APPEAL NO. 001458

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 June 6, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant has appealed this determination, asserting that her doctors' reports show that she cannot work. The respondent/cross-appellant (self-insured employer) contends in response that the evidence is sufficient to support the challenged determination. Further, in its response, which was filed in time to be considered as an appeal, the self-insured employer contends that the hearing officer erred in excluding from evidence a videotape that shows that the claimant is able to work.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on November 21, 1997, with an impairment rating (IR) of 24% and has not commuted any portion of her impairment income benefits (IIBs); and that the qualifying period for the fifth quarter began on December 26, 1999, and ended on March 25, 2000.

The claimant testified that she was working as a cashier for the self-insured employer at the time of her compensable injury, that cashier work is all she has ever done, and that she can no longer perform that work due to her injury. She indicated that she still sees her treating doctor, Dr. M; that she receives pain management treatment from Dr. D; and that her medications make her sleepy and forgetful. Dr. D's pain clinic records reflect that he has been administering cervical facet joint injections as well as trigger point injections for right hip pain and that he manages the claimant's pain medications through the infusion pump. One of the claimant's records reflects that her spinal column stimulator is inoperative but that the claimant does not want it removed.

Dr. M testified that he was the claimant's treating doctor for her injury; that he saw her during the qualifying period; and that she has also been seen by Dr. D, a pain management specialist. He further stated that the claimant's injuries have not improved enough for her to tolerate even sedentary work; that she has an implanted pain drug pump and an implanted spinal cord stimulator; and that her medications impair her ability to work. Dr. M also testified that he referred the claimant for evaluation by Dr. E, a psychiatrist, and that Dr. E felt that the claimant's capacity was so low as to be able to work only a few hours in a sedentary position, allowing for frequent changes of position and the ability to lie down from time to time. Dr. M said he called Dr. E and discussed Dr. E's report and that Dr. E stated that, going by the strict criteria, the claimant could work up to four hours at sedentary work under the right conditions including the ability to stand, sit, and lie down as necessary. According to Dr. M, Dr. E also felt that, given the effects of the claimant's

medications, her working was not a realistic goal and was not in her best interest. Dr. M also stated that in his, Dr. M's, opinion the claimant was not able to perform any type of work during the qualifying period. He also said that he had expressed the hope that at some time the claimant could find work on an "as able to" basis, perhaps doing computer work in her home.

Not mentioned by the hearing officer is the detailed June 15, 1998, report of a required medical examination from Dr. C. This report indicates that the claimant, then 61 years of age, was injured at work on _____, when she lost her balance descending a staircase and fell down some stairs; that she continued to work for three weeks with pain in her neck, thoracic spine, and low back; that she has since had various modes of conservative treatment as well as arthroscopic knee surgery; that she has not worked since August 23, 1995; and that Dr. S assigned the claimant a 22% IR and Dr. E assigned 24%. Dr. C's diagnoses include severe degenerative cervical and lumbar spine disc disease with cervical spondylosis and radiculopathy and various additional lumbar spine conditions. Dr. C recommended a variety of conservative treatment modalities, as well as the consideration of cervical spine surgery, and stated that if the claimant "wants nothing further done, then she is totally disabled from working."

The September 14, 1999, report of a functional capacity evaluation (FCE) ordered by Dr. S states that the claimant's dynamic and lifting tests were invalid based on consistency criteria; that she "exhibited symptom/disability exaggeration behavior"; that her scores of "5/5 by Waddell's and 9/21 by Korber's protocols" indicate a nonorganic component to her pain, medical impairment, and disability; and that her validity criteria suggest very poor effort or voluntary submaximal effort which is not necessarily related to pain or impairment. The report concluded that the claimant's physical demand classification was sedentary and qualified full time. In Dr. S's September 17, 1999, report of his examination of the claimant, he discusses the FCE report. Dr. S states that the FCE report concluded that the claimant would be able to work at a sedentary physical demand level for an eight-hour day. He also commented that he did not appreciate the symptom magnification found by the therapist but that he felt the therapist's evaluation was thorough and the results believable. Dr. S's report details the records he reviewed, including several from 1998. Dr. M testified that he did not feel that Dr. S's report was an accurate description of the claimant's ability to work.

