she has continuing pain which limits her ability to function. He described in detail how this translates into inability to work. Although he at certain times used the phrase "gainful employment," he also opined that her limitations prevent her from working in any capacity. The claimant was under continuing treatment for pain relief. Dr. F stated in an October 6, 1999, letter to the adjuster that the claimant had daily pain and her tolerance level for being upright or ambulatory would be 30 minutes to one hour. Dr. A's notes of August 23, 1999, reflect that her pain is not relieved with moderate strength opiates. Dr. F has requested various procedures for further testing, not all of which have been approved by the carrier.

[1] A typographical error in Stipulation J erroneously cites the starting date for the eighth quarter as September 1, 1999.

Dr. B has, as noted by the hearing officer, examined the claimant throughout the claim. On March 12, 1999, he noted that she could not return to work at all, pending further evaluation of her pain through recommended tests. Dr. B said that the best claimant could hope for in terms of future employment would be part-time sedentary. There is a May 24, 1999, checklist physical capabilities form ostensibly signed by Dr. B, with no attached narrative. It noted that claimant could not work an eight-hour day, but could work four hours. It noted that she could sit for one hour maximum and walk for under 30 minutes maximum, but could not stand or drive. She was recommended to have breaks every 10-15 minutes. According to this form, claimant can push/pull occasionally (one to two and one-half hours), or reach above shoulder level occasionally, but can not climb, balance, bend and stoop, kneel, crouch, crawl, or squat at all. While barely legible, it appears that Dr. B stated that claimant could only occasionally lift up to 10 pounds, or grasp and engage in fine manipulation (again, in the one to two and one-half hour range). She could not work at heights or be exposed to fumes, chemicals, or temperature changes or extremes. He stated these restrictions were permanent.

On October 18, 1999, Dr. B wrote to the adjuster that he had discussed with the case manager the possibility of the claimant returning to sedentary work that would permit intermittent standing and sitting and rest periods limited to a four-hour day. He noted that the case manager was going to discuss this with Dr. F. Dr. F responded to this on November 16, 1999, setting forth his "very definite" opinions as to claimant's actual ability to work. He said that testing had confirmed that she was unable to perform any type of gainful maneuver that would allow her to obtain or maintain employment. He said that claimant had leg pain and numbness that caused her leg to buckle and her to fall. While he said her "static testing" would allow a sedentary classification, realistically she could not work for any length of time without laying down.

Dr. A wrote on November 18, 1999, that claimant had been his patient for two years, suffered from chronic "intractable" back pain, and that she could not maintain any work because of the severe discomfort and disability produced by her pain. Dr. A had no estimate as to when she could return to work.

There are no doctors who opine that claimant's pain results from symptom magnification or anything other than real and persistent pain. Although the substance of the claimant's testimony basically tracks that which was noted in her doctors' reports, the claimant also pointed out that she tried to return to work in 1994 after her first back surgery but was unable to continue at that time on even a 20-hour per week basis.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) (in effect during the periods under review) defines good faith as follows:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

(1) has returned to work in a position which is relatively equal to the injured employee's ability to work;

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;

(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; or

(4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The applicable provision for the hearing officer to apply was Rule 130.102(d)(3). While these rules have more clearly structured the analysis to be employed to SIBS qualifications, they did not remove the fact finding function of the hearing officer. It is the responsibility of the hearing officer to assess both whether the narratives supplied by the claimant's doctors "specifically explain" how the injury causes a total inability to work, and whether any contrary records "show" that the injured employee can return to work. The hearing officer has explained in the decision how she weighed these records to reach the conclusion that claimant's practical and functional ability to work was nil. She made findings that claimant's records specifically explained how her injury caused a total inability to work and that there were no other records that showed that she was able to return to work. The hearing officer particularly noted in her discussion that the claimant was restricted from standing or driving by Dr. B, could, at best, sit for an hour, and walk for 30 minutes. The hearing officer found that these restrictions were contradictory of the overall notion that claimant could work four hours. Furthermore, in light of Dr. B's March assessment that claimant could do part-time, sedentary work if her pain was controlled, and the considerable medical evidence throughout the periods under review that showed her pain was not under control, the hearing officer's conclusion that a total inability to work was proven in accordance with Rule 130.102(d)(3) is supported sufficiently by the evidence. We would further note that this was not a case where the hearing officer merely had "side by side" medical records, but also had the benefit of Dr. F's direct response to Dr. B's opinion to weigh.

We must note that each SIBS period is evaluated on its own facts, and Dr. B's last letter, at the very end of the period of review, shows that there may exist medical evidence in future qualifying periods which would change the preponderance of evidence in the eyes of the trier of fact. For these periods under review, we affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge