APPEAL NO. 000880

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 March 31, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. In her appeal, the claimant contends that the hearing officer erred in determining that the great weight of the other medical evidence was contrary to the opinion of the designated doctor, who was selected by the Texas Workers' Compensation Commission (Commission) in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110), that the claimant's condition has not improved sufficiently to permit her to return to work. Thus, the claimant further contends that the hearing officer erred in determining that she is not entitled to SIBs for the 11th and 12th quarters. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, in the course and scope of her employment with the (employer). The parties stipulated that the claimant reached maximum medical improvement on May 29, 1996, with an impairment rating of 18%; that she did not commute her impairment income benefits; that the 11th quarter of SIBs ran from October 21, 1999, to January 19, 2000, with a corresponding qualifying period of July 9 to October 7, 1999; and that the 12th quarter of SIBs ran from January 20 to April 20, 2000, with a corresponding qualifying period of October 8, 1999, to January 6, 2000. It is also undisputed that the claimant did not seek any employment during the relevant qualifying periods.

At issue in this case, is whether the claimant had any ability to work in the qualifying periods for the 11th and 12th quarters of SIBs. As noted above, pursuant to Rule 130.110, which became effective November 28, 1999, the Commission selected Dr. D, a chiropractor, to serve as the designated doctor on the question of whether the claimant's medical condition, which had prevented her from returning to work in the prior year, had improved sufficiently to allow her to return to work on or after the second anniversary of her initial entitlement to SIBs. Rule 130.110(a) provides that a designated doctor's report on that issue "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary." In addition, subsection (a) of Rule 130.110 provides that the presumptive weight of the report "shall begin the date the report is received by the Commission" and shall continue "until proven otherwise by the great weight of the other medical evidence" or "until the designated doctor amends his/her report based on newly provided medical or physical evidence."

In a January 17, 2000, report, Dr. D noted that he had examined the claimant that day "for the purpose of resolving the dispute as to whether or not her medical condition has improved sufficiently to allow her to return to work." Dr. D noted that the claimant's case was "complicated"; that there was some evidence of "psychosocial overlay, both on prior exams with other providers, and to a lesser extent with me today"; and that the claimant's "main functional limitation today is prolonged sitting or standing greater than 20 minutes, sitting seemingly worse." Dr. D ended his report by stating that he was referring the claimant for a functional capacity evaluation (FCE). On January 25, 2000, the claimant underwent the FCE ordered by Dr. D. The report from that FCE states that the claimant was lifting in the sedentary category of work and that she "demonstrated tolerance of walking on an occasional basis and no activities on a frequent basis." The report concluded that "[b]ased on her functional tolerance to activity, it is doubtful that she could tolerate more than 2-4 hours of work per day." In a January 28, 2000, addendum to his report, Dr. D stated that he had reviewed the results of the January 25th FCE. He stated that the claimant's "function is fairly restricted" and that "[s]he is unable to tolerate prolonged sitting or standing, or essentially any activity in any one position greater than 10 to 15 minutes." Dr. D further noted that the claimant had a 10-pound lifting restriction secondary to her hernia repair and that her testing revealed slow fine motor and gross motor skills that "could be due to cognitive issues and concentration, which may be affected by her pain medication (OxyContin)." Dr. D further stated that the claimant's "physical capacity significantly restricts her employability and essentially does not allow her to return to work, particularly even beginning to approach full-time. Also, her physical capacity does not match her vocational skill set." Dr. D concluded:

> In summary, I do not think that [claimant] has improved sufficiently to allow her to return to work, at least not in any type of capacity for which she has training, and she does not appear to be able to work even a 20-hour-per-week job, with fairly significant restrictions. There are also barriers to vocational rehabilitation. She has somewhat complex multifactorial barriers to return to work from both physical and cognitive/psychosocial perspectives.

The hearing officer determined that the great weight of the other medical evidence was contrary to the designated doctor's opinion that the claimant's condition has not improved sufficiently to allow her to return to work and that, as a result, the claimant is not entitled to SIBs for the 11th and 12th quarters because she did not satisfy the good faith job search requirement. We have long recognized that we will affirm a hearing officer's decision on any theory reasonably supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). When Dr. D's report is reviewed in its entirety, we cannot agree that he determined that the claimant's condition had not improved sufficiently to allow her to return to work because he qualified his statement to that effect with the phrase "at least not in any type of capacity for which she has training, and she does not appear to be able to work even a 20-hour-per-week job, with fairly significant restrictions." That is, Dr. D did not opine that the claimant had no ability to work; rather, he opined that she could not work at any level even approaching full time and that her "physical capacity does not match her vocational skill set." The hearing officer erred in

determining the nature of Dr. D's opinion as to the claimant's status with respect to her ability to work. However, his determination that the claimant is not entitled to SIBs for the 11th and 12th quarters is affirmed because it is undisputed that the claimant did not engage in a job search in the qualifying periods for those quarters and, thus, she did not satisfy the good faith job search requirement of Rule 130.102(d).

The claimant asserts that the hearing officer erred in excluding Claimant's Exhibits Nos. 14 and 15, which are the hearing officer's Decision and Order and the Appeals Panel decision for the seventh quarter of SIBs, respectively. The hearing officer determined that the claimant was entitled to seventh quarter SIBs based on a no-ability-to-work theory and the Appeals Panel affirmed. The claimant argued that those determinations were relevant on the issue of whether her medical condition had improved sufficiently to allow her to return to work. In his discussion, the hearing officer acknowledged that "[i]t has previously been determined that the Claimant had no ability to work during the qualifying period for the seventh quarter, so that the Claimant was entitled to [SIBs] but she was not required to seek employment." As such, any error in the exclusion of Claimant's Exhibits Nos. 14 and 15, which provided evidence of the fact recognized by the hearing officer in his discussion, was not reversible error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Lastly, we consider the claimant's assertion that the hearing officer erred in considering the fact that she is receiving disability retirement income benefits in resolving the issue of whether the claimant is entitled to SIBs. Specifically, the hearing officer stated:

> The Claimant is receiving disability retirement income benefits now from the [employer]. Disability retirement income is payment to a person who has been hurt on the job. It is the functional equivalent of [SIBs]. It would be double-dipping and double payment for the same disability for the claimant to receive [SIBs].

The hearing officer cites no authority for his assertion that disability retirement income benefits are the "functional equivalent" of SIBs or for the assertion that it would be "double-dipping" to receive SIBs in addition to those benefits. We are unaware of any such authority. The issue of the claimant's entitlement to SIBs is to be resolved on the basis of whether she has satisfied the eligibility criteria for continuing entitlement to SIBs, namely whether she has made a good faith effort to look for work commensurate with her ability to work and whether her unemployment is a direct result of her impairment from the compensable injury. The question of whether the claimant receives benefits from a collateral source simply has no application to the resolution of that issue. The hearing officer's consideration of this factor was error; however, it was not reversible error because the claimant did not satisfy the good faith requirement in this instance.

The hearing officer's decision and order are affirmed on other grounds.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge