APPEAL NO. 001099

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 17, 2000. The hearing officer determined that the appellant (claimant) did not make a good faith effort to find employment commensurate with his ability to work and is not entitled to supplemental income benefits (SIBs) for the first quarter. The claimant appeals contending that he had a total inability to work as supported by medical evidence and that, in the alternative, he has complied with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)) by contacting the Texas Rehabilitation Commission (TRC). Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed doing computer work and developed pain in both wrists. Claimant was at first thought to have de Quervain's disease and/or carpal tunnel syndrome (CTS). More recently, some doctors believed claimant has symptoms of reflex sympathetic dystrophy (RSD). Claimant had right arm surgical release surgery in September 1997. The parties stipulated that claimant sustained a compensable (bilateral wrist/arm) injury on _____; that claimant reached maximum medical improvement on May 26, 1998, with a 28% IR; and that the qualifying period for the first quarter was from September 23 through December 22, 1999. There was no finding or stipulation on commutation of impairment income benefits (IIBs); however, we will infer that finding from the rest of the decision.

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 his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

Claimant proceeds both on a total-inability-to-work theory and that he is entitled to SIBs because he complied as best he could with Rule 130.102(d)(2), the version then in effect. Addressing the total-inability-to-work contention, 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 Rule 130.102(d). Rule 130.102(d)(3), the version then in effect, requires the employee (claimant) to prove three elements, namely (1) that he 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." The hearing officer made no specific findings regarding those elements but, in his Statement of the Evidence, cited Rule 130.102(d)(3) and its elements, and commented:

> In this instance, the Claimant testified that he felt he was unable to work in any capacity during the qualifying period. However, the Claimant did not provide medical evidence for his treating doctor which explained why he could not work. The narratives from [Dr. G] merely stated that he was still undergoing treatment for [RSD] and that he was totally unable to work. Conclusory statements from doctors are not sufficient to establish a total inability to work. [Dr. G] did not detail why the Claimant was totally unable to work and should be permanently disabled.

Claimant appeals this commentary, asserting that the narrative showing a total inability to work need not come from the treating doctor but, rather, that the rule "allows this information to come from a doctor" (emphasis in the original). We agree, however, only Dr. G comments on claimant's ability to work. In a report dated September 15, 1999, Dr. G commented that claimant is continuing to see Dr. R for treatment of his RSD and Dr. W "for psychological support regarding his over all injury." Dr. G also states "no work status." Other reports merely refer to claimant's treatment by Dr. R for the RSD and Dr. W for depression and anxiety. In a November 17, 1999, report, Dr. G states: "Certainly in [claimant's] present state and medical diagnoses, he is in no condition to work. He should be considered for permanent disability." That comment is essentially repeated in a January 24, 2000, note. Dr. R's reports merely document Dr. R's treatment, findings, and claimant's complaints. A July 30, 1999, note by Dr. R has an impression of:

> Very mild left [CTS].
> Burning in the palms of the hands with question of component of RSD.
> Prior right de Quervain's tenosynovitis.

Carrier points out that Dr. R does not make a firm diagnosis of RSD. Dr. W (a Ph.D psychologist), in reports dated October 28 and December 15, 1999, gives lengthy and detailed background information and developmental/physical and psychosocial histories, lists the tests given and interpretations, and gives a diagnosis of mood disorder and major depression. Dr. W concludes with recommendations and a prognosis by saying:

> It is recommended that [claimant] participate in supportive individual psychotherapy that is specifically tailored to enhance daily rehabilitation coping skills. Training in pain and stress management is vital, given the research that shows that perceptions of helplessness and negative expectations are a major predictor of treatment outcome. Self-calming skills should be taught, with audiotapes provided for home practice to be augmented by use of biofeedback equipment and hypnotherapy during sessions.

* * * *

> Prognosis for this patient for psychological recovery is significantly dependent on his gaining a sense of efficacy and control over his depressive and withdrawal reactions. Professional judgment would dictate that his level of care is both medically necessary and related to [claimant's] post-injury needs.

Evidence to the contrary includes a February 1998 functional capacity evaluation (FCE), for which claimant was referred by Dr. G. The FCE showed claimant physically able to perform in a medium-work category (claimant discounts this report because it is 18 months prior to the qualifying period). A report dated February 11, 1999, by Dr. C notes "major overlay with symptom magnification" and concludes:

> As far as return to work is concerned, I think that would be the best thing in the world for this man if an appropriate job could be found for him. He needs something that does not require a lot of heavy use of his right hand but does require that he use it to a certain degree in terms of light grasping and light moving and using of his fingers and hands. This is the best sort of therapy for anybody with this kind of a problem.

Claimant dismisses Dr. C's report as being prior to the qualifying period and being historically biased in favor of carriers.

Although the hearing officer did not make specific findings regarding the provisions of Rule 130.102(d)(3), he clearly considered that rule and his discussion indicated that Dr. C did not provide a sufficient narrative which specifically explains how the injury causes a total inability to work. While the hearing officer could also consider Dr. R's and Dr. W's reports, he could consider that they did not address how the injury causes a total inability to work. We find the hearing officer's decision on this point sufficiently supported by the evidence.

Claimant also advances the proposition that he is entitled to SIBs because he complied with the provisions of Rule 130.102(d)(2), which provide that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period[.]

We agree with claimant that the provisions of Rule 130.102(d)(1), (2), (3), (4), and (e) are considered in the disjunctive and that compliance with only one of the rules will establish entitlement to SIBs. Claimant's evidence of entitlement under Rule 130.102(d)(2) includes documentation from the TRC of a contact in April 1996 which resulted in a finding that

claimant does "not have a physical or mental disability which results in a substantial impediment to employment" and that claimant's case is being closed with a closure code of "no vocational impediment." The hearing officer made no findings on this contention but rather, clearly, the documentation from the TRC fails to show enrollment in and satisfactory participation in "a full time vocational rehabilitation program."

A good portion of claimant's appeal deals with the unfairness of requiring an injured employee to obtain a "scripted narrative" from a doctor regarding the inability to work and that obtaining such reports are very expensive with "no provision for this cost to be borne by the Carrier." Claimant goes on to say that the new SIBs rules make "it mandatory for a Claimant to hire an attorney for a SIBS dispute" and while the attorney can "bear the cost of requesting a narrative," the claimant will still ultimately bear the cost "as the attorney will claim it as an expense." We refer claimant to Section 408.147(c) which provides that if a carrier disputes entitlement to SIBs "and the employee prevails on any disputed issue," the carrier "is liable for reasonable and necessary attorney's fees incurred by the employee as a result of the insurance carrier's dispute," and that attorney's fees awarded under this subsection are not subject to Sections 408.221(b), (e), and (h).

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:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge