APPEAL NO. 000639

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 March 2, 2000. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 11th quarter. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant had no ability to work in the qualifying period for the 11th quarter, that the claimant's unemployment in the qualifying period was a direct result of his impairment, and that he is entitled to 11th quarter SIBs are against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable lumbar and cervical spine injury on _____; that the claimant reached maximum medical improvement on July 16, 1996, with an impairment rating of 16%; that he did not commute his impairment income benefits; that the 11th quarter of SIBs ran from December 15, 1999, to March 15, 2000; and that the qualifying period for the 11th quarter of SIBs ran from September 2 to December 1, 1999. The claimant testified that he has severe unrelenting back pain and that he did not look for work in the qualifying period because he was not physically able to work. He stated that his treating doctors are Dr. F and Dr. G, a neurosurgeon who performed anterior fusion surgery at L4-5 and L5-S1 on August 7, 1997.

In a March 17, 1999, "To Whom it May Concern" letter, Dr. F addressed the issue of the claimant's ability to work, as follows:

> The problem is this man has done hard work all his life. He has done electrical type work, he has done construction type work, he has trained horses, et cetera. He is not able to do any of that now. He has trouble sitting for long periods of time, trouble standing, has to change positions frequently. His surgeon, [Dr. G], does not feel that he is capable of carrying out any gainful employment at this time. He believes it is permanent. I believe that he is not capable of carrying out gainful employment at this time. I do not know whether it is permanent or not, but I know that it can be expected to last for probably longer than an additional twelve month period. I would consider him disabled totally during this time.

In a September 2, 1999, letter, Dr. G noted that the claimant had a lumbar L4-5 fusion and that he continues to have chronic pain. He concluded that the claimant "continues to be completely and totally disabled at this time." In a November 22, 1999, progress report, Dr. G stated that the claimant is developing increasing pain in the back and into the legs and that he is also

getting "more depressed and there are times when he will burst out into tears for no reason." Dr. G recommended a myelogram and post myelogram CT "to evaluate disc replacement devices, pressure on nerves, and possibility of nonunion." In a November 23, 1999, letter, Dr. G stated that the claimant is "still disabled, unable to return to work in my opinion." In a December 27, 1999, progress report, Dr. G stated that the myelogram and post myelogram CT revealed possible nonunion of the fusion at L5-S1. Thus, he recommended that the claimant undergo a posterior lateral fusion at L5-S1. In a December 28, 1999, letter Dr. G stated:

> I do not believe that [claimant] can return to work at the current time because of the following reasons:
>
> 1. He has post laminectomy syndrome with the objective findings of severe paraspinous spasm and positive straight leg raising. On exam, further objective findings are of a potential nonunion at L5-S1.
>
> 2. Finally, he has evidence of post fusion syndrome with paraspinous spasm, stiffness, and significant pain.
>
> Because of his pain, [claimant] is unable to walk successfully more than 200 yards without having to rest. He is having to take pain medications during the day that would further impair his ability to work. It is my medical opinion that he is disabled, unable to work as a result of his work related injury. In fact, we are recommending further surgery at the posterior fusion at the L5-S1 level for treatment of his nonunion.

On August 13, 1999, Dr. S examined the claimant at the request of the carrier for the purposes of providing an opinion on the claimant's ability to work. Dr. S referred the claimant for a functional capacity evaluation (FCE). The claimant underwent the FCE testing on August 13, 1999. The FCE report states that the claimant had "exaggerated pain behaviors" and that "inconsistencies were observed with trunk range of motion, squatting ability, pushing and pulling abilities, and lifting ability." The FCE report concluded "[a]ccording to the results of the functional capacity testing today, [claimant] would have difficulty even performing sedentary work physical demands secondary to pain complaints." In an August 23, 1999, addendum to his August 13, 1999, report, Dr. S noted that the FCE results "revealed many inconsistencies, and documentation of exaggerated pain behaviors and symptom magnification" and opined that the claimant could return to work "immediately" at a light- to medium-duty level. In a letter dated February 4, 2000, Dr. G stated that he is in disagreement with Dr. S's assessment that the claimant can return to work. Specifically, Dr. G stated:

> [Dr. S], who is not a neurosurgeon, felt that no further neurosurgery is warranted. I am in complete disagreement with [Dr. S]; and in fact we have filed a TWCC-

63 [Recommendation for Spinal Surgery] because we recommend further surgery for him. There is no question in my mind that [claimant] is disabled and unable to return to work at this time.

The claimant's entitlement to SIBs for the 11th quarter is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)), applicable to this case, provides that an injured employee has made a good faith effort to look for work 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." We have recognized that the question of whether another record "shows" an ability to work is a question of fact for the hearing officer, as the fact finder and the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000; Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000; and Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000. Those cases have emphasized that the question of whether a record "shows" an ability to work is a different question than the question of whether the record states that the claimant has some ability to work.

The hearing officer determined that the claimant sustained his burden of proving that he had no ability to work in the qualifying period for the 11th quarter. The hearing officer was persuaded that the evidence from Dr. F and Dr. G concerning the claimant's inability to work provided sufficient explanation as to how the claimant's injury caused a total inability to work. Dr. S's report states that the claimant can work in a light to medium capacity. However, the mere existence of that report does not resolve the issue of whether the claimant is entitled to SIBs for the quarter at issue under Rule 130.102(d)(3). Rather, the hearing officer, as the fact finder, had to determine if he was persuaded that Dr. S's report "shows" that the claimant had some ability to work in the relevant qualifying periods. The hearing officer was acting within his province as the sole judge of the weight and credibility of the evidence under Section 410.165 in deciding to reject the evidence from Dr. S and in finding that the claimant had no ability to work in the qualifying period for the 11th quarter. Our review of the record does not reveal that the hearing officer's determination that the claimant had no ability to work in the qualifying period for the 11th quarter is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination 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 carrier also asserts that the hearing officer erred in finding that the claimant's unemployment in the qualifying period for the 11th quarter was a direct result of his

impairment. We find no merit in this assertion. Having affirmed that the claimant had no ability to work as a result of his compensable injury it is apparent that "the impairment from the compensable injury is a cause of the reduced earnings." *See* Rule 130.102(c).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge