APPEAL NO. 000725

On March 7, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issue by deciding that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter. Appellant (carrier) requests that the hearing officer=s decision be reversed and that a decision be rendered in its favor. Claimant requests that the hearing officer=s decision be affirmed.

DECISION

Affirmed.

Eligibility criteria for SIBs are set forth in Section 408.142(a) and Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case. Rule 130.102(b) provides that an injured employee who has an impairment rating (IR) of 15% or greater, and who has not commuted impairment income benefits (IIBs), is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee=s average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee=s ability to work.

Claimant was injured while working for employer as a cashier on _____, when she fell to the floor when attempting to sit in her chair. Claimant said that as a union member, her cashier job is still available to her. The parties stipulated that claimant sustained a compensable injury on _____; that she reached maximum medical improvement (MMI) with a 45% IR; that she did not commute IIBs; that the qualifying period for the first quarter was from June 26, 1999, to September 24, 1999; that the first quarter was from October 9, 1999, to January 7, 2000; and that claimant had no earnings and made no job searches during the qualifying period.

Claimant underwent a cervical fusion at C5-6 in April 1996. EMG findings in July 1996 were positive for old and/or chronic cervical and lumbar radiculopathy. Dr. E, the designated doctor, certified in May 1998 that claimant reached MMI on March 8, 1997, with a 45% IR for impairment of the cervical and lumbar regions and wrote that claimant is unable to work due to her musculoskeletal condition. Claimant testified that her son, Dr. R, has been her treating doctor and that he is associated with Dr. RO, whom, she indicated, has also treated her. Claimant testified that during the qualifying period, she had head, neck, and back pain, and pain radiating down her right arm and right leg; that she took prescribed medications for her pain which caused her to be tired; that she was unable to work; that she has not worked since March 1995; and that she does various activities of daily living. Dr. SU evaluated claimant in June 1998 and wrote that claimant has an inability to maintain employment due to her injury.

Dr. S evaluated claimant at carrier=s request in September 1999 and he wrote that he was unable to find any evidence of objective abnormality on clinical examination that would account for claimant=s subjective complaints and that claimant=s imaging studies do not

indicate significant nerve root compressions or disc abnormalities that would account for her symptoms. Dr. S wrote that claimant is capable of returning to her former employment, which he stated was a sedentary-type position. In reviewing post-surgery reports of diagnostic tests, Dr. S noted that a cervical MRI done in November 1997 showed no cord flattening and he also noted the reports of the cervical and lumbar myelograms done in December 1998. Dr. S did not mention that the report of the cervical CT scan done in December 1998 noted at C6-7 a flattening of the ventral thecal sac and a mild posterior displacement of the ventral left C7 nerve root nor did he mention that the report of the lumbar CT scan done in December 1998 noted a flattening of L5 nerve roots.

At Dr. R=s request, claimant underwent a functional capacity evaluation (FCE) in September 1999 and the physical therapist reported that, based on the results of the FCE, claimant is functioning at a light physical demand level, but the therapist then noted several deficits, including, among others, limited lifting capacity, restricted flexibility, and a high pain level with activity, and wrote in the recommendations section of her report that A[d]ue to the above physical limitations and deficits, I do not believe that [claimant] is capable of returning to work at this time.@ The therapist noted that claimant may benefit from a conditioning exercise program and then she could progress to a work hardening program.

In a narrative report dated September 12, 1999, Dr. RO wrote that claimant is unable to perform any type of job activities due to her current disability and noted that claimant=s current condition is quite severe. Dr. RO explained that claimant has cervical pain that radiates down her arms; that she has severe restriction of mobility; that she has marked weakness of her upper extremities; that she suffers from severe headaches (Dr. RO related the headaches to claimant=s cervical pain in another report); that her lumbar condition causes bilateral radicular pain and sensory and motor loss; that she takes pain medication that has side effects of drowsiness, forgetfulness, digestive disorders, depression, sleep disorder, and fatigue; that she is also treated by Dr. SH, a pain management specialist, for prescription and injection treatment; and that she is also under the care of Dr. B. On October 15, 1999, Dr. RO wrote that claimant should be enrolled in a work conditioning and work hardening program and that with proper treatment and physical conditioning, he believes that claimant can return to the workplace in her former capacity. In October 1999, Dr. SH wrote that claimant continues to be very symptomatic and listed medications he prescribed to treat claimant=s back pain, anxiety, and sleep disturbance.

During the qualifying period, Rule 130.102(d)(3) provided that an injured employee has made a good faith effort to obtain employment commensurate with the employee=s ability to work if the employee 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. Rule 130.102(e) provided, in pertinent part, that, except as provided in subsections (d)(1), (2), and (3) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The hearing officer found that claimant=s unemployment is a direct result of the impairment from her compensable injury; that the FCE of September 1999 found that claimant is incapable of working and is in need of work hardening before entering the work force despite her actual functioning at a light physical demand level; that although Dr. S=s report concluded that claimant could return to her regular work duties at a sedentary level, his report is not credible because of findings on diagnostic testing that he omitted; that the September 12, 1999, report of Dr. RO alone and coupled with the September 1999 FCE specifically explained how the injury has caused a total inability to work; and that claimant had a total inability to work and met the good faith criterion for SIBs under Rule 130.102. The hearing officer concluded that claimant is entitled to SIBs for the first quarter. Carrier appeals the hearing officer=s findings and conclusion.

Whether the good faith and direct result criteria for SIBs were met by claimant presented factual questions for the hearing officer to determine from the evidence presented. Whether another record Ashows@ an ability to work is a question of fact for the hearing officer to resolve, and the question of whether a record Ashows@ an ability to work is a different question than the question of whether the record states that the claimant has some ability to work. Texas Workers= Compensation Commission Appeal No. 000625, decided May 11, 2000. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). When reviewing a hearing officer=s decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers= Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer=s decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer=s decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney

Appeals Judge