Dr. E wrote to Dr. M on January 17, 2000, stating that he had reviewed the FCE (no date or further identification of the FCE); that the test confirms the recommendations he made in a November 19, 1999, note and indicates that the claimant can perform light to sedentary work and was able to tolerate up to about four hours of activity. However, Dr. E goes on to state that the claimant "is really not capable of going back to any type of gainful employment" since she would have to be in a position which would allow her to work only part-time and only basically at a sedentary position where she could change positions frequently; that considering her age and work restrictions, he did not really see that there is any type of work she is going to be able to do on a regular and consistent basis.

Dr. M wrote on February 28, 2000, that he has Dr. E's report stating that the claimant's FCE pointed to minimal sedentary activity; that the claimant is limited to four hours or less a day of functional activity with frequent changes of position and opportunities to lie down to relax; and that it is his opinion, as well as Dr. E's, that the claimant "is not employable," that she is at high risk for reinjury, and that he cannot recommend that the claimant return to work even part-time in a sedentary position.

Dr. M wrote a self-insured employer nurse on April 27, 2000, stating that Dr. E feels that the claimant is capable of minimal sedentary activity but would be at a disadvantage for trying to work since she is not in a position to undergo new training nor able to sit, stand, or hold any single position for more than a very few minutes without severe pain. Dr. M wrote the claimant's assistant on April 21, 2000, stating that although the claimant's FCE (no date or further identification of the FCE) indicated the possibility of her working three to four hours of sedentary work several days a week, "it is not an option at this point since we are unable to keep her pain free even when working"; that requiring her to return to work even on a part-time basis would negatively impact her ability to function with any independence and with any freedom from pain; and that perhaps in the future the claimant will be able to do some self-directed, home-based work which does not require her to sit, stand, bend and so forth for any appreciable amount of time.

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.

The IR and non-commutation of IIBs criteria were determined by stipulation. The hearing officer's finding that during the qualifying period the claimant was unemployed as a direct result of her impairment has not been appealed.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) 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: . . . (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 injured employee is able to return to work and no other records show that the injured employee is able to return to work."

The claimant challenges findings that she had some ability to work and that she did not attempt in good faith to obtain employment commensurate with her ability to work. The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3), now Rule 130.102(d)(4) must be satisfied. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20,

2000; Texas Workers' Compensation Commission Appeal No. 001153, decided June 30, 2000; and Texas Workers' Compensation Commission Appeal No. 001294, decided July 20, 2000. The Appeals Panel has repeatedly encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(4). *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999; Appeal No. 001153, *supra*.

The hearing officer does discuss the three elements of Rule 130.102(d)(4) in her statement of the evidence. She states that the claimant has not shown by a preponderance of the evidence that she was unable to work during the qualifying period; that Dr. M's testimony and records do specifically explain how the claimant's injury causes a total inability to work; that the records of Dr. S and the September 1999 FCE report are not credible as records showing that the claimant is able to work because Dr. S's report was based on incomplete and remote medical records and because the FCE was performed prior to the qualifying period and another FCE was performed following that time; and that the later FCE and Dr. E's records do show that the claimant has some ability to work.

We are satisfied that the challenged findings that the claimant had some ability to work and that she did not attempt in good faith to obtain employment commensurate with her ability to work 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).

As for the self-insured employer's assertion of error in the hearing officer's exclusion from evidence of the proffered videotape, we are satisfied that the hearing officer did not abuse her discretion with this evidentiary ruling. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The benefit review conference was held on May 2, 2000, and the self-insured employer's attorney represented that the videotape was sent to the self-insured employer on May 23, 2000, and that he received it on June 1, 2000, and sent it to the claimant the next day. The hearing officer stated that she found no good cause to admit the videotape given the delay of the self-insured employer in acting on the videotape between May 23 and June 1, 2000.

Finding the evidence sufficient and no reversible error in the record, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge