APPEAL NO. 001030

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 10, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the ninth quarter for supplemental income benefits (SIBs) began on December 23, 1999, and ended on March 22, 2000. The hearing officer determined that the during the qualifying period for the ninth quarter for SIBs that began on September 10, 1999, and ended on December 9, 1999, the claimant's unemployment was a direct result of the impairment from her compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer determined that during the qualifying period for the ninth quarter the claimant was not unable to perform any work in any capacity because of the compensable injury; that the narrative reports of Dr. O'D, the claimant's treating doctor, do not explain or even establish that the claimant's compensable injury caused a total inability to work during the qualifying period; that medical reports of Dr. H, who examined the claimant at the request of the carrier, indicate claimant could work in some light-duty capacity; that the claimant did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period; and that the claimant is not entitled to SIBs for the ninth quarter. The claimant appealed, urged that those determinations are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBs for the ninth quarter. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We disregard part of one finding of fact made by the hearing officer and affirm the decision of the hearing officer that the claimant is not entitled to SIBS for the ninth quarter.

The claimant testified that was she attending college to obtain a bachelor's degree in nursing; that after she obtained her degree, she hoped to work in case management at home; that the first semester she attended school, the Texas Rehabilitation Commission paid for her to attend school; that after the first semester, her schooling was paid for by a Pell grant; and that during the fall 1999 semester she took nine hours, spent about a total of 20 hours a week related to attending school, was not a full-time student, and did quite well in school.

The carrier sent a letter dated December 20, 1999, to Dr. O'D, apparently asking him some questions. In a letter dated December 28, 1999, Dr. O'D wrote:

> [Claimant] is capable of most ordinary activity if her pain is not severe on a particular day. The only problem on these minimally painful days is the time it takes to complete a particular activity and the amount of exertion required. What would have taken two hours before her injury would now probably take

> an entire day. It is unlikely any employer would agree to this. Particularly since any job would require such restrictions as minimal walking and no stooping, climbing or bending. At the current time she has family members who perform these tasks for her as needed or the tasks are left undone until the pain subsides. As is obvious, [claimant] has to plan her days carefully.
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> It must be understood that [claimant] has Fibromyalgia, which complicates her condition. While this condition is not a consequence of her injury (as far as we know) it is a complicating factor in that it can and does produce severe disabling pain without warning or pattern. Fibromyalgia at the current time has neither a specific cause nor a specific treatment plan. It is classified as a form of arthritis only because of its pain pattern. It is more probable that it is some type of neuromuscular affliction.
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> [Claimant] is enrolled in a college program leading to a degree in nursing administration. At the completion of her studies she can accept employment for administrative tasks in a hospital, HMO, nursing home or other health care entity. These duties, which would be primarily supervisory and record keeping, would be within her capability. At the current time she does not have the academic credentials for this level of employment but it is well within her intellectual capacity. Her marks have been exceptional and she has been honored for academic excellence.

In a letter to the law firm representing the claimant dated February 15, 2000, Dr. O'D wrote:

> This letter is in response to questions concerning my letter of 12-28-99 concerning [claimant's] health condition. At no time or in no way did I intend to indicate in that letter that [claimant] had the capacity to work in any job, either full or part time. That letter was intended to indicate some of the reasons she was not and is not capable of employment at this time.
>
> I do have hopes that [claimant] will be capable of employment in the future. This is based on [claimant's] intense desire to work and her plans to attain this goal. I am somewhat disturbed that there is even a hint of an insinuation that [claimant] is not endeavoring to regain the ability to be gainfully employed. She is one of the most highly motivated patients I have seen.

In another letter dated February 15, 2000, Dr. O'D stated that considering the claimant's injury and her pain when he first saw her; that literature indicates that Fibromyalgia is most likely to occur in sedentary, obese, middle-aged females; it is his opinion that the most likely prime cause of her Fibromyalgia is her injury. At the hearing, Dr. O'D testified that he changed his mind about the cause of the claimant's Fibromyalgia after he read information the claimant obtained from the Internet. He also said that the claimant was attending school, but was not capable of working because more was expected of an employee than was expected of a student. At the request of the carrier, Dr. H examined

the claimant. In a report dated May 3, 1999, Dr. H commented on medical records; reported on his examination of the claimant; stated his impression was that the claimant had morbid obesity, pain of unestablished etiology, and bulging discs at C4-5 and C5-6; and did not comment directly on the ability of the claimant to work.

In his Decision and Order, the hearing officer set forth all of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) except for the general statement that an injured employee is not entitled to SIBs until the expiration of the impairment income benefit period. We will only repeat part of the provisions of Rule 130.102(d) that states:

> (d) Good faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
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> * * * * *
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> (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; or. . . .

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's findings of fact that the narrative reports of Dr. O'D do not explain or even establish that the claimant's compensable injury caused a total inability to work during the qualifying period and that during the qualifying period the claimant was not unable to perform any work in any capacity because of the limitations of the compensable injury are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We affirm those findings of fact.

The hearing officer also made a finding of fact that medical reports of Dr. H indicate the claimant could work in some light-duty capacity. He did not use shows used in Rule 130.102(d)(3) in making that finding of fact and apparently considered a report of Dr. H dated November 20, 1996. That finding of fact does not precisely address the third criterion in Rule 130.102(d)(3), may be supported by the report of Dr. O'D, may be considered surplusage, and is disregarded. Since the findings of fact that we have

affirmed are sufficient to support the conclusion of law that the claimant is not entitled to SIBs for the ninth quarter, we do not reverse the decision of the hearing officer and remand for him to make other determinations.

We affirm the decision and order.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge