APPEAL NO. 000521

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 24, 2000. (The hearing officer recited that the record would be held open for some additional medical records. An additional report, apparently added after the CCH, from Dr. P, is listed as Claimant's Exhibit No. 12.) The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 11th quarter, from September 22 through December 21, 1999. The hearing officer determined that claimant "had some ability to work" and that since claimant had made no effort to obtain employment commensurate with his abilities claimant was not entitled to SIBs for the 11th quarter. Claimant appeals, citing various medical reports that support his position and requesting that we reverse the hearing officer=s decision and render a decision in his favor. The respondent (self-insured) responds, urging affirmance. The hearing officer's finding that claimant's unemployment was a direct result of his impairment has not been appealed and will not be addressed further.

DECISION

Affirmed.

Claimant had been a driver and was involved in a motor vehicle accident where he was apparently thrown forward into the windshield. It is undisputed that claimant did not lose consciousness. The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement "with an impairment rating [IR] of 15% or greater" (apparently a 30% IR which includes 20% impairment "on a psychological/psychiatric basis" (designated doctor's report)), that impairment income benefits (IIBs) have not been commuted and that the qualifying period for the 11th quarter was from June 10 to September 8, 1999. Claimant asserts a total inability to work based on a combination of claimant's physical problems (neck and back pain) and mental problems (depression, loss of memory and other cognitive deficiencies). Most of the testimony at the CCH from Dr. H, claimant's treating doctor, and Dr. C, the self-insured's doctor, concerned whether claimant actually had a closed head injury and/or objective testing or lack thereof, regarding claimant's mental condition. Claimant was initially treated for various neck, back and shoulder complaints and was first diagnosed with a closed head injury by Dr. H in March 1994. In evidence were surveillance videotapes taken on various dates in December 1999 (after the qualifying period) showing claimant walking, sitting, standing and driving with no apparent problems. Claimant alleges a video of him at a car wash shows him to be depressed, but at the CCH he conceded that was for the hearing officer to judge. A private investigator testified that claimant was able to get around and drive normally. Claimant testified that he would drive "to overcome [his] depression."

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.

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 Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(3) (the version then in effect) 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 specifically address Rule 130.102(d)(3), but makes a finding that "[d]uring the qualifying period . . . Claimant had some ability to work." That finding addresses the element of whether claimant was "unable to perform any type of work in any capacity." 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.

Dr. H testified regarding claimant's restrictions; that claimant cannot lift more than 10 pounds; "no crawling, bending, stooping"; changing positions "about every 20 minutes" with no prolonged sitting or standing; and to be in "a protected environment." Dr. H testified that the employer would "have to be very lenient because there are going to be days when [claimant] just cannot get up and get out of bed." (Dr. H seems to attribute that condition to claimant's neck and back pain.) In a series of reports from March 31 to September 24, 1999, Dr. H comments that claimant is "completely disabled" and is placed in an "off work status." In a report dated June 16, 1999, Dr. H speculates that there are not many jobs claimant could do and concludes that claimant "continues to be totally disabled and unable to work." In other reports, Dr. G, a psychiatrist, in a report of July 29, 1997, diagnosed major depression with psychotic features, and comments that claimant "could benefit from a routine exercise program." Dr. S, another psychiatrist, in a report dated November 18, 1999, noted claimant appeared "unshaven, disheveled"; diagnosed major depressive disorder, recommended "[n]euro-psych testing, CT scan"; and commented that claimant's "deficits appear quite clear on gross examination." Neurocognitive testing was performed on January 25, 2000 (the medical evidence for which the record was left open), and Dr. P commented that claimant "had difficulty comprehending instructions"; that he has difficulty planning and organizing visual material; and that it was "difficult for him to stay on task and function in unstructured situations."

Evidence to the contrary is Dr. C's testimony that there is no objective evidence of a closed head injury, that claimant was treated some months before Dr. H first diagnosed a closed head injury and such "symptomatology" will be manifest immediately. Dr. C emphasized that based on objective evidence claimant "has the ability to function in . . . the medium work capacity as defined by the Dictionary of Occupational Titles." A functional capacity evaluation (FCE) report dated August 17, 1999, indicated that claimant "demonstrated the ability to perform work at a medium level." Dr. C agreed that an FCE does not measure mental capability. As previously mentioned, a private investigator testified that he had seen claimant seated in a pick-up for one and one-half hours without getting out of the vehicle, that claimant drove quite smoothly and normally in traffic and that claimant clearly had the ability to drive himself from one location to another.

The hearing officer, in the discussion portion of his decision, commented:

> As for his physical limitations, a[n] [FCE] was performed on the Claimant in August 1999 squarely within the relevant period, which indicted that the Claimant could perform work at a "medium" demand level. The FCE was not persuasively disputed by any medical evidence; [Dr. H's] arguments, in particular, would lead to the conclusions that no FCE has any practical value--a conclusion the Hearing Officer declines to reach here. Furthermore, it appears that some of [Dr. H's] statement [sic] as to the Claimant's physical limitations, in particular the asserted inability to drive and inability to sit for prolonged periods, were plainly erroneous: The Claimant was observed by the Self-Insured's investigator doing substantially more driving then [sic] he was allegedly able to do, and the Claimant himself sat virtually motionless for 20 to 30 minute periods during the CCH (although he did take the opportunity to stand up and stretch near the end). Regarding his mental state, the Claimant did exhibit some difficulties at the hearing during his testimony, but overall was able to testify adequately to the events of some 4-6 months past--not hesitating, for example, to recall the names of the medications he was taking at that time. The totality of the evidence, in short, fails to sustain the Claimant's burden to show that he was totally unable to work during the relevant filing period. As the Claimant conceded that he made no effort during that period to find any employment, his case must fail here.

Claimant, on appeal, asserts that the FCE does not account for mental deficits and "*that three psychiatrists and a licensed psychologist* all found claimant's mental difficulties substantial or severe." (Emphasis in the original.) Claimant referenced Dr. P's report and commented regarding the hearing officer's discounting of claimant's mental difficulties as affecting his ability to work. As indicated previously, and in Texas Workers' Compensation Commission Appeal No. 992595, decided January 3, 2000, Rule 130.102(d)(3) is the standard by which we review the entitlement to SIBs on a total inability to work basis to meet the statutory good faith effort requirement after January 31, 1999.

Although the hearing officer failed to address the last two elements of Rule 130.102(d)(3), which in some circumstances would invite a remand, in this case, the hearing officer, having found that claimant "had some ability to work," and that finding being supported by the evidence and being dispositive (the claimant having the burden of proving all three elements of Rule 130.102(d)(3)), we will affirm the hearing officer's decision.

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:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge