APPEAL NO. 001189

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 May 5, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the qualifying period for the ninth quarter for supplemental income benefits (SIBs) began on September 15, 1999, and ended on December 14, 1999. The hearing officer determined that during the qualifying period the claimant did not in good faith attempt to obtain employment commensurate with his ability to work and that he is not entitled to SIBs for the ninth quarter. The claimant appealed, contended that he was unable to work during the qualifying period, urged that the Texas Workers' Compensation Commission (Commission) rule requiring a doctor's statement that he is unable to work is *ultra vires* and is null and void, argued that the carrier did not contest his application for SIBs within 10 days of receiving it, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBs for the ninth quarter. The carrier responded, stated that the issue of timely contest of entitlement to SIBs by the carrier was not an issue at the CCH, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

We first address the claimant's contention that the carrier did not timely contest his entitlement to SIBs for the ninth quarter. That issue was not litigated at the CCH, the record does not contain the information on which to decide the issue, and there is not a determination of the hearing officer to be reviewed. The issue was raised for the first time on appeal and will not be considered. Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991.

We next address the argument that the Commission did not have the authority to adopt rules concerning the entitlement to SIBs. Section 402.061 provides that the Commission shall adopt rules as necessary for the implementation and enforcement of the 1989 Act. The Commission has adopted numerous rules concerning entitlement to income benefits. Whether or not the Commission exceeded its authority in adopting a rule is for the courts, not the Appeals Panel, to decide.

The claimant testified that during the qualifying period he sought employment as a welder with one employer. In a report dated August 2, Dr. K, a neurologist, stated that the claimant was placed on medication for a balance problem and that it was highly unlikely that the claimant would ever be able to work around fast-moving equipment or at heights. In a Specific and Subsequent Medical Report (TWCC-64) dated August 12, 1998, Dr. K said that the claimant had persistent cervical pain, limited cervical range of motion, muscle spasms, and weakness in the left upper extremity and recommended a follow-up EMG of the upper extremities. In a letter dated September 8, 1999, Dr. A, who worked in Dr. K's

office, stated that his assessment was post traumatic brain injury, herniated lumbar disc, lumbar radiculopathy, and cervical radiculopathy and that he recommended that the claimant proceed with a functional capacity evaluation (FCE) to determine his work ability as requested by the carrier. Mr. T, a physical therapist, performed an FCE. In a report dated September 14, 1999, Mr. T said that the claimant could work at the sedentary level and provided restrictions. In a narrative report dated September 16, 1999, Mr. T repeated restrictions and wrote "[FCE] results demonstrate that patient is not classified in the sedentary range and continues to have low back pain with radicular symptomology." It appears that "not" is a clerical error and perhaps the intended word was "now."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) provides:

> 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:
>
> * * * *
>
> (4) 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 did not make a finding of fact on each of the three criteria in Rule 130.102(d)(3), but did make a finding of fact that during the qualifying period the claimant possessed a sedentary ability to work. 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 provisions for ability to work are the same in the SIBs rules effective January 31, 1999, and effective November 28, 1999. We interpret the hearing officer's comments concerning the old SIBs rules to be a reference to the SIBs rules that became effective January 31, 1999, and not to SIBs rules in effect prior to that. The record does not contain a narrative report from a doctor which specifically explains how the injury causes a total inability to work. It contains an FCE that states that the claimant can work at the sedentary level and provides restrictions. The hearing officer's findings of fact that during the qualifying period the claimant possessed a sedentary ability to work and did not attempt in good faith to obtain employment commensurate with his ability to work and her conclusion of law that the claimant is not entitled to SIBs for the ninth quarter 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 the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kathleen C. Decker
Appeals Judge