APPEAL NO. 001024

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 April 7, 2000. The hearing officer resolved the sole disputed issue by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter, from January 2 to April 1, 2000. Claimant has appealed, challenging the dispositive legal conclusion and certain underlying factual findings. The respondent (carrier) urges the sufficiency of the evidence to support the hearing officer's determination.

DECISION

Affirmed as reformed.

We note at the outset that the hearing officer's Decision and Order has Findings of Fact Nos. 1A through G and 2, 8, 9, and 10, and contains Conclusions of Law Nos. 1, 2, and 3; and that claimant's appeal disputes Findings of Fact Nos. 4, 8, 12, 13, and 14 and Conclusions of Law Nos. 3, 15, 17, and 25. We will assume that the hearing officer misnumbered Findings of Fact Nos. 3, 4, and 5 as 8, 9, and 10 and reform the Decision and Order accordingly.

The parties stipulated that claimant sustained a compensable lumbar spine injury in the course and scope of employment with (employer) on _____, with an impairment rating (IR) of 15%; that claimant has not elected to commute any portion of the impairment income benefits (IIBs); that the first quarter of SIBs was from January 2 through April 1, 2000; and that the qualifying period for the first quarter of SIBs was from September 20 through December 19, 1999.

Claimant testified that on _____, while employed by the employer as a licensed vocational nurse (LVN), she injured her back while assisting another nurse in getting a frightened, combative patient out of a sling scale and into the bed; that on March 15, 1999, she underwent a 360E fusion at the L3-4 and L4-5 levels by Dr. HC in (city 1); that Dr. RC, in the area where she resides, provides her follow-up care; that after the surgery she attempted physical therapy but her legs began to swell and she was examined by a cardiologist who found no heart problem; that she then attempted a course of work hardening but could not complete it due to pain and swollen legs; and that she underwent a functional capacity evaluation (FCE) on August 17, 1999, and another FCE in January 2000. She further stated that during the qualifying period, she could not perform her prior floor nurse duties with the employer because of her pain and swollen legs; that she did not want to give up her dream of being an LVN and hoped to be able to return to LVN work; and that she made no effort to look for any type of work because she could not perform any work. Claimant further stated that she was willing to attempt more work hardening but that the carrier would not authorize it after having previously characterizing her participation as noncompliant. Claimant further stated that during the qualifying period she did not drive although she has a valid driver's license; that she was virtually housebound with no social

life; and that she did very little around the house but did read nursing magazines and engage in crafts-type projects with her grandchildren. She also indicated that in February 2000 she contacted the Texas Workforce Commission but no jobs were available for her since she can no longer perform LVN duties as a floor nurse; and that she also contacted the Texas Rehabilitation Commission and hopes to be sent to school to become a registered nurse and get into nursing administration or education.

According to his operative report of the March 15, 1999, surgery, Dr. HC's diagnosis was L3-4, L4-5 and L5-S1 herniated nucleus pulposus and obesity, and he performed fusion at two of the levels with insertion of hardware.

Dr. RC wrote on January 12, 2000, that claimant "is still under my care." Dr. HC wrote on February 25, 2000, that claimant has been followed for disrupted discs at L3-4, L4-5, and L5-S1 as a result of a work-related injury sustained on _____; that she underwent spinal surgery on March 15, 1999; and that she "has been unable to work since 1/27/98 - 12/31/99 as she was being worked up for surgery and rehabilitation after undergoing 360E spinal fusion."

According to the report of the August 17, 1999, FCE, claimant manifested some mild symptom magnification, answered three out of five inappropriate questions on a Waddell's questionnaire, and scored below the sedentary level on a test of her perceived capacity. The report reflected that four weeks of work hardening were recommended.

According to the report of the January 21, 2000, FCE, claimant's lifting ability placed her at the lower end of the medium level of ability to perform work. This report also recommended a course of work hardening. Dr. HC wrote on January 26, 2000, that claimant may drive and is job-ready for full-time work at the low end of the medium-duty work level.

Section 408.142(a) provides 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.

This is a "new" SIBs rules case. Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). In the version in effect when the qualifying period commenced, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), addressing "Good Faith Effort", provides in Rule 130.102(d)(3) that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "(3) 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[.]

The hearing officer found that claimant had the ability to perform some work during the qualifying period; that she neither looked for work nor conducted a job search during the qualifying period; and that during the qualifying period she had not in good faith attempted to obtain employment commensurate with her ability to work. The hearing officer further found that claimant's unemployment during the qualifying period was not a direct result of her impairment from the compensable injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual determinations of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer makes clear in his discussion of the evidence that he did not find Dr. HC's "conclusory" report to meet the demands of Rule 130.102(d)(3). Further, the hearing officer could conclude from the evidence that claimant's unemployment during the qualifying period was not a direct result of her impairment from the compensable injury.

The decision and order of the hearing officer, as reformed, is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge