APPEAL NO. 000488

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 February 16, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 14th quarter, from November 14, 1999, through February 14, 2000. The hearing officer determined that the medical records show that claimant had some ability to work, that since he made no job searches claimant failed to make a good faith effort to obtain employment commensurate with his ability to work and therefore the claimant was not entitled to SIBs for the 14th quarter. The claimant appeals, contending that his doctors have more credibility than the respondent's (self-insured) doctors and that the hearing officer "should have the right to weigh that in making a decision." Claimant also contends that Dr. D should be considered a designated doctor pursuant to Section 408.151(b) and (c) and as such his opinion be accorded presumptive weight. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The self-insured responds, urging affirmance.

DECISION

Affirmed.

This is a "no ability to work" case. Claimant was employed as a district court bailiff and sustained a compensable injury on _____, when he was an observer at a training exercise and a vehicle veered off the training course and struck him. Claimant at the time of the accident was 67 years old. Claimant sustained a distal right clavicle fracture and numerous other injuries to his left knee, right shoulder, neck and low back. Claimant was kept in the hospital over night, released and has had extensive physical therapy. Claimant had not had any surgery. Dr. R is claimant's treating doctor.

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 impairment rating (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.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant has a 30% IR; that IIBs have not been commuted; that the qualifying period for the 14th quarter was from August 1, 1999, through October 31, 1999; that claimant had not worked or earned wages during the qualifying period; and that claimant had made no job searches.

The parties agreed that the "new" SIBs rules, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 *et seq.* (Rule 130.102 *et seq.*), effective January 31, 1999, were in effect

with regard to claimant's contention that he has a total inability to work. 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 "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." 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. 992712, decided January 18, 2000 (Unpublished). 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* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

Evidence of claimant's inability to work includes a report dated June 2, 1999, from Dr. R, where Dr. R references "diagnoses as mentioned previously," claimant's hypertension (not part of the compensable injury) "causing significant dizziness," and an inability to stand for more than 30 minutes due to "back pain due to the degenerative lumbar disc problems." Dr. R also says that claimant can only sit "for about 20 minutes [before] he begins to get neck pain and muscle spasm" related to his degenerative disc disease. Dr. R concludes:

> Therefore his combination of injuries sustained on _____ along with the medical problems of hypertension in a man being 73 years of age will prevent him from working in any significant functional capacity in my opinion.

A more comprehensive report is provided by Dr. D. Claimant contends Dr. D was a designated doctor appointed pursuant to Section 408.151 which deals with medical examinations for SIBs and provides that if a dispute exists whether the employee's medical condition allows the employee to return to work, a designated doctor, whose report has presumptive weight, would be appointed. (Section 408.151 was not effective until September 1, 1999, whereas Dr. D was appointed as a required medical examination (RME) doctor by letter dated May 4, 1999.) The self-insured disputes that Dr. D was appointed as such a designated doctor and the appointment letter, dated May 4, 1999, in evidence, is an order of the Texas Workers' Compensation Commission for a RME "[p]ursuant to Sec. 408.004 of the Texas Labor Code" for the purpose to determine claimant's ability to work and "if there is an ability, whether he can perform full duty or part-time." In a report dated June 1, 1999, Dr. D recites claimant's medical history, reviews various reports and diagnostic testing, conducts his own examination and explains that claimant's main problem deals with the "cervical and lumbar spines with concomitant degenerative joint disease and spinal stenosis." Dr. D recognizes that the degenerative cervical and lumbar spinal disease "pre-existed the work injury" but the work injury "certainly caused exacerbation of the injury." Dr. D also noted that other medical problems

unrelated to the work injury "precluded any type of formal functional capacity evaluation [FCE]." Dr. D concluded:

> In any event, I feel that I can give a reasonable medical opinion in regards to [claimant's] work ability regardless of whether he underwent FCE testing. Due to the multiple musculoskeletal problems involving the right shoulder, left knee, posterior neck and lower back I do not think that [claimant] is capable of performing any type of gainful employment. I do not think that he could even handle a part time job at a sedentary level. He cannot even tolerate the simple walking that is required since this would exacerbate his pseudoclaudication. Prolonged sitting would exacerbate his arthritic pain from the cervical and lumbar spondylosis. I simply think that he is unable to perform any type of gainful employment due to the multiple musculoskeletal problems that he has experienced which I think are directly related to the motor vehicle accident of _____. The right shoulder and left knee are mild problems but I would expect him to have difficulty performing any type of lifting activities with the right arm. The concomitant problems in both the cervical and lumbar spine, i.e., cervical spondylosis with concomitant spinal stenosis leading to pseudoclaudication in the lower extremities, has reached a point where he is unable to perform any type of sedentary to light duty activities on a constant basis.
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> Therefore in summary, I do not feel that [claimant] is capable of performing any type of work activities at the present time. This would include both full time and/or part time duties. I think that he sustained a rather severe injury from the motor vehicle accident which resulted in rapid acceleration of cervical and lumbar spondylosis with concomitant spinal stenosis as well as orthopedic problems of the left knee and right shoulder.

Evidence to the contrary is in the reports of Dr. K. In similar reports dated December 12, 1996, and July 24, 1998, Dr. K states claimant is not a surgical candidate and that claimant could "perform clerical activities" of a bailiff but would not be able to assist in arrests or restraining prisoners. The last report, dated August 26, 1999, has similar background information as the other reports and concludes:

> In regard to his ability to perform work activities, I believe the primary limiting factor here is his degenerative change in the neck and lower back that pre-exist the work related injury but is aggravated by the injury.
>
> The spinal canal stenosis would cause him problems with any work activities that required repeated bending or lifting greater than ten pounds, repetitive lifting greater than five pounds, or occasional lifting greater than ten pounds.
>
> I believe that [claimant] can drive his car, stand, walk and perform clerical activities that would be those of a bailiff. He would not be able to assist in

> arrest procedures or restraining of inmates. If this type of limited work is available for a 73-year-old individual, then I feel he would be a valuable employee.

The hearing officer, in her Statement of the Evidence, clearly references and considers Rule 130.102(d)(3); cites Appeal No. 992197, *supra* (which applies to Rule 130.102(d)(3)); and concludes:

> [B]ased on a review of all the medical evidence, I find that during the relevant qualifying period there were other records (those of [Dr. K]) that evidenced some ability to work pursuant to Rule 130.102(d)(3). Further, even Claimant's own treating doctor's letter of 06-02-99 does not specifically explain how the injury caused a total inability to work. Rather, [Dr. R] opines that, "will prevent him from working in any significant functional capacity." As noted in prior appellate decisions, the measure of a good faith effort does not equate to gainful employment, but employment commensurate with the injured worker's ability to work.
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> Thus, I must find that Claimant is not entitled to [SIBs] for the 14th subsequent quarter, because he had some ability to work, and failed to make a good faith effort to obtain employment commensurate with his ability to work.

Claimant in his appeal asserts that his doctors (Dr. R and Dr. D) "have more credibility than [Dr. K] and the hearing officer should have the right to weight [sic] that in making a decision."

Clearly, the standard of "good faith effort to obtain employment" was tightened and more specifically defined than was the case under the prior general rules. In this case, and other SIBs cases which assert a total inability to work, the requirements of the rule are factual determinations within the province of the hearing officer to resolve. In this case, the hearing officer found that Dr. K's report or reports were such other records which show that claimant is able to return to work in some capacity. 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). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Regarding claimant's contention that Dr. D's report should have presumptive weight under Section 408.151; there is no evidence that Dr. D was appointed under that section. In fact, the evidence in the appointing letter would indicate that Dr. D was appointed under Section 408.004 as an RME doctor prior to the effective date of Section 408.151 and as such the hearing officer was not obligated to give that report presumptive weight over the reports of Dr. R or Dr. K.

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:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge