APPEAL NO. 000804

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 28, 2000. The hearing officer determined that the appellant (claimant) "was not unable to work in any capacity" in a total-inability-to-work case and that, therefore, she is not entitled to supplemental income benefits (SIBs) for the 11th quarter. The claimant appealed, contending that two doctors have said that claimant had "no ability to work" and that a functional capacity evaluation (FCE) to the contrary "did not consider Claimant's prospective surgery." Claimant also submits a report from the designated doctor which was not offered or admitted at the CCH. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responded that the report submitted for the first time with claimant's appeal should not be considered and otherwise urges affirmance.

DECISION

Affirmed.

Claimant submitted a report dated February 24, 2000, with her appeal. That report was not offered or considered at the March 28, 2000, CCH. We do not normally consider new evidence for the first time on appeal. We may, however, in very limited circumstances, remand a case when new evidence is presented if that evidence came to the party's knowledge after the CCH, is not cumulative of the evidence presented, it was not through lack of diligence that the evidence was not presented at the CCH for the hearing officer to consider, and the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, the doctor's report states that claimant cannot return to work "without retraining for a physically less demanding work." Claimant was obviously aware that she had been examined by the designated doctor on February 24, 2000, and failed to request a continuance or procedure by which the designated doctor's report could be considered. Under these circumstances, we decline to consider the evidence submitted by claimant for the first time on appeal.

Claimant had been employed as a housekeeper for the employer hospital at the time she fell and sustained a compensable injury to her right knee. There was testimony and argument whether claimant was being considered for additional knee surgery during the qualifying period; however, as of the date of the CCH, claimant had not, for whatever reason, had the additional knee surgery. Claimant had, in fact, worked since her injury but, during the qualifying period, her doctor had advised her not to work and she neither worked nor sought employment. The parties stipulated that claimant sustained a compensable injury on _____; that claimant has an impairment rating (IR) of 15% or more; and that impairment income benefits (IIBs) have not been commuted. Although there is neither a

stipulation nor a fact finding on the point, the parties appear to agree that the qualifying period at issue was from September 7 through December 5, 1999.

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. There is no appeal of the hearing officer's finding that claimant's unemployment during the qualifying period was a direct result of her impairment.

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 Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) (the version then in effect), WHICH 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." In evidence are several reports from December 10, 1999, through March 9, 2000, from Dr. G, claimant's treating doctor, stating "[c]laimant is unable to work at any occupation at this time." Dr. G states that claimant's knee has been "locking" and that claimant has been recommended for additional arthroscopy of the knee or total knee replacement. There is no explanation why claimant had been able to work and now, after the qualifying period, is not able to work, or why claimant could not do a sedentary job, at least part time. A handwritten progress note dated August 25, 1999, states that claimant is being scheduled to see Dr. S "for consultation of ® knee" on December 23, 1999. An undated report from Dr. S, while detailed on medical aspects, merely comments "[s]he remains disabled at the present time." Evidence to the contrary that claimant has some ability to work is an FCE performed on September 10, 1999, which showed claimant could have worked in some capacity during the filing period.

The hearing officer specifically addressed Rule 130.102(d)(3) and commented:

> I am unable to conclude that [Dr. G's] narrative reports contained within this record specifically explains why the claimant can perform no work at all. His reports state that the claimant is unable to work in any occupation because of her severe pain, and also because he had recommended that she go to a surgeon for a consideration of a total knee replacement. However, [claimant] even concedes that she could have been a telemarketer. Furthermore, there was a record, the September 10, 1999 FCE, which showed that she could have worked in some capacity during the qualifying period. I conclude, based upon Rule 130.102(d)(3), that the claimant is not entitled to [SIBs] for the 11th quarter.

The hearing officer goes on to make the following disputed specific findings of fact:

FINDING OF FACT

2. The Claimant was not unable to work in any capacity.

3. The claimant did not provide a narrative report from a doctor which specifically explained how the injury caused a complete inability to work.

4. Other records showed that the claimant was able to return to work.

Claimant's appeal cites the reports of Dr. G and Dr. S and the report attached to the appeal. We hold that the hearing officer's findings that none of the offered medical reports provide a narrative which specifically explains how the injury causes a total inability to work, or why claimant could not perform a sedentary job or work which could be done sitting, are not against the great weight and preponderance of the evidence. We find the hearing officer's decision sufficiently supported by the evidence.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

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

Elaine M. Chaney
Appeals Judge