APPEAL NO. 001555

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 5, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the claimant's impairment rating is 23%; that the qualifying period for the eighth quarter for supplemental income benefits (SIBs) began on March 24, 1999, and ended on June 22, 1999; that the qualifying period for the ninth quarter began on June 23, 1999, and ended on September 21, 1999; that the qualifying period for the 10th quarter began on September 22, 1999, and ended on December 21, 1999; and that the claimant did not seek employment during any of the qualifying periods in dispute. Whether the claimant is entitled to SIBs for the 8th, 9th, and 10th quarters depended on whether she was unable to perform any type of work in any capacity during the qualifying periods. The hearing officer determined that the claimant failed to establish that she was unable to perform work at all during the qualifying periods, that during the qualifying periods she did not make a good faith effort to seek employment commensurate with her ability to work, and that she is not entitled to SIBs for the 8th, 9th, and 10th quarters. The claimant appealed; contended that the hearing officer did not properly apply the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110) concerning the use of a designated doctor in SIBs cases; urged that the determinations of the hearing officer are against the great weight and preponderance of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBs for the 8th, 9th, and 10th quarters. The carrier responded, contended that the hearing officer properly applied the provisions of Rule 130.110, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that her decision be affirmed.

DECISION

We affirm.

We first address the application of the provisions of Rule 130.110. That rule was effective November 28, 1999. It states that it

> only applies to disputes regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to SIBs

and that presumptive weight afforded the designated doctor's report shall begin the date the report is received by the Texas Workers' Compensation Commission.

The record does not indicate the date the initial determination of the claimant's entitlement to SIBs was made and there is no date to determine the second anniversary.

In a report dated January 11, 2000, Dr. L reported that he reviewed medical records and examined the claimant. He said that he would have treated the claimant differently and that he did not have a clear answer as to whether the claimant could return to work. The report of Dr. L does not contain an opinion as to whether or not the claimant had the ability to work. As a result, there is no opinion that is entitled to presumptive weight. Since there is nothing to give presumptive weight, we need not address the effective date of presumptive weight of a report rendered under Rule 130.110. The report of Dr. L may be considered as any other medical report.

Rule 130.102(d) provides, in pertinent part:

> 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; or [.]

On May 9, 1995, Dr. DG performed a bilateral laminectomy, discectomy, and fusion at L5-S1. During 1999, Dr. DG wrote letters to the carrier in which he indicated that the claimant was having pain, that he did not think that the claimant's fusion had been successful, that he recommended a two-level fusion, that the claimant was considering the surgical option, and that the claimant was unable to work. In a letter dated June 7, 1999, Dr. DG said that, in his medical opinion, the claimant would not be able to gain and maintain meaningful employment. In a letter dated February 23, 2000, Dr. DG wrote:

> In terms of [claimant's] ability to work, I have pointed out on a number of occasions that although [claimant] could do sedentary work for a short period of time, I don't feel she can maintain this type of employment. This takes into account that a pseudarthrosis is an unstable situation and will cause her pain in her lower back. It has been stated what [the claimant] can do as opposed to what she cannot do. She cannot lift greater than 10 lbs. She cannot sit or stand for greater than 20 minutes at one time for rest periods. She cannot climb. She cannot crawl. She cannot kneel. Bending and stooping should be restricted to only a very limited basis. Her carrying should be restricted to 10 lbs as well.

In a letter dated May 11, 2000, Dr. DG wrote:

> It is my medical opinion that she cannot work in any type of activity because of an unstable pseudoarthrosis. This does not allow her to bend, stoop or

> stand for any period of time. Lifting is restricted to 10-15 lbs. If she sits for 30-45 minutes it will cause her increased pain as it relates to her lower back and she would have to continuously change positions. She is also taking medications which include Vicodin, Parafon Forte DS and Ambien all of which could certainly make it difficult for her to reasonably gain and maintain meaningful employment.

In a letter dated March 6, 1999, Dr. G-V stated that he suspected that the claimant had pseudoarthrosis, that that had not been confirmed; and that he could not recommend that the claimant return to work, limited or full work, since a diagnosis had not been established. In a letter dated January 11, 2000, Dr. G-V said that if the claimant had surgery she would remain disabled and if she did not have surgery she could probably do light-sedentary work.

In a letter dated June 1, 1999, Dr. N stated that he reviewed the medical records and opined that the claimant could return to work activities which required seeing, hearing, and speaking; that there was no evidence of loss of manual dexterity; that she should be able to sit for up to two hours at a time during an eight-hour day; that she should be able to stand for two hours at a time and walk for a similar period of time during an eight-hour day; that the claimant could lift 35 pounds occasionally and 20 pounds frequently; and that she should refrain from excessive bending and stooping.

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 trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). The hearing officer's determinations that the claimant had some ability to work during the qualifying periods and that she is not entitled to SIBs for the 8th, 9th, and 10th quarters 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:

Robert E. Lang
Appeals Panel
Manager/Judge

Gary L. Kilgore
Appeals Judge