APPEAL NO. 001525

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 June 6, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) had some ability to work; had failed to make a good faith effort to obtain employment commensurate with her ability to work; and is not entitled to supplemental income benefits (SIBs) for the fourth quarter. The claimant appeals, summarizing the claimant's medical history and emphasizing reports that indicated that the claimant had a total inability to work in any capacity. The claimant disputes the individual findings of a functional capacity evaluation (FCE), contending that the FCE was "not credible when compared to all the other medical evidence." The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responds, citing evidence to the contrary and urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a secretary, performing computer keyboarding activities. The parties stipulated that the claimant sustained a compensable (bilateral hand and wrist) injury on _____; that the claimant reached maximum medical improvement on October 22, 1997, with a 28% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the fourth quarter of SIBs was from November 19, 1999, through February 17, 2000.

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 portions 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 the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

The claimant contends that she had a total inability to work during the applicable qualifying period. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(3), the version then in effect. That rule provides that the good faith element is met when the injured employee is (1) 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." We have held that all three elements

of Rule 130.102(d)(3) must be established. Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999 (Unpublished).

The claimant's treating doctor is Dr. N. In November 1999, the Texas Workers' Compensation Commission appointed Dr. D as its required medical examination (RME) doctor to determine the claimant's "current ability to work." In a report dated November 4, 1999 (just prior to the qualifying period), Dr. D reviewed the claimant's lengthy medical history and concluded:

> I do not feel that [claimant] is capable of performing any type of gainful employment at the present time. Her prognosis is very poor for recovery or return back to gainful employment. I don't think that she could even handle a sedentary-type job where she sits in place and performs simple activities. Even limiting motion of the wrists and hands would not be of much help since this still would cause significant neuropathic pain. Even slight motion with the wrists and hands, especially on the left side, is enough to cause debilitating dysesthetic pain which would realistically limit [claimant] from performing any type of sustained work activities.

In a report dated March 28, 2000, Dr. N commented:

> Regarding the work status for [claimant], she is unable to perform any work at this time. She is currently being put into a program of work hardening, which will be a four- to six-week program. At that time, hopefully, [claimant] will be ready to go to a light to moderate work activity situation. At this time, though, she is under orders for no work of any type. She needs to maintain sedentary activities.

These and other reports are summarized by the hearing officer, including some progress notes from Mr. RS, a licensed professional counselor, where Mr. RS noted that the claimant was "able to walk, drive, etc."

Evidence that the claimant could do some type of work is in the form of two FCEs performed in February 2000. In an FCE performed on February 10, 2000, Dr. WB, carrier's RME doctor, reviewed the claimant's medical history; commented that the physical examination "is essentially within normal limits"; and, based on the testing, concluded that the claimant's demonstrated performance qualifies in the light category of the Dictionary of Occupational Titles and there is no "medical reason which would preclude [claimant] from traveling to work, . . . being at work and performing appropriate tasks and duties." Certain restrictions on the use of her hands were noted, and repetitive or direct trauma to the hands and wrists was to be avoided. In another FCE performed on February 24, 2000, Dr. N concluded that the claimant was capable of performing at the sedentary work level.

The hearing officer, in the Statement of the Evidence, comments:

> Claimant's evidence is insufficient to prove by a preponderance of the evidence that she had no ability to work during the qualifying period for the 4th quarter of [SIBs]. Medical records from [Dr. B], [Mr. RS] and [Dr. WB] demonstrate that Claimant was able to return to work at some capacity during the 4th quarter qualifying period and as such she failed to meet the third requirement of Rule 130.102(d)(4). [The rule in effect during the qualifying period was actually Rule 130.102(d)(3), which was renumbered Rule 130.102(d)(4) effective November 28, 1999.]

The claimant argues that Dr. WB's FCE does not show an ability to work because Dr. WB said the claimant should "refrain from any tasks that require frequent or constant pushing, pulling[,] [etc.]" and, effectively, Dr. WB was saying the claimant "cannot use her hands in any type job" and, therefore, "[p]ractically speaking, what type of job could an individual successfully perform without the use of their hands?" Obviously, the hearing officer did not interpret Dr. WB's FCE in that manner. The claimant, both at the CCH and on appeal, goes through various test scores and argues that they show different results than those interpreted by the doctors and, therefore, the FCEs "are not credible when compared to all the other medical evidence." The carrier notes that objective diagnostic testing was negative and that Dr. N, in reports stating the claimant had no ability to work, referred to "normal" work, which could be interpreted to mean the preinjury job.

In any event, this evidence was all presented to the hearing officer and, at best, the medical evidence of whether "other records show that [claimant] is able to return to work" was subject to differing interpretations. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Upon review of the record submitted, we find no reversible error. 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:

Robert E. Lang
Appeals Panel
Manager/Judge

Judy L. Stephens
Appeals Judge