APPEAL NO. 001569

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 20, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the seventh and eighth quarters. The appellant (carrier) appealed, asserting that the claimant's medical evidence of her inability to work is insufficient, that she failed to look for work each week of the qualifying periods, and that her claimed inability to work was also based on her back problem which is not part of the compensable injury. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury in the form of an occupational disease of carpal tunnel syndrome (CTS) in both wrists, which later resulted in a 15% impairment rating (IR); that the qualifying period for the seventh quarter was from August 7 through November 5, 1999; and that the qualifying period for the eighth quarter was from November 5, 1999, through February 4, 2000.

The claimant testified that she is 53 years of age; that she has, since high school, worked in a sewing factory until going "on the road" with her husband to construction sites in various states for the past several years; that since June 1999 she and her husband have resided in (town), a small town with a population of around 2,000; and that she has no ability to work due to her bilateral compensable CTS injury for which she had right wrist surgery in 1995. She also said she sustained a back injury in February 1997 while working for the employer and that her back bothers her "probably as much" as her CTS. The claimant further testified that she has restrictions for her back, neck, and shoulders; that she cannot drive for long nor lift very much; and that she also has stiff knees.

The claimant further testified that her treating doctor, Dr. P, whom she last saw in late September or early October 1999, told her there is no work she can do. Dr. P, who gave testimony by telephone while away from his office and without the claimant's records, stated that if all the claimant had was the CTS, she could do what others with severe CTS can do, but that she has, in addition, "a lot of arthritis in her hands from her job" and "cannot manipulate things" well. He also stated that the claimant's back problems limit her lifting and the time she can sit and he indicated that the claimant cannot work even at sedentary work with her additional problems.

Dr. P wrote the carrier on December 17, 1999, stating that he last saw the claimant on September 28, 1999; that she was in significantly worse condition than she was at the time she reached maximum medical improvement; that her hand and finger numbness, knee pain and stiffness, neck pain and stiffness, low back pain, and thoracic back pain are chronic and unrelenting; and that he still believes that she "is unable to maintain gainful

employment due to these conditions and will continue to be so." Dr. P wrote on February 23, 2000, that the claimant is unable to return to work even with sedentary work restrictions; that she is unable to use her hands due to arthritic joints, CTS, and wrist arthritis; that she has low back disability and cannot sit, stand, bend, twist, lift and so on for any length of time; and that due to the combination of these problems she cannot, he believes, maintain gainful employment. Dr. P wrote on March 16, 2000, that the arthritis in the claimant's wrists make her CTS worse due to the inflammation; that the arthritic joints of the fingers are due to years of micro trauma from sewing at the employer's facility; that the arthritic finger joints may have contributed secondarily to the CTS but are not the primary cause; and that in his opinion both the arthritis and the CTS originate from the same cause and are severe to the extent that the claimant cannot maintain gainful employment.

According to the report of Dr. M, the designated doctor who examined the claimant on September 9, 1997, and assigned her a 15% IR for her right and left wrist impairments, the entirety of the IR was for loss of sensation and Dr. M indicated that he intentionally did not assign ratings for the claimant's abnormal range of motion (ROM) because of comments in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. However, Dr. M's report reflects that the claimant had loss of wrist ROM bilaterally, both upon observation and with measurement.

The claimant introduced an Application for Supplemental Income Benefits (TWCC-52) for both of the quarters in issue. Concerning the job search contacts annotated on her TWCC-52 forms, 21 during the seventh quarter qualifying period and 21 during the eighth quarter qualifying period, the claimant said she made those contacts, not because she felt she could work but because the adjuster, Ms. C, told her she had to. Her first job contact was on August 23, 1999, and, as stipulated, the qualifying period for the seventh quarter began on August 7, 1999.

The requirements for entitlement to SIBs are set out in Sections 408.142(a) and 408.143 of the 1989 Act and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(c) provides that "[a]n injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings."

The version of Rule 130.102(d) in effect when the qualifying periods in issue commenced provides, in pertinent part, that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "(3) 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 record shows that the injured employee is able to return to work[.]"

The claimant had the burden to prove her entitlement to SIBs. It was the claimant's contention that she had no ability work in any type of employment, as she was told by Dr. P; that she only looked for jobs because the adjuster told her she had to do so; and that Dr. P's evidence was sufficient to meet the requirements of Rule 130.102(d)(3).

The carrier introduced the May 9, 2000, report of Ms. C, stating that many of the employers listed by the claimant on her TWCC-52 forms had no jobs available and that many could not confirm a contact by the claimant. The carrier did not introduce or call attention to a record which it contended showed that the claimant was able to return to work. The carrier's position was that the claimant's medical evidence of her total inability to work was insufficient because Dr. P's testimony and reports were conclusory and because they referred to "gainful employment" which is not the standard for SIBs.

The hearing officer determined that during the qualifying periods the claimant was "unable to perform any work at all as a direct result of her impairment from her compensable injury," that during the qualifying periods the claimant "was excused from attempting to find work because she had no ability to perform any work," and that the claimant therefore made a good faith attempt to obtain employment commensurate with her ability to work.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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). The hearing officer could read Dr. P's reports in their entirety, consider Dr. P's testimony, conclude that Dr. P was not saying that the claimant could perform some type of work which might not be "gainful" employment, and conclude that the claimant's compensable injury caused her total inability to work.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge