APPEAL NO. 001166

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 10, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000276, decided March 27, 2000, remanded the case to the hearing officer for further consideration and findings on each element of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) relative to the second and third quarters of supplemental income benefits (SIBs). A CCH on remand was held on April 27, 2000. The hearing officer determined that the respondent (claimant) is entitled to SIBs for the second and third quarters. The appellant (carrier) appeals, contending that the claimant did have some ability to work during the second and third quarter qualifying periods in issue, citing a functional capacity evaluation ordered by the claimant's treating doctor and other records. The carrier urged that the hearing officer's decision was not supported by any evidence or was against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust and requested the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the second and third quarters. There was no response filed by the claimant.

DECISION

Affirmed.

The facts are set forth in our prior decision and will not be repeated here. The carrier asserts that the hearing officer failed to discuss why the records demonstrating an ability to work were not credible.

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 impairment rating of at least 15%; (2) not returned to work or has earned less than 80% of the 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. It is undisputed that the claimant made no attempt to seek employment during the qualifying periods.

We briefly consider the carrier's assertion that the hearing officer erred in finding that the claimant's unemployment during the qualifying period for the first through third quarters was a direct result of his impairment. The claimant's testimony, in conjunction with the medical evidence of the claimant's restrictions, was sufficient evidence to support the hearing officer's determination that the claimant's unemployment was a direct result of his impairment.

Pertaining to the filing period for the second and third quarters, the Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at

all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish no ability to work is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994.

Rule 130.102(d)(3) applies to the qualifying periods for the second and third quarters. Rule 130.102(d)(3) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work 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. 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. 992197, decided November 18, 1999, and has encouraged hearing officers to make specific findings of fact addressing each of the three elements. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In this case, the claimant presented evidence tending to demonstrate that he has no ability to work and the carrier presented evidence tending to demonstrate that the claimant has some ability to work. The hearing officer had to judge the credibility of the evidence before her in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3) for the second and third quarters. Whether another record "shows" an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; and Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. The question of whether a record "shows" an ability to work is a different question than the question of whether the record states that the claimant has some ability to work.

The mere existence of records demonstrating that the claimant had some ability to work does not resolve the issue of whether the claimant is entitled to SIBs for the second and third quarters. The hearing officer in this instance decided these records were not credible and were, therefore, without probative value. In a concurring opinion (*see* Texas Workers' Compensation Commission Appeal No. 000678, decided May 17, 2000), Judge Kelley wrote:

> I want to stress to the hearing officer that while liberal construction of the workers' compensation laws is the legal standard, the trier of fact is no longer free under the new [SIBs] rules to engage in a simple weighing of all medical evidence when an inability to work is asserted. The statute itself does not

provide for inability to work, and to the extent that a humane provision has been created for those few injured workers who cannot do even part-time work, the provisions of the rule should be followed, not ignored through a recited "disbelief" of records that plainly point out that there is some ability to work.

We believe the better practice would have been for the hearing officer to explain why she did not find the records credible but under the specific circumstances of this case, we decline to hold as a matter of law that the hearing officer's decision was not in compliance with Rule 130.102(d)(3) because whether the good faith and direct result criteria were met by the claimant presented factual questions for the hearing officer to determine from the evidence presented. She decided the records indicating some ability to work were not credible and, in reviewing the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer did make findings on remand regarding the factors listed in Rule 130.102(d)(3). We therefore conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge