APPEAL NO. 000883

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 29, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the seventh quarter. The claimant appeals this determination, contending that it is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable back injury in _____, was assigned an impairment rating of 18%, has had four surgeries, and has been recommended by her doctor for a surgery to remove hardware. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBs quarter and consists of the 13 previous consecutive weeks. The seventh SIBs quarter was from January 5, 2000, to April 5, 2000, and the qualifying period was from September 22, 1999, to December 22, 1999.

At issue in this case is whether the claimant made the required good faith job search. The claimant did not look for work at all during the qualifying period and asserts that she was unable to work in any capacity. Rule 130.102(d)(3), in effect at all relevant times, provides that an employee has made the required good faith job search effort 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[.]"

In support of her position, the claimant offered the medical opinion of Dr. S, her treating doctor. He has performed four back surgeries and proposed a fifth to remove hardware, but this last one was not approved by the Texas Workers' Compensation Commission. There was some indication that this last surgery recommendation has been resubmitted for approval. In any case, Dr. S wrote on December 16, 1999, that the claimant requires medication to control her pain; that this medication has a sedative effect

and compromises her mental status; that any type of increased activity aggravates her back and leg pain, thus requiring more medication; and that she "is not a candidate for any type of work including sedentary work." He also stated that she will be undergoing surgery "during this quarter" but it is not clear whether he meant the qualifying quarter or the calendar quarter in which the letter was written. He also said that she is "not a candidate for any activity which requires lifting, pushing, pulling, stooping, bending, crawling, squatting or climbing." Dr. S has consistently repeated this opinion since at least as early as June 9, 1999.

Contrary medical evidence from the carrier consists of the May 19, 1999, examination of the claimant by Dr. L at the carrier's request. Dr. L had previously seen the claimant in June 1998. In a report of May 19, 1999, Dr. L reviewed the claimant's medical history and commented that "subjectively" the claimant feels she is totally disabled from any and all type of activity. He believes that she should be weaned off her narcotic pain medication, that her fusion is solid, and that she "is certainly capable of doing sedentary work of a light capacity."

The hearing officer considered this evidence and concluded that Dr. S's narrative did not explain how the injury caused a total inability to work and that Dr. L's record of examination of the claimant showed an ability to work. The claimant further argued that the hearing officer's findings of fact on the elements of Rule 130.102(d)(3) were conclusory and without explanation of why the hearing officer reached these findings. For these reasons, he contends that the determination of some ability to work is against the great weight and preponderance of the evidence. In the cases cited by the claimant, including Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999, and Texas Workers' Compensation Commission Appeal No. 992804, decided January 31, 2000, we stressed the importance of making express findings on each element in the rule. Such findings then become the explanation for the conclusion that a claimant did or did not have an ability to work. Each of the elements of the rule presents a question of fact for the hearing officer to decide. And while a narrative statement or report of a doctor may, if taken at face value, state an ability or inability to work, the hearing officer is not required to accept the reports at face value. Rather, it was the responsibility of the hearing officer to assign the weight and credibility to this evidence deemed appropriate. Section 410.165(a). In the case now before us, the hearing officer clearly did not find Dr. S's statements credible or persuasive to establish as fact that the claimant had no ability to work. This was within his prerogative as hearing officer. Similarly, he found Dr. L's report more persuasive and credible on this issue. The claimant submitted that Dr. S was more credible because of his long history of treating the claimant and that Dr. L seemed to favor carriers. 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 of the credibility of the two doctors for that of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge