APPEAL NO. 000558

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 17, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fifth quarter. The hearing officer determined that the claimant was entitled to SIBs for the fifth quarter. The appellant (carrier) appeals, requesting that we reverse the hearing officer=s decision and render a decision in its favor. The carrier asserts that the hearing officer merely weighed evidence of inability to work against those records showing ability and that this is not the proper standard under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)). The carrier argues that because other records showed that the claimant had the ability to work during the qualifying period, he is not entitled to SIBs. There is no response from the claimant in the appeals file.

DECISION

Affirmed.

The claimant previously worked as a baggage handler for (employer) and fractured his right ankle on _____; he had several surgeries and has developed reflex sympathetic dystrophy (RSD) in the extremity as well. Although pain complaints in other regions of his body are noted (knees, hips, and back), the actual additional injuries for which he has been treated include only psychological problems. The claimant's treating doctor is a podiatrist, Dr. W, by whom his wife was one time employed. Medical records note that the claimant has gained nearly 100 pounds since the date of his accident. The claimant had a dorsal column stimulator implanted in February 1998 for pain relief. The claimant was assigned a 27% impairment rating (IR) by a designated doctor for right extremity and psychological impairment.

The qualifying period under review ran from August 27 through November 25, 1999. The claimant testified he had received SIBs for the previous four quarters. He did not seek any employment during the qualifying period. The claimant said that he took several drugs for pain relief, including morphine, which made him drowsy and dizzy. The claimant asserted he could not return to work in any capacity, that he could not drive due to his medication, and that he needed to keep his leg elevated. He said that he also has "attacks: of RSD which he has no way of anticipating.@ He maintained that he had been injured further in a January 1999 functional capacity evaluation (FCE), which caused him to be more cautious when he went through another FCE on October 19, 1999. The claimant said that he did not engage in activities on the second FCE which he believed would lead to further injury and that this is likely why the examiner stated that he did not give maximal effort.

The claimant was asked if he could drive during the qualifying period. At first, he testified that he could not remember, but he thought he was driving. He said that he was not on

such heavy medication then as at the time of the CCH. He then amended his testimony to say he had not driven in two years, not so much because of his injury as his medication.

Dr. W testified at the CCH. He said that he would refer the claimant to other doctors for conditions that were not part of his specialty. Dr. W said that the claimant's condition had deteriorated since his initial injury. Asked why he believed that the claimant could not have worked in any capacity since August 1999, Dr. W identified the primary reason as the claimant's medication, as well as decreased mobility due to his injuries. Dr. W expressly said that work would put the claimant in jeopardy of injury "in terms of manual lifting and manual tasks." He said that the claimant could not physically function in a job like he had before or one where he would be climbing or standing for long periods of time. Dr. W also felt that if a job involved decision making, the claimant could not do it because of medications. He also identified RSD as a reason that the claimant could not work.

Dr. W was asked what he thought that the claimant could do. He said that the claimant could sit for periods of time although he would need to shift position (30 minutes to an hour). He said that the claimant could walk maybe 50 yards. The claimant could also lift up to five pounds, although not repetitively. He said that the claimant was on an "as needed" basis for many pain medications.

Both the claimant and Dr. W assailed the examination performed by Dr. S, the carrier-appointed doctor. Dr. W attended the examination, although he did not attend the related FCE. The claimant and Dr. W said that Dr. S's examination lasted perhaps 15 minutes and that he did not do a full-body examination. Dr. W said he disagreed with Dr. S that RSD was a temporary condition. Dr. W was not specifically asked as to the extent to which he felt that the claimant could work any part-time tasks, given some of the physical capabilities outlined by Dr. W.

The claimant presented over 90 exhibits, including many before and after the period under review. We will briefly summarize that which is pertinent to the time period under review here.

> January 14, 1998: Claimant was treated for severe depression, related to loss of self-esteem associated with working and with pain.
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> June 6, 1999: Dr. W supplies a narrative with the fourth quarter SIBs application. This report identifies a surgery performed on May 7, 1999, as a result of injury during the January FCE. He reported that objective findings were gross joint structure motion and moderate to severe pain present, with swelling and pain upon any ambulation. Claimant had severe pain in both knees. Dr. W recommended a motorized scooter. Dr. W identified claimant's deteriorating physical condition, including chronic pain, and numerous narcotic medications, as preventing him from being released to any type of work.

August 20, 1999: Dr. W's report notes that claimant has instability during static stance and that he needed a more stable brace. Claimant had isolated pain on palpation of the right ankle. He had some deterioration in muscular strength, primarily on the right.

August 30, 1999: In a letter to the carrier, Dr. W opined that ambulation had caused some progressive deterioration in claimant's back and hip. He noted that carrier had previously denied treatment for the claimant's knees as unrelated to his injury.

September 16, 1999: Claimant was examined by Dr. C, an orthopedic specialist. Dr. C found that claimant=s range of motion (ROM) in his ankle was "surprisingly high," up to 80% of normal. He was found not to have a great deal of atrophy. Dr. C noted that some of claimant's pain appeared to be neurogenic, as well as mechanical, but it was difficult to pinpoint how much was attributed to either. He found that claimant was too dependent upon opiates, and recommended that he lose 100 pounds and wean himself off opiates before further surgery (including total ankle replacement) was considered. Dr. C said that claimant "must" get in an exercise program, which he opined would likely be limited to pool exercises.

September 23, 1999: Dr. H examined claimant and found problems with both knees. He opined that, purely on the history that had been given to him, there was a causal connection to the right ankle injury.

October 29, 1999 FCE. Claimant was noted to have self-limited himself in various areas of the test. The narrative of the test has attached schedules which rate various discrete physical functions in terms of the percentage of an eight-hour day that claimant could sustain these activities. For example, he is shown to be able to carry up to ten pounds but only for up to five percent of the eight-hour day. The evaluator noted that claimant rated his ability to drive at that time as "fair."

November 1, 1999: Another doctor in Dr. W's clinic saw claimant on an emergency basis, for increased pain he said was due to the FCE. Although severe pain was noted radiating up to the back, claimant's neurological examination was normal. Most pain was noted to be across the dorsum of claimant's foot. The doctor found no evidence of torn ligaments of a new injury as opposed to an old injury. There was limited ROM and crepitation in the right ankle joint. Rest and elevation of the right extremity was recommended.

December 2, 1999: Dr. W filed another narrative with the fifth quarter application. He noted that claimant was last seen at his clinic on the November

1, 1999, emergency visit. This letter also questioned the conclusions made by Dr. S; the inadequacy of the examination itself was not raised in this letter. Dr. W repeated his contention that the claimant had no ability to work or even to seek retraining.

January 17, 2000: Notes from the pain clinic where claimant was treated showed that he was given a mental status evaluation and that his medication for depression and anxiety was adjusted.

Dr. S's October 29, 1999, report noted that the claimant weighed 325 pounds on that date. He noted that the claimant's problems would not be completely corrected with surgical intervention. He concurred with Dr. C's opinion that the claimant should wean himself from narcotics and lose weight. He noted that state board requirements, also governing podiatrists, stipulated that an individual must be socially functioning with a return to work in order for narcotic medication to continue. He questioned that there was any psychiatric component to the claimant's injury. He further stated that any psychological component related to matters other than the injury would be temporary in nature. Dr. S reviewed the FCE and concluded that the claimant could return to light-duty work. He recommended office work which would minimize walking and standing. Dr. S stated that the feeling of pride that the claimant would have from bringing home a paycheck would be what the claimant needed to turn his situation around. On December 6, 1999, Dr. S wrote to the adjuster in response to her apparent request to clarify the extent of the claimant's injury. To greatly summarize, Dr. S made it clear that he believed that the claimant's psychosocial condition was "unrelated." Although Dr. S was furnished a copy of the designated doctor's IR, he undertook to do his own IR.

The report of the January 1999 FCE in evidence showed that the claimant's abilities to lift or sit were less than on the October 1999 FCE. The evaluator on the January FCE stated that the claimant was unable to work, notwithstanding that he had some limited functioning ability.

It is worth commenting that the claimant has filed several letters (which are in evidence) that are well-written, organized, and articulate, including a rebuttal to Dr. S's conclusions.

The legislature has required that, as a condition of receiving SIBs, the injured worker should make a good faith search for employment commensurate with his or her ability to work. Where there is a total inability to work, in certain rare circumstances, no search may be equivalent to a search commensurate with ability to work. We have held that the burden of establishing no ability to work at all is Afirmly on the claimant,@ Texas Workers= Compensation Commission Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers= Compensation Commission

Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers= Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be Ajudged against employment generally, not just the previous job where injury occurred.@ Texas Workers= Compensation Commission Appeal No. 941334, decided November 18, 1994. Because the SIBs statute provides for compensation in the case of "underemployment," as well as unemployment, the good faith search requirement need not, in every case, be directed toward finding full-time employment if it is part-time work that is commensurate with the injured employee's ability to work.

The Texas Workers= Compensation Commission passed rules, effective for the period under consideration here, that more specifically delineate SIBs entitlement and define good faith. Rule 130.102(d)(3) relates to the case under consideration:

> 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:
>
> (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[.]

We cannot endorse the hearing officer's global determination that "the records" of Dr. W's, which are not identified in her decision so that they may be meaningfully reviewed, satisfy the requirements in the rule of "a narrative report." We do believe, however, that live testimony from a doctor can satisfy the requirements of a narrative, especially if supported by medical reports. In this case, we can affirm the hearing officer's determination that there was a narrative report through the June 6, 1999, narrative of Dr. W, combined with his testimony that the claimant has, if anything, deteriorated from that point and was not able to work, in any capacity, during the qualifying period. The hearing officer was left to infer that the claimant's reactions to prescription medications would preclude even part-time work, especially as Dr. W was not otherwise asked to address this.

Thus, it remains to determine if the hearing officer's further finding that there were no other medical records which "show" that the injured employee could return to work is sufficiently supported. We agree that such contrary records must not merely state a physical functioning capability, but must show that the claimant "is able to return to work" and must consider the psychological sequelae of an injury. Texas Workers' Compensation Commission Appeal No. 000154, decided March 9, 2000. While we believe that the hearing officer has misinterpreted the FCE because it, in fact, assessed the ability of the claimant with reference to an eight-hour day in the charts that are attached to the narrative portion of the FCE, we cannot agree that this necessitates a reversal and remand. The main reason is that it was Dr. S who used the FCE results and his understanding of the scope of the injury to state that the claimant had a light-

duty ability to work. Dr. S's letters in evidence make it clear that he did not consider the psychological condition, expressly part of the claimant's IR, as part of his injury. Thus, the hearing officer's according of less credibility to Dr. S's report as "showing" an ability to return to work is supported in the record. We, therefore, affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge