APPEAL NO. 000678

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). On November 19, 1999, a contested case hearing was held. The hearing officer determined that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 14th and 15th compensable quarters. Appellant self-insured (carrier) appealed, asserting that claimant did not make a good faith effort to find work for either quarter, contending that the medical evidence does not show a total inability to work. Claimant replied that the decision should be affirmed. The Appeals Panel reversed the hearing officer=s decision and remanded the case for reconsideration and findings of fact regarding the factors listed in Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)) and whether claimant proved he had no ability to work. Texas Workers= Compensation Commission Appeal No. 992777, decided January 24, 2000. After the remand, the hearing officer again determined that claimant met the good faith SIBs requirement and that claimant is entitled to SIBs for the 14th and 15th quarters. Carrier again appealed on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer=s decision and order on remand.

DECISION

We affirm.

Carrier contends that the hearing officer erred in determining that claimant was unable to work during the filing periods in question and that he is entitled to SIBs for the 14th and 15th quarters. Carrier asserts that: (1) the hearing officer did not state what narrative report explains how the injury causes a total inability to work, and there is no such narrative; (2) other medical records show that claimant had an ability to work; (3) the hearing officer found only that claimant was "medically unable" to work, rather than "unable to work"; (4) the hearing officer erred in determining that claimant was unable to work when claimant had a "sedentary physical ability" to work; and (5) the hearing officer should not have disbelieved evidence from claimant'S own treating doctor, Dr. P.

The facts and applicable law are set forth in our prior decision and will not be repeated here. In this case, the hearing officer noted that claimant=s treating doctor had retracted a prior opinion indicating that claimant could work. As noted by the hearing officer, Dr. P stated that claimant could not work, both in his deposition on written questions and in his report of July 2, 1999. Dr. P noted the worsening of claimant=s condition and pain. The hearing officer reviewed the medical evidence and determined that claimant had no ability to do even sedentary work. The hearing officer did make findings on remand regarding the factors listed in Rule 130.102(d)(3). We have reviewed the record and the hearing officer=s determinations and we conclude that her determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer=s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

Because the carrier has raised the point that other records "show" an ability to work, and the hearing officer has indicated that she may simply weigh these records against other records of inability, which I believe the new rules preclude, I feel I must indicate why I concur based upon the record. As recently stated in Texas Workers' Compensation Commission Appeal No. 000638, decided May 12, 2000, the word "show" in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3) does not mean "prove" by a further preponderance standard.

The letter from Dr. W, dated December 7, 1998, which seems to reinstate an ability-to-work opinion, is plainly conditioned upon his understanding that the claimant does not have a renal function problem. The hearing officer has found that claimant does, for the period of time under review, and this was not appealed. Therefore, Dr. W's own earlier November 20, 1998, letter, which concludes no ability to work due to the renal functioning along with other problems, may be used by the trier of fact to assess whether other medical records "show" an ability to work. But I want to stress to the hearing officer that while liberal construction of the workers' compensation laws is the legal standard, the trier of fact is no longer free under the new supplemental income benefits rules to engage in a simple weighing of all medical evidence when an inability to work is asserted. The statute itself does not provide for inability to work, and to the extent that a humane provision has been created for those few injured

workers who cannot do even part-time work, the provisions of the rule should be followed, not ignored through a recited "disbelief" of records that plainly point out that there is some ability to work.

Susan M. Kelley
Appeals Judge