APPEAL NO. 000512

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. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the third compensable quarter, from December 10, 1999, through March 9, 2000, because claimant failed to establish that she had no ability to work during the applicable qualifying period. Claimant appeals, contending that the credible medical evidence of her doctors outweighs the respondent's (carrier) medical evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responds, urging affirmance. The hearing officer's finding that claimant's unemployment was a direct result of her impairment has not been appealed and will not be addressed further. Neither party nor the hearing officer address Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)).

DECISION

Affirmed.

This is a "no ability to work" case. Claimant had been employed as a "machine operator" for a number of years and, on _____, she felt a "pop" in her neck as she was "putting up a wicket." Claimant sustained a cervical disc injury. Claimant received conservative treatment and has not had any surgery. The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement with an impairment rating (IR) of 15%; that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the third quarter was from August 27 through November 26, 1999. The parties further stipulated that claimant had no earnings and sought no employment during the qualifying period.

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 her ability to work.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was substantially tightened and was specifically addressed after January 31, 1999, in Rule 130.102(d)(3) (the version then in effect) which requires the employee (claimant) to prove three elements, namely, (1) that she is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." The hearing officer does not address Rule 130.102(d)(3), but makes a finding

that "the credible medical evidence fails to establish that Claimant had no ability to work during the qualifying period." That finding addresses the element of whether claimant was "unable to perform any type of work in any capacity" by finding the medical evidence does not support that element. 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* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

The hearing officer summarizes in some detail various medical reports and functional capacity evaluations (FCE) in evidence. Dr. T, claimant's treating medical doctor, in a number of reports, explains that claimant is "not able to work in any capacity" because of "multi-level degenerative disc and joint disease" which causes "arm pain and neck pain even at rest" and that any kind of work would aggravate that condition. *See* reports of March 17, 1999; November 17, 1999; and February 10, 2000. Dr. F, claimant's treating chiropractor, in reports dated March 30; 1999, April 20, 1999, and September 5, 1999; is of the opinion that claimant "is still permanently disabled" and is unable to return to any type of employment. In addition, an FCE performed on February 2, 2000, ordered by Dr. T finds claimant unable to work in any category. The hearing officer makes no findings whether any, all or some combination of these reports are such a narrative which specifically explains how the injury causes a total inability to work.

Carrier offers the reports of Dr. M who, in a report dated June 14, 1999, notes what he perceives to be claimant's "lack of motivation" to return to work and orders an FCE, which was performed on June 30, 1999. That FCE notes claimant is 61 years old, has "numerous subjective complaints" and "inconsistencies" and concludes that claimant has "the physical capabilities of sedentary work physical demands." The FCE lists what the examiner believes claimant's physical restrictions are. In a report dated October 12, 1999, Dr. M states claimant could do "a sedentary type job" and that her problems "are mainly a product of aging more than they are due to traumatic injury." Another FCE was performed on February 15, 2000, and both the examiner and Dr. M again concluded that claimant "could perform sedentary work if she were motivated to do so." The hearing officer makes no findings that those reports are such other records which show claimant is able to return to work.

The hearing officer's failure to address the last two elements of Rule 130.102(d)(3), namely whether Dr. T's and Dr. F's reports provide a sufficient narrative which explains a total inability to work and whether Dr. M's reports and associated FCEs are such records which show claimant is able to return to work, would normally invite a remand for specific findings on those elements. However, in this case, the hearing officer, having found that claimant had a limited ability to work, and that finding being supported by the evidence and being dispositive, we will affirm the hearing officer's decision on any theory supported by the evidence. Daylin,Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

Claimant, at the CCH, argued that she had been paid the prior two quarters of SIBs based on her total inability to work, that her condition has not changed and, therefore, she should be entitled to SIBs for the present quarter. We first note that each compensable quarter stands alone and the determinations in one quarter are not necessarily binding on subsequent quarters (Texas Workers' Compensation Commission Appeal No. 951752, decided December 8, 1995) and, second, carrier responded by saying additional medical evidence became available. We would further add that prior quarters of SIBs apparently did not consider the new requirements of Rule 130.102(d).

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:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge