APPEAL NO. 000675

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. After the appellant (claimant) and the respondent (carrier) entered into stipulations, whether the claimant is entitled to supplemental income benefits (SIBs) for the first quarter depended on whether during the qualifying period that began on August 19, 1999, and ended on November 17, 1999, she met the requirements of Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) concerning the ability of the claimant to work. The hearing officer determined that during the qualifying period the claimant did not meet any of the three criteria in Rule 130.102(d)(3) and that she is not entitled to SIBs for the first quarter. The claimant appealed, urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, and requested that the Appeals Panel reverse the hearing officer=s decision and render a decision in her favor. The carrier responded, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that her decision be affirmed.

DECISION

We affirm.

Rule 130.102(d)(3) effective for the qualifying period in this case provides:

> 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[.]

The claimant is 70 years old; had a two-level cervical fusion; and has a 24% impairment rating, consisting of 14% for specific disorders of the cervical spine and 12% for loss of cervical range of motion. She testified that she thought she could work one or two hours a day. A functional capacity evaluation was performed on March 26, 1999, at the request of Dr. V, who examined the claimant and reviewed her medical records at the request of the carrier. In a letter dated March 26, 1999, Dr. V stated that range of motion of the cervical spine was full; that there appeared to be a disproportionate verbalization, facial expression, and pain behavior; that the claimant voluntarily terminated the test because of complaints of pain in her neck and right upper extremity, although her heart rate was not significantly elevated above her resting heart rate; that she graded out at a sedentary physical demand level, but he felt that this

was in part influenced by her voluntary termination of the examination; and that he felt that she could perform at the physical demand level of light to medium activity. In a letter dated November 1, 1999, Dr. D, the claimant=s treating doctor, stated that he was aware that an examiner opined that the claimant was capable of performing light to medium activity; that this did not consider that she was significantly disabled by chronic pain and was currently taking Limbitrol, Elavil, Soma, Talwin, Oruvail, and Darvocet; that she was not a candidate for driving to and from work on those medications; and that in his opinion she remained substantially disabled and was not ready to return to the workplace. A letter dated January 20, 2000, is identical.

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 hearing officer considered the evidence and determined that the claimant did not meet any of the three criteria in Rule 130.102(d)(3) set forth earlier in this decision and that the claimant is not entitled to SIBs for the first quarter. Her determinations 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:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge