APPEAL NOS. 000720
AND 000721

These appeals arise 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 9, 2000. Both docket numbers were heard at the same time, with Appeal No. 000720 involving the third and fourth quarters of supplemental income benefits (SIBs) and Appeal No. 000721 involving the fifth quarter of SIBs. With regard to those quarters, the hearing officer determined that the respondent (claimant) was unable to work in any capacity during the qualifying periods for the applicable quarters; that narrative reports of Dr. S specifically explained how the injury causes a total inability to work; and that no other records "credibly show that the Claimant could have returned to work" during the periods at issue.

Appellant (carrier) appealed, cited various portions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102), both new and old rule Appeals Panel decisions, and asserted that there was medical evidence "verifying the claimant's ability to work" and that claimant had not made a good faith effort to seek employment during the applicable filing/qualifying periods. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, citing certain medical reports and emphasizing the dissent in two Appeals Panel decisions and urging affirmance.

DECISION

Affirmed.

The circumstances of claimant's injury are not immediately evident other than that claimant sustained a low back lifting injury on _____. The parties stipulated that claimant sustained a compensable back injury on _____; that claimant's impairment rating (IR) "is more than 15%" (17%) that impairment income benefits (IIBs) were not commuted; that the filing/qualifying period for the third and fourth quarters was February 9 to May 10, 1999, and April 28 through July 27, 1999, respectively; and that the qualifying period for the fifth quarter was from July 28 through October 26, 1999. After some conservative treatment, claimant had spinal surgery by Dr. S on January 16, 1997, in the form of "a bilateral laminectomy from L3-4, L4-5 and L5-S1, as well as a fusion from L4 to S2." The surgery was apparently unsuccessful, a bone stimulator was used and eventually a second spinal surgery was performed on February 10, 1998, which involved various grafts and fusions with hardware. This apparently has also been unsuccessful. Claimant testified that she is unable to dress herself and requires the assistance of her 19-year-old daughter to take her to the doctor and do the household chores. Claimant says that she sees Dr. S twice a month and a chiropractor twice a week. In addition to the surgeries, claimant receives periodic injections.

The parties recognized that the third quarter filing period was under the "old" SIBs rules, those in effect prior to January 31, 1999 (carrier said it was "on the cusp of the change of rules"), and carrier cites an Appeals Panel decision that the "new" rules "offer guidance as to

what should be considered to have made a good faith effort." Claimant proceeds on an inability to perform any type of work in any capacity theory.

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 hearing officer's finding on direct result has not been appealed and will not be addressed further.

Claimant relies on medical evidence of a total inability to work in various reports of Dr. S, which consistently refer to "gainful employment." Carrier cites an Appeals Panel decision which points out that "gainful employment," while perhaps a standard for other programs, is not a standard for SIBs. The hearing officer commented on Dr. S's use of that term as follows:

> HEARING OFFICER: We're not looking at whether she can be gainfully employed. Whether gainful or not, the question is: Can she do any work?
>
> [ATTORNEY]: Correct. And that's --
>
> HEARING OFFICER: And so using that lingo makes it difficult for the Claimant because the -- his [the doctor's] records have to show that she can't do any employment whether it's gainful or not. To just say she can't do gainful [employment] doesn't necessarily satisfy the inquiry as to whether or not she's got any ability to work.

In a report dated February 24, 1999, Dr. S outlines claimant's past surgeries, and notes her use of "narcotics to control the pain that had a sedative effect," that claimant "was in a brace" and the recovery time from surgery. Dr. S concludes that claimant "was not a candidate for any type of gainful employment" since her injury and continues in that status. In a letter report dated April 2, 1999, Dr. S castigates the carrier's doctor, Dr. D; comments that claimant "continues to have x-ray evidence of failure of her lateral fusion masses to heal"; and that "[e]ven sitting, standing, or walking aggravates her pain such that further narcotics are necessary, further compromising her mental status and causing a sedative effect." Other progress notes detail claimant's progress, or lack thereof. In a report dated August 4, 1999, Dr. S comments:

> This patient is using a bone stimulator in an effort to stimulate her fusion mass to heal. She continues to require pain management and narcotics to control her pain.
>
> This patient is not a candidate for any type of gainful employment. This patient is not released by her treatment physician. . . . Her medical condition prevents her from even looking for work because of her back and leg pain and her medications. She is under active pain management and medical treatment and not a candidate for gainful employment.

In a report dated January 14, 2000, rebutting a functional capacity evaluation (FCE), Dr. S states that claimant is using Xanax and Zoloft, which "are sedative producing and compromise mental status" and that:

> This patient cannot perform sitting, standing, or walking for longer than thirty minutes without having a marked increase of her pain from 5 to 8 on the scale, worsening the numbness and weakness in her legs.
>
> * * * *
>
> This patient is not qualified for any type of gainful employment. The ability to do one or two tasks, in the face of severe pain, does not constitute a DOT [Department of Transportation] category for any type of return to gainful employment.
>
> This patient is not a candidate for gainful employment. She is under active pain management. She is under active medications that cause a sedative effect as well as compromise mental status. She would not be safe in a workplace environment because any type of increased activity would cause increasing pain requiring increased amounts of medication that would put her in danger of hurting herself or her other workers.

Evidence to the contrary includes a report dated March 2, 1999 (during the third quarter filing period), where Dr. D was asked to evaluate a "lumbar strain." Dr. D recites the medical history, including surgeries; notes a failed fusion; comments on a zero percent IR that he gave claimant in 1996; opines that claimant is in "no need for any further treatment, be it chiropractic or otherwise," or any other testing; and concludes:

> Concerning her ability to return to work, [claimant] should be able to return to work in a light duty to sedentary capacity with the ability to get up frequently. She should also avoid lifting or carrying of more than 15 pounds on an occasional basis, as well as excessive repetitive twisting, stooping or bending. Use of a lumbosacral corset would also be helpful in preventing future aggravation or reinjury.

An FCE was performed on July 20, 1999, and, in a report dated July 27, 1999, Dr. N comments on the FCE. Dr. N stated that there "were no imagining studies to review," noted the FCE lifting and carrying tests and concluded that those tests place claimant "at sedentary to light level work category; sedentary to light category is defined by the DOT as exerting force of less than 15 pounds. I would agree with that assessment."

The hearing officer, in her Statement of the Evidence, summarized claimant's surgeries and treatment and commented:

> Even though [Dr. S's] records repeatedly refer to the Claimant's inability to obtain "gainful" employment, which is not dispositive in the [SIBs] inquiry, his records in their totality nonetheless do specifically document her inability to work in any capacity during the third, fourth and fifth filing/qualifying periods.
>
> Other doctors, including [Dr. N] and [Dr. D], have opined that the Claimant had at least a minimal ability to work during the periods in question. After a review of the entire record, it is determined that the credible evidence supports a finding that the Claimant did not have any ability to work from February 9, 1999 through October 26, 1999. This is because of her symptoms, limitations and the effects of her medication during this time frame. Both parties argued that their opponent's selected doctor lacks credibility and is biased, and actually both parties' positions were persuasive in that regard. But in light of the Claimant's surgeries, including the insertion and removal of hardware, coupled with the diagnosis of a failed fusion, the Claimant met her burden of proof to show no ability to work. She, therefore, is entitled to third, fourth, and fifth quarter [SIBs].

Clearly, findings to the effect of those comments would support a decision of entitlement to SIBs under the "old" SIBs rules, the rules in effect prior to January 31, 1999. Accordingly, we affirm the hearing officer's decision on entitlement to SIBs for the third quarter without further comment.

Regarding the fourth and fifth quarters, the standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(3) (the version then in effect) 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." To this end, the hearing officer made the following disputed findings:

FINDINGS OF FACT

3. [During the fourth and fifth quarter qualifying periods], the Claimant was unable to work in any capacity pursuant to narrative reports provided by her treating doctor, [Dr. S].

4. No other records credibly show that the Claimant could have returned to work [during the fourth and fifth quarter qualifying periods], given her condition due to the _____ injury and the medications she was taking for the condition.

The hearing officer's findings that claimant was unable to work in any capacity and that Dr. S's narrative reports specifically explain how claimant's back injury causes a total inability to work

are sufficiently supported by the evidence to be affirmable. Records which purport to show claimant's ability to work include Dr. D's report. In that report, Dr. D refers to the fact that he had seen claimant previously; that he was of the opinion that claimant only had a lumbar strain; and that he had previously given her a zero percent IR. Dr. D, in his comments and conclusions, continues to be of the opinion that claimant needs no further treatment and that she has, at most, a four percent IR. In view of the undisputed fact that claimant has had two surgeries, apparently has a failed fusion, and continues to receive weekly therapy and biweekly medical care, would allow the hearing officer to find Dr. D's report biased and not credible. The FCE noted "fair compliance" with "some inconsistencies" and, based on claimant's performance on July 20, 1999 (at the end of the fourth quarter and just prior to the fifth quarter qualifying period), she could lift 12 pounds occasionally, six pounds frequently and carry 15 pounds. The hearing officer could, and apparently did, find that the ability to lift and/or carry certain weights do not in and of itself constitute such a record that shows claimant is able to return to work. Dr. N's report is based on the FCE and his examination. Dr. N's report indicates that he did not review any of the imaging studies and his conclusion merely repeats the FCE results and states "I would agree with that assessment." Neither the FCE nor Dr. N address one of Dr. S's key points, which was adopted by the hearing officer, that the medication claimant was taking for her back pain compromises her mental status, that claimant would not be safe in a workplace environment and that she would be "in danger of hurting herself" or others if she returned to work. Under these circumstances, we decline to hold, in essence, as a matter of law, that the FCE and Dr. N's report are such "other records [which] show that [claimant] is able to return to work" and the hearing officer's decision was not in compliance with Rule 130.102(d)(3).

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

Alan C. Ernst
Appeals Judge