APPEAL NO. 001583

Following a contested case hearing held on June 16, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 14th quarter (March 14 through June 12, 2000). The appellant (self-insured employer) requests review of this legal conclusion and certain underlying findings of fact, asserting that two medical records as well as the claimant's own conduct show that she was able to return to work during the qualifying period for the 14th quarter. The file does not contain a response from the claimant.

DECISION

Affirmed.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating (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 parties stipulated that the claimant reached maximum medical improvement on October 22, 1995, with a 20% whole body IR and that the qualifying period for the 14th quarter was from November 29, 1999, through February 27, 2000. Not appealed are findings that on _____, as the claimant was moving a tray of meat from a higher shelf to a lower shelf for the self-insured employer, she sustained an injury which includes cervical disc herniations at two levels with spinal cord damage, a nervous system disorder with chronic right shoulder and neck contractions, torticollis, chronic neck pain, headaches and nausea, and vomiting so severe that the claimant must take sedating medications. Also not appealed are findings that the claimant has not returned to work; that she did not seek employment during the 14th quarter qualifying period; and that during that period the claimant's decrease in earnings was a direct result of her impairment from her compensable injury of _____.

The "good faith effort" is the only SIBs entitlement criterion in dispute. The claimant contends that she satisfied that criterion by proving that during the qualifying period for the 14th quarter she had no ability to work. The self-insured employer contends that the claimant's evidence falls short of meeting her burden of proof.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) provides 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 injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]" The Appeals Panel has stated that all three prongs of Rule 130.102(d)(4) must be satisfied. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 001619, decided August 21, 2000.

The January 22, 1996, report of Dr. G, the designated doctor who assigned a 20% IR for the claimant's neck and right upper extremity injuries, states that prior to her injury at work the claimant underwent lumbar spine fusion surgery at L4-5 in August 1991, and that following her injury at work she underwent cervical spine fusion surgery at C5-6 and C6-7 in February 1995 and a right carpal tunnel release in November 1995.

The self-insured employer introduced the October 5, 1998, report of Dr. D, a psychiatrist who treats the claimant. Dr. D stated that it would be "severely difficult" for the claimant to tolerate any type of light-to-medium level work and that all he could see her being able to perform would be sedentary work such as a desk job, with no overhead range of motion and no lifting of more than five pounds. The self-insured employer also introduced the November 17, 1999, addendum of Dr. S to his September 1, 1999, report stating that the additional records he reviewed did not change his opinion and that he feels the claimant can perform sedentary work "such as writing and moving light weight papers," probably for four hours a day with restrictions against lifting more than five pounds and against climbing, pushing, and pulling with the right upper extremity.

The November 16, 1999, report of Dr. R, a neurosurgeon and the claimant's treating doctor, states that the claimant is considered totally and permanently disabled; that she has a right shoulder dystonia (disordered tonicity of muscle), which has not been relieved even with injections and which has her in constant pain, and also chronic neck pain related to cervical disc disease; that she relies on medications which are sedating including analgesics, muscle relaxers, and anti-depressants; and that she cannot perform even sedentary work because of the dystonia and need for medications. Dr. R responded to a December 3, 1999, carrier letter indicating that certain restrictions would be appropriate.

Dr. R's Texas Workers' Compensation Work Status Report (TWCC-73) signed on February 8, 2000, states that the claimant is unable to work and is restricted from all work permanently due to continued dystonia. Dr. R's report of February 22, 2000, states the same information as his November 16, 1999, report. Dr. R's report of April 10, 2000, states that the claimant has been unable to work since her surgery for a combination of reasons; that her right shoulder and neck spasms/dystonia left her with chronic neck pain and headaches which limit the time she can sit, stand, and walk and that she walks with a very antalgic gait; that her chronic pain requires multiple medications, many of which are extremely sedating including injections; and that while physically she would be able to do a very sedentary job that did not require prolonged sitting, standing, or walking, her sedating medications would make her unacceptable for a job requiring constant monitoring and decision making.

In a quite detailed report of May 12, 2000, Dr. R wrote that the claimant's cervical disc herniation caused spinal cord damage which has led to a severe disorder of the autonomic nervous system and that both he and Dr. D feel the claimant is totally and permanently disabled and unable to return to work, not even to sedentary work, due to severe disability from this autonomic dysfunction. Dr. R further stated that neither he nor Dr. D, both of whom have been treating the claimant, feel that she has any psychosomatic or conversion disorder. He also commented on the extent of the claimant's anatomic problems and the sedating effect of her medications.

The hearing officer makes specific findings of fact concerning why he does not regard the October 5, 1998, report of Dr. D; the November 17, 1999, report of Dr. S; and the December 3, 1999, report of Dr. R as records showing an ability to return to work. The self-insured employer challenges these findings as well as findings that during the qualifying period the claimant was unable to perform any type of work in any capacity, that Dr. R's reports specifically explain how the claimant's compensable injury causes a total inability to work, and that no other records "show" that the claimant was able to return 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 determinations 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge