APPEAL NO. 000647

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 28, 2000. With respect to the only issue before him, the hearing officer determined that the appellant (claimant) had some ability to work at a sedentary or light job and that because claimant made no effort to find employment during the "filing" (qualifying) quarter, the claimant was not entitled to supplemental income benefits (SIBs) for the first compensable quarter. The claimant appeals, contending that she had not been released to work and that she met the requirements of Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)). Claimant requests that we reverse the hearing officer=s decision and render a decision in her favor. The respondent (carrier) responds, urging affirmance. The hearing officer=s decision that claimant=s unemployment was a direct result of her impairment has not been appealed and will not be discussed further.

DECISION

Affirmed.

Claimant had been employed as a cook supervisor and on _____, sustained a compensable injury during an incident involving a coworker where claimant fell out of her chair onto her right side, injuring her right side and right arm. Claimant apparently had surgery in September 1998 for a carpal tunnel release and may have later developed reflex sympathetic dystrophy. Claimant did not seek any employment during the qualifying period and asserts entitlement to SIBs on a total inability to work theory.

It is undisputed that claimant sustained a compensable injury on _____. The parties stipulated that claimant has a 21% impairment rating (IR), that impairment income benefits (IIBs) have not been commuted and that the first compensable quarter was from December 7, 1999, through March 6, 2000. The parties appear to agree that the qualifying period for the first quarter was from August 25 through November 23, 1999.

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 her ability to work.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was defined and specifically addressed after January 31, 1999, in Rule

130.102(d). Rule 130.102(d)(3) (the version then in effect[1]) 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 the following findings:

FINDINGS OF FACT

6. Claimant made no efforts to find employment during the filing period for the first compensable quarter.

7. Claimant had some ability to work a sedentary or light job during the filing period for the first compensable quarter.

8. Claimant can work to some extent with her right hand, can use her left hand normally and can drive a motor vehicle and sit for at least one hour.

9. Claimant did not look for work each and every week of the filing period.

10. Claimant did not make a good faith effort to obtain employment commensurate with her ability to work during the filing period for the first compensable quarter.

Claimant testified that although she could not use her right arm, she could use her left arm (although it was awkward to do so), that she could drive and that she could sit for periods of time. In a note attached to a November 23, 1999, report, Dr. D, claimant=s treating doctor, wrote "It is in my opinion that [claimant] is unable to obtain or retain employment at this time secondary to severe pain in her upper extremity and headache." We observe the "obtain and retain" standard is for "disability" as defined in Section 401.011(16) and is not the standard for SIBs. In a report dated December 21, 1999, Dr. D says claimant is "unable to work because of her constant unrelenting pain of her right upper extremity." Dr. Y, claimant=s surgeon, in a report dated January 6, 2000, stated that claimant was "unable to work regular duty" or "light duty either" and that claimant=s symptoms "are clearly and significantly functionally disabling." Dr. V, claimant=s current treating doctor, in a note dated January 10, 2000, comments that claimant "currently has no skills that she can use one handed and in pain could not even be a door greeter." However, in that same note Dr. V recommends "a release for sedentary work so that she may undergo job retraining by TRC [Texas Rehabilitation Commission]." On a

[1]Rule 130.102(d) was amended, effective November 28, 1999, by the addition of a subsection and, consequently, Rule 130.102(d)(3) was renumbered as Rule 130.102(d)(4) after November 28, 1999.

form dated February 10, 2000, Dr. V remarks "unable to work and restricted from all work as of 2-10-00." (Emphasis in the original.)

Medical evidence to the contrary includes a functional capacity evaluation (FCE) dated September 30, 1999, which concludes that claimant is limited to sedentary work and may need some retraining. In a note dated December 21, 1999, Dr. D referenced the FCE and a report by Dr. E, which opined that claimant could do sedentary work.

The hearing officer did not address the last two elements of Rule 130.102(d)(3) (whether there is a narrative from a doctor which specifically explains how the injury causes a total inability to work and whether other records show an ability to return to work); however, he did find that claimant had some ability to work a sedentary or light job and those findings are 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:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge