APPEAL NO. 001153

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 28, 2000. The hearing officer, finding that during the pertinent qualifying periods the appellant (claimant) did not attempt in good faith to obtain employment commensurate with his ability to work, concluded that he is not entitled to supplemental income benefits (SIBs) for the third and fourth compensable quarters. The claimant appeals, contending that the report of Dr. T specifically explained how he had no ability to work while the report of Dr. KS failed to show that he could do some type of work. The respondent (carrier) urges in response that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

Inexplicably, no stipulations were obtained to establish the dates of the qualifying periods for the quarters at issue nor were findings made on these periods. However, the disputed issues include the dates of October 21, 1999, through January 19, 2000, for the third quarter and January 20, 2000, through April 19, 2000, for the fourth quarter. Also, our decision in Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999 (Unpublished), in which we affirmed another hearing officer's decision that the claimant was not entitled to SIBs for the second quarter, contains certain relevant stipulations. Thus, this is a "new SIBs rules" case. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished).

The claimant testified that following his back operation, he developed a "drop foot" condition in his right foot which necessitates his wearing a foot brace and using either a cane, a walker, or a wheelchair. He stated that Dr. T, his primary care physician, told him not to drive except for emergencies but that he does occasionally drive into town to pay bills, obtain medications, and pick up food. The claimant further testified that during the period from July 8, 1999, to January 5, 2000, ostensibly the period of the two qualifying periods, he did not look for any type of work and that Dr. T did not want him to work.

In his report of May 25, 1999, Dr. KS, who examined the claimant on that date for the carrier, states that the claimant injured his low back on the job on March 15, 1997; that he underwent lumbar spine surgery on May 27, 1997; that following this surgery, the claimant's severe pain in his right lower extremity ceased but he was "unable to bring his foot back as he could before the surgery"; and that he has worked construction all his life and has been unable to return to this type of work because of the weak right lower extremity and foot drop. Dr. KS went on to state that the claimant will not be able to safely operate construction machinery now or in the future and that "[t]he only thing that he could do would be to sit at a desk and do sedentary type work." Dr. KS wrote on September 17, 1999, after again seeing the claimant, that the claimant returns with the same complaints he had in May 1999 and that he "may continue to sit at a desk and do sedentary type

work." In his letter of February 1, 2000, Dr. S discussed the activities of a man seen on a videotape climbing into and out of the bed of a pickup truck and cleaning out a gutter, all without apparent difficulty. Dr. KS, who said he twice examined the claimant, identified the man in the videotape as the claimant, as did the carrier's investigator who was "positive" of the identification. However, the claimant denied being the man seen in the videotape. In any event, Dr. KS again stated that he "continues to feel that this patient is capable of some type of gainful sedentary work." The claimant introduced some statements from persons which asserted that the man in the videotape is not the claimant.

Dr. T wrote on October 5, 1999, that the claimant suffers pain at all times to the extent that self-application and motivation for productive endeavors is virtually impossible, and that with his foot drop, any physical labor by the claimant would be out of the question. As for doing simple office work, Dr. T said "[t]he answer is a resounding NO." Dr. T went on to explain that the claimant would have to transport himself to work and the operation of an automobile for more than a short distance would be dangerous and painful; and that because the claimant's constant pain requires medication, personal application to the work would not be feasible and the claimant's job performance "would be nil rendering him totally unemployable; and that job retraining is out of the question because of the claimant's physical problems and his age." Dr. T concluded as follows: "[The claimant] is totally unfit for gainful employment by reason of his injury incurred in 1997 and as such he should be adjudicated totally unemployable for income-productive job activities. This is a result of his physical disability and the pain generated with activity as a result of the physical disability."

Dr. T wrote a report on January 25, 2000, again describing the claimant's physical problems with his back and right lower extremity and his pain. Dr. T also observed that the claimant's education renders him fit for only common labor which he is not physically capable of performing; that the claimant is not intellectually trainable or educable considering his age and lack of physical stamina; that he cannot conceive of the claimant's driving to an "eight to five job or to school at any time"; and that even if the claimant could get to a job or school, "he would be unable to stand the rigors of class room activity or work activity - even if it were a desk job." Dr. T concluded that in his opinion, "[the claimant's] strength and coordination are worsening and he should be declared COMPLETELY AND PERMANENTLY DISABLED for any and all wage earning pursuits."

In his narrative report of September 29, 1998, Dr. ES, the designated doctor who assigned the claimant an impairment rating (IR) of 26% for his lumbar spine injury, noted that Dr. T, who practices in Oklahoma, had assigned an IR of 96%.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (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. The hearing officer's factual findings that during the third and fourth

quarter qualifying periods the claimant was unemployed as a direct result of his impairment from the compensable injury have not been appealed.

The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) then in effect provides in pertinent part that "[a]n 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[.]" Rule 130.102(e) provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." As noted, the claimant testified that he made no effort to seek employment during the qualifying periods.

The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000. The Appeals Panel has also repeatedly encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3). *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999. Section 410.168(a) requires a written decision to include findings of fact and conclusions of law. The only other substantive factual findings on the disputed issues are findings that during the qualifying periods the claimant "did not attempt in good faith to obtain employment commensurate with his ability to work."

The claimant disputes the "good faith" findings, asserting that they must be reversed because, first, they are inconsistent with the "direct result" findings, and second, because Dr. T's reports proved that the claimant had no ability to work during the qualifying periods while Dr. KS's reports failed to "show" that the claimant was able to return to work.

In her discussion of the evidence, the hearing officer mentions Rule 130.102(d)(4). However, in the version of Rule 130.102(d) in effect prior to November 28, 1999, the current subsection (d)(4) was numbered subsection (d)(3) without substantive change, and for qualifying periods commencing before November 28, 1999, subsection (d)(3) should be cited.

The hearing officer states in her discussion of the evidence that Dr. T's medical documentation stating that the claimant is "totally unfit for gainful employment" and "totally unemployable" does "not explain **how** the Claimant's injury causes a total inability to work as set forth in Rule 130.102(d)(4) [sic]." While we agree that the two isolated statements

from Dr. T's reports quoted by the hearing officer do not comply with the requirement of Rule 130.102(d)(3) requiring a statement which specifically explains how the injury causes a total inability to work, we believe that the additional portions of Dr. T's reports, set forth above, do comply with the rule. And while entitlement to SIBs must rest upon the evidence adduced in support of each quarter, we note that in Appeal No. 992592, *supra*, another hearing officer found Dr. T's testimony and reports to have sufficiently explained how the claimant's injury caused a total inability to work.

The hearing officer goes on to state in her discussion that Dr. KS's report stating that the claimant can "sit at a desk and do sedentary type work" does demonstrate that the claimant can do some type of work and that since the claimant did not look for any work during the qualifying periods, he is not entitled to SIBs.

While these determinations in the hearing officer's Statement of the Evidence should have been set out as findings of fact, we do not find fatal error in the hearing officer's having failed to do so. We are satisfied that the hearing officer's determinations that Dr. KS's reports do constitute records which show that the claimant is able to return to work and that since the claimant failed to look for work he is not entitled to third and fourth quarter SIBs are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge