APPEAL NO. 000659

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 10, 2000. The appellant (carrier) and the respondent (claimant) stipulated that the 9th quarter for supplemental income benefits (SIBs) began on August 5, 1999, and ended on November 3, 1999; that the 10th quarter began on November 4, 1999, and ended on February 2, 2000; and the 11th quarter began on February 3, 2000, and would end on May 3, 2000. Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.101(4) (Rule 130.101(4)) provides that the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. The hearing officer determined that the claimant=s unemployment during the qualifying periods for the 9th, 10th, and 11th quarters was a direct result of the impairment from his compensable injury. Those determinations have not been appealed and have become final. The hearing officer also found that during the qualifying periods for those quarters the claimant was Atotally unable to work@ and made a good faith effort to obtain employment commensurate with his ability to work and concluded that the claimant is entitled to SIBs for the 9th, 10th, and 11th quarters. The carrier appealed; contended that the hearing officer did not properly apply the provisions of Rule 130.102(d)(4); urged that the hearing officer=s determinations that the claimant was Atotally unable to work@ during the qualifying periods are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the 9th, 10th, and 11th quarters. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that he injured his low back, that Dr. D performed surgery, that the surgery was not successful, that about three years and two months ago he did not want additional surgery, that his condition has become worse, that now he wants surgery, that he receives help with daily living activities, that he takes a lot of pain medication, and that the pain is the "big" reason he cannot work. The claimant said that most of his prior work experience involved labor, but that he had been an automobile salesman.

A report of a functional capacity evaluation (FCE) dated December 31, 1998, contains the following assessment:

> Most of his limitations in the clinic were due to poor Positional Tolerances. No greater capability could be inferred into the Frequent and constant categories. His strength has ranked him only into the Sedentary category, indicating that he is only capable of lifting 10 pounds occasionally. Even though his strength has rated him in the Sedentary category, I tend to believe that this gentleman is unemployable at this time due to his lack of positional tolerances. It will be very

> hard to obtain a job that will allow frequent unscheduled breaks to lie down and relieve his muscle complaints, only a typical 81/2 -minute sitting time, 5 and 9 -minute standing time.

In a form dated April 19, 1999, Dr. F, the claimant=s treating doctor, checked that the claimant was still unable to return to work and wrote Apatient is totally disabled.@ An office visit note from Dr. F dated May 19, 1999, contains:

> Although, he is a candidate for another redo surgery on decompressed nerve root, he has elected over the years not to do that because of the multiple surgeries he has already had. I refilled his Abien, Paxil, Xanax and Parafon Forte DSC. We have changed Tylenol 4's to Talwin NX at his request. I have been asked to address his work status. An FCE in December showed him capable of sedentary work. Although this is a valid test, Ive felt that he is incapable of returning to any kind of gainful employment and for multiple reasons. Firstly, he presents with significant and ongoing pain, but in addition also takes multiple medications to manage his pain condition. This too, in my opinion, renders him incapable of holding down any kind of job. Because of the pain complaints and the presentation today, we have gone ahead and given him a Celestone/Toradol injection to the left upper quadrant of his buttocks.

In a note dated September 22, 1999, Dr. F stated that the claimant had a lot of back and leg pain and that x-rays showed fairly significant degenerative changes with almost total collapse of the L5-S1 and L4-5 disc spaces. On October 20, 1999, Dr. F wrote that he refilled the claimant=s medications, that the claimant remained at no work status, and that he did not anticipate any type of return to gainful employment based on his overall presentation. In a note dated November 22, 1999, Dr. F said that the claimant reported that his pain was so bad that if surgery was an option, he would consider it.

The Texas Workers= Compensation Commission (Commission) appointed Dr. A as a designated doctor under the provisions of Rule 130.110. Dr. A had an FCE performed. A letter dated January 24, 2000, forwarding the report of the FCE to Dr. A states that the claimant was not able to work on that day and that additional medical intervention appeared to be necessary before the claimant Awill be feasible for employment. In a letter dated January 13, 2000,[1] that was received by the Commission on January 27, 2000, Dr. A wrote:

> Based on examination, review of records and the FCE report I find no conclusive evidence which would indicate that [claimant=s] medical condition has improved sufficiently to allow him to return to work. Although [claimant] was

[1]The date does not appear to be correct.

able to drive to this office an approximate 4-5 mile distance, I am not sure he could drive or commute to work on a consistent basis and then handle the demands of a job. The fact that the precious FCE indicated he was able to lift 10 lbs. occasionally does not in my opinion qualify [claimant] for full time work as I do not think he could perform this activity in such a manner as would be sufficient to meet job demands.

At the request of the carrier, Dr. T reviewed the records of the claimant, but did not examine him. In a letter dated November 1, 1999, Dr. T stated that the records did not indicate that the claimant complained about daily living activities and that based on that he could perform light duty. He also said that the records for 1997, 1998, and 1999, did not indicate an FCE and he recommended one.

The Decision and Order of the hearing officer contains findings of fact that would lead to a conclusion that Dr. A was not properly appointed as a designated doctor under the provisions of Rule 130.110. In addition, that rule provides that presumptive weight is afforded the designated doctor=s report beginning the date the report is received by the Commission. The report of Dr. A was received after the close of the qualifying period for the 11th quarter.

Rule 130.102(d) provides in part:

(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:

* * * *

(4)[2] 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; or[.]

The hearing officer made a finding of fact that A[t]he Claimant was >totally unable to work= during the respective qualifying periods.@ He should have made findings of fact concerning each of the three elements contained in Rule 130.102(d)(4). But, in other decisions, the Appeals Panel has inferred or implied findings of fact under certain circumstances. In his note dated May 19, 1999, Dr. F does say A[a]n FCE in December showed [claimant] capable of sedentary work.@ However, considering the finding of fact made by the hearing officer that the claimant was totally unable to work, the complete December 1998 FCE, and the additional comments of Dr. F in the May 1999 report and other medical records of Dr. F; we are able to

[2]Previously Rule 130.102(d)(3).

imply or infer findings of fact required by Rule 130.102(d)(4) but not made by the hearing officer.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The appealed findings of fact and conclusions of law of the hearing officer are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge