APPEAL NO. 000553

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 February 15, 2000. The issue at the hearing was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the fifth quarter, from November 19, 1999, through February 17, 2000. The hearing officer determined that the claimant was not entitled to SIBs for the fifth quarter. In her appeal, the claimant æsserts error in the hearing officer's determination that she is not entitled to fifth quarter SIBs and asks that we reverse and render a decision in her favor. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the fifth quarter of SIBs ran from November 19, 1999, to February 17, 2000; that the qualifying period for the fifth quarter ran from August 7 to November 5, 1999; and that the claimant was unemployed and did not seek employment during the qualifying period for the fifth quarter of SIBs. In a "To Whom it May Concern" letter dated May 28, 1999, Dr. FG recommended a laminectomy, discectomy, and fusion at L5-S1, noting that "further conservative management would probably not work." In an off-work slip also dated May 28, 1999, Dr. FG checked the box stating that the claimant could not return to regular duties until "unknown." On June 1, 1999, Dr. FG apparently faxed a Recommendation for Spinal Surgery (TWCC-63) to the Texas Workers' Compensation Commission (Commission); however, for some reason the spinal surgery second opinion process was not initiated at this time.

In an undated "To Whom it May Concern" letter, Dr. D, one of the claimant's treating doctors, noted that Dr. FG had recommended spinal surgery for the claimant; expressed his agreement with the proposed surgery because conservative treatment had not resolved the claimant's back problems; and stated that "[u]ntil she receives surgery, I do not anticipated [sic] her return to the work force anytime in the near future." In an August 31, 1999, Specific and Subsequent Medical Report (TWCC-64), Dr. B, another of the claimant's treating doctors, stated that carrier "insists she go back to work. We do not think she is ready. We believe she needs surgery."

On July 15, 1999, Dr. C, examined the claimant at the request of the carrier. In his July 21, 1999, report, Dr. C stated that he saw "no reason for operating on [claimant] and would not approve it on a second opinion." In addition, Dr. C opined that the claimant could return to a light-duty job. Dr. L examined the claimant as the carrier's spinal surgery second opinion doctor. In his October 21, 1999, report, Dr. L did not concur in the spinal surgery proposed by Dr. FG.

Dr. DG examined the claimant as her choice of spinal surgery second opinion doctor. In his November 22, 1999, report, Dr. DG concurred in the surgery proposed by Dr. FG. In his report, Dr. DG noted that the claimant "has failed conservative care and has been unable to work due to the amount of pain she is experiencing."

On January 28, 2000, another hearing officer with the Commission determined that the carrier was liable for the cost of spinal surgery despite the fact that the claimant did not notify the Medical Review Division of her selection of a second opinion doctor within the 14-day period provided for doing so in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(h)(7)(C) (Rule 133.206(h)(7)(C)). The hearing officer in that case found that "[e]xtenuating circumstances exist for the Commission to order payment for surgery by the Carrier." In Texas Workers' Compensation Commission Appeal No. 000349, decided March 31, 2000, the Appeals Panel reversed that decision and rendered a new decision that the carrier was not liable for the cost of spinal surgery because the spinal surgery file was closed after the claimant's noncompliance with Rule 133.206(h)(7)(C).

The claimant contended that she had no ability to work in the qualifying period for the fifth quarter of SIBs because spinal surgery was "pending" during the qualifying period. The claimant cited several Appeals Panel decisions which stood for the proposition that where surgery was pending and a recuperative period would follow, the claimant should not be put through a meaningless job search exercise. It is important to note that those cases were decided before the effective date of the "new" SIBs rules and before the term "good faith" was defined. However, the claimant's entitlement to fifth quarter SIBs is to be determined under the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. Rule 130.102(d) now defines good faith and it does not provide for a claimant being excused from making a job search because of a pending surgery and recuperation period. Rather, it appears that in order to be excused from the job search requirement, the claimant must prove total inability to work by satisfying the requirements of Rule 130.102(d). Accordingly, the continued vitality of the cases cited by the claimant is questionable. The version of Rule 130.102(d)(3) applicable to this case 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 hearing officer determined that the claimant did not sustain her burden of proving that she had no ability to work in the qualifying period for the fifth quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. The hearing officer was not persuaded by the evidence indicating that the claimant had no ability to work in the relevant qualifying period. The hearing officer was acting within his province as the sole judge of the weight and credibility of the evidence in so evaluating the evidence. Our review of the record does not reveal that his determination in that regard is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal.

Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The claimant stipulated that she did not look for work in the qualifying period. Accordingly, the hearing officer properly determined that the claimant is not entitled to SIBs for the fifth quarter.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge