APPEAL NO. 000638

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 March 8, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth and fifth quarters. He stated that she had the inability to work for both quarters, that her unemployment did not result from her voluntary retirement but that her impairment remained a factor, and that a functional capacity evaluation (FCE) did not "show" that claimant had the ability to work. The hearing officer further stated that he understood "show" as used in Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) to mean "prove."

The appellant (carrier) appeals, arguing that claimant did not have the inability to work, that the FCE showed a sedentary ability, and that claimant was, therefore, required to look for work. As claimant did not look for work, the good faith search for employment requirement was not met. The carrier further argues that voluntary retirement of the claimant, who was 65 years old during the time periods under review, precludes her injury in this case from directly resulting in her unemployment. The appeals file contains no response from the claimant.

DECISION

We affirm based upon our standard of review.

The claimant was employed for 38 years in an orthopedic physician's clinic Dr. C, and hurt her back on _____, while lifting a patient. The claimant had back surgery on June 6, 1996, which made her better for a while but she had since gotten progressively worse. Claimant had fallen several times when her left leg, which continued to be affected, gave out on her. She said that she understood that the carrier also paid for treatment of these additional injuries.

The qualifying periods in issue were found to run from May 2 to August 20, 1999, and from August 20 through November 18, 1999. The claimant said her treating doctor was Dr. W, who prescribed medication for pain relief. She saw him in August and December of 1999. The claimant said she did not believe she could work, and she could not sit or stand for very long. She said she mainly laid down with a heating pad or watched television, and that her mother-in-law lived in her home and did all of the housework and cooking. However, she could take care of her personal care needs.

The claimant had also had surgery for lung cancer in 1997 followed by 13 weeks of chemotherapy and radiation treatments. The claimant said that a chemical she took during this time helped her back tremendously. However, the dates of her chemotherapy were not established. The claimant said the FCE that she underwent on November 9, 1999, right at the end of the fifth quarter qualifying period, lasted four hours, and she could not do many of the things she was asked to do. The report's recommendation states no level at which her overall

performance is rated, but states that she would need considerable accommodation to return to work. This report noted also that claimant considered herself retired. To the extent that it contains a statement that claimant can perform at a sedentary level, this observation is made only with respect to lifting. The claimant was also observed to be capable of "no" activities on a frequent basis. The claimant had the maximum Waddell's score for symptom magnification. The FCE report also noted that claimant considered herself retired.

She was examined by a doctor appointed by the Texas Workers' Compensation Commission, Dr. D, after her FCE, and he told her she would never be able to work. Dr. D's report did not interpret the FCE report as consistent with a sedentary work level; rather, he stated that he did not think she had any ability to work from May 21, 1999, to the date of his November 15, 1999, examination. He sets out at length his observations that underlie his conclusions. To very briefly summarize other medical evidence, there are other opinions in the record from Dr. W (January 1999) and another referral doctor, Dr. CP, relevant to the periods under review, that share this conclusion.

The claimant testified that she had begun to draw Social Security retirement benefits when she was 62. She said that her original intent (prior to her injury) had been to retire at 65 to get greater benefits. She turned 66 the week prior to the CCH. She said that she would have continued working until Dr. C retired.

Dr. C testified for claimant, and expressed some concern about the fact that he felt claimant had gotten the "runaround" although she was obviously disabled. He had been an orthopedic surgeon for 40 years. Based upon talking with claimant and her treating doctors, Dr. W and Dr. M, he opined that she was totally unable to work in a capacity similar to what she had done before, and, further, that she could not even work on a sedentary basis.

Rule 130.102(d)(3) defines good faith as follows:

> (d) 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[.]

In reviewing the evidence, we agree that there is sufficient support for the hearing officer's finding that claimant had presented narratives which specifically explained how her injury caused a total inability to work.

In this case, we agree that the FCE does not "show," or even "say," that the claimant's overall level of ability to work is sedentary. It shows that she could not even perform many of the tasks requested. The FCE report uses the word "sedentary" in connection with one component activity of her overall functional capacity. We cannot agree that this is tantamount to a demonstration that claimant had an overall sedentary ability to work, nor was it so interpreted by Dr. D. We therefore agree that there is sufficient support for the hearing officer's determination that for the periods under review there were no other records which showed an ability to work.

Having said that, we must nevertheless expressly state that we cannot agree with the hearing officer's analysis that "show," as used in Rule 130.102(d)(3), means "prove." The definition in Black's Law Dictionary, 6th ed., 1990, is not the "common meaning" of the word "show." Had the FCE in question evaluated the claimant's overall demonstrated abilities, rather than certain functions in isolation, a further insistence that it also "prove" her ability would not be well-taken. Webster's Collegiate Dictionary, 10th ed., 1997, defines "show" in such terms: "To give indication or records of . . . to point out . . . to set forth, declare . . . to present . . . to demonstrate or establish by argument or reasoning . . ." and it is clear that the word is commonly understood in a manner that need not meet a further preponderance standard that the word "prove" connotes.

Of greater concern in this case is that the hearing officer concluded that the claimant had intended to retire when Dr. C retired; claimant's own testimony was that she had intended to retire at 65. These events occurred before the qualifying period in question. It can be argued, under these circumstances, that she is merely where she intended to be all along with respect to her availability for work.

However, SIBs is not based upon hypothetical facts, but the facts as they have occurred. The "best laid plans" did not come to pass, and the claimant, in fact, retired early at 62 due to her injury. She had no ability to work during the qualifying period, due to a severe injury with lasting effects. We cannot agree that retirement (or, for that matter, her other medical problems) override the effect of her injury for the periods in issue. The hearing officer's finding that the injury remained a factor in her unemployment is sufficiently based on the record. We note that the hearing officer indicated that claimant's situation was different from one in which a worker has some ability to work, but remains "retired."

For the reasons cited above, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge