APPEAL NO. 000409

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 26, 2000. The issue at the CCH was whether the respondent/cross-appellant (claimant) was entitled to supplemental income benefits (SIBS) for the fifth quarter, August 27, 1999, through November 25, 1999. The hearing officer determined that the claimant is not entitled to SIBS for the fifth quarter, primarily due to the fact that she did not make a good faith search for employment commensurate with her ability to work; he did not agree that the claimant proved a total inability to work.

The claimant appeals, contending that she is entitled to SIBS for the fifth quarter because she had the inability to work. The appellant/cross-respondent (carrier) appeals, contending that the claimant's unemployment is not a direct result of her impairment, but by her own choice. The carrier responds to the appeal of the claimant by asking that the determination that she had the ability to work be affirmed.

DECISION

Affirmed.

The claimant was injured when she was employed as a receptionist by (employer). On _____, the company logo fell off the wall onto the back of her head, neck, and shoulders. The claimant has had cervical surgery and injections in her neck for pain. The qualifying period for the fifth quarter of SIBS ran from May 14 through August 12, 1999. The claimant did not look for work during that quarter because she felt pain and had not been released. She had been assigned a 24% impairment rating for her cervical injury.

Dr. O attempted to have claimant undergo a functional capacity evaluation on July 7, 1999. He stated that claimant refused to cooperate or give effort on most tasks and would not, at one point, even lift an empty box. He said that he was not able to get functional data that would be compatible with a person who was able to stand upright, walk, or get dressed. He noted that she was able to get up on and off the examining table. He noted that there was no increase in heart rate or respiratory rate while she performed limited functions (as would be observed in a pain response). Dr. O found considerable psychological overlay. It was claimant's position that she attempted to cooperate and the box she was asked to lift was weighted in the bottom.

The claimant denied that she abused alcohol or marijuana. Although tests from an emergency room admission in March 1999 were positive for marijuana and showed her to be intoxicated (alcohol), she said the marijuana test was wrong and denied she was intoxicated.

Claimant was asked if she had discussed a return to work date with her treating doctor, Dr. S, and she said that while she recalled the topic being discussed in September 1999, she had no recollection of what was said. Dr. S appears to have started taking claimant off pain medication to prevent further dependency. Some of his notes indicate that this may have happened in July 1999 (at least no further medication was prescribed). Dr. S wrote on August 10, 1999, that the source of claimant's continued pain was not discogenic. He wrote that he was going to start detoxification measures as of that visit. Dr. S noted that claimant had bilateral cervical syndrome but also psychological overlay and possible chemical dependency. Dr. S's referral for chronic pain evaluation noted that the claimant had pain extending past the usual healing time, inconsistency between medical findings and symptoms presented, functional disability out of proportion to the injury, and psychological effects which adversely impacted her ability to respond to medical treatment.

On September 9, 1999, Dr. S noted that a vocational counselor for the carrier had asked him that if claimant could participate in a few hours of school per day under a part-time Texas Rehabilitation Commission (TRC)-sponsored program, was she then capable of working light-duty reception. Dr. S said his answer was a qualified yes. However, he opined that she should not work under the influence of her medications. He noted that as of August 24th, she had significantly reduced her use of the problematic medications.

Claimant confirmed that she attended a TRC-sponsored computer skills class, but it was not full time pursuant to her TRC counselor's recommendations. She attended class for two hours a day during a month of the qualifying period. Her continuing symptoms were headache and neck pain.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) 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 [TRC] 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 hearing officer could evaluate the medical evidence presented as to whether it met the requirements of Rule 130.102(d)(3). We cannot agree that his determination that claimant had some ability to work, and that the medical evidence presented did not show a total inability to work, is against the great weight and preponderance of the evidence. The presence or absence of a release is not dispositive of total inability to work; the rule makes clear that a detailed narrative is required. Likewise, he could consider that claimant had a severe injury with lasting effects, and find that her inability to work was the direct result of her impairment. Although claimant asserts on appeal the "obvious" problems associated with detoxification, no evidence was presented of any of these problems. It appears that detoxification was not started until the very end of the period under consideration. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge