APPEAL NO. 001609

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 5, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. The claimant appealed, contending that the evidence is "overwhelming" that the claimant has a total inability to work in any capacity and cites medical reports that support that assertion. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (self-insured) responds, citing evidence and a surveillance videotape which it contends shows some ability to work, and urges affirmance.

DECISION

Affirmed.

The claimant was employed as a teacher in one of the self-insured's schools when a Hispanic, 14-year-old student, pulled a gun and shot at (and missed) the claimant. The claimant fell down some stairs and the assailant then put the gun to the claimant's head and pulled the trigger, but the gun misfired. While the claimant sustained some physical injuries (she testified about two broken arms), the more severe injury was psychological, which includes post-traumatic stress disorder (PTSD), anxiety, panic attacks and agoraphobia. The parties stipulated that the claimant has sustained a compensable injury; that the claimant had at least a 15% impairment rating (IR); and that impairment income benefits (IIBs) had not been commuted. The parties were unable to stipulate as to the exact dates of the qualifying periods and the hearing officer did not make findings on that matter. Generally, the 11th quarter qualifying period was from around August 22 (the other party said September 5), 1999, to around the end of November, depending on whose dates are used, with the qualifying period for the 12th quarter being roughly from the first of December 1999 to the end of February or first part of March 2000. The claimant proceeds on a total-inability-to-work theory.

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. 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.

Although neither party nor the hearing officer specifically referenced the specific rule involved at the CCH, the claimant's entitlement to SIBs in both quarters is determined by the "new" SIBs rules in effect after January 31, 1999, and the amendment to those rules, effective November 28, 1999 (which may or may not have been applicable to the 12th

quarter 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 was treated by a number of health care providers, including doctors in other states, as the claimant had lived in Virginia and California before returning to Texas. The claimant's current treating doctor is Dr. V, apparently a clinical psychologist in California. In reports dated June 3, August 28, August 30, and September 26, 1999, and an undated report, Dr. V indicates that the incident occurred on "January 25, 1993," and, in another report references "February 11, 1993," which appears to be the correct date. In the June 3 report, Dr. V states that the claimant "is not able to return to work" in response to a question about whether the claimant "is able to work on a full time basis." In response to a question on the claimant's restrictions, Dr. V wrote:

> She is phobic of office settings, cannot be in a room with other people unless she can sit against a wall where she can see all entrances to the room.
>
> At the present time [the claimant] would not have the freedom from acute anxiety to carry out any work tasks in a setting outside of her own home.
>
> [The claimant's] return to work restrictions would include the need to do the work tasks at home, at her own pace, and with the support of a professional (psychologist or return to work counselor, or both) to help problem solve the barriers she faces, so that she might have the opportunity to move towards a more normal work setting.

Dr. V also comments, in some of the other reports, that the claimant is subject to panic attacks; that she can go to the grocery store "if there is no one else at the checkout counter, and if the checkout person is not Hispanic." Dr. V goes into some detail how the claimant's PTSD, anxiety, etc., precludes her from working, but seems to reference this on a full-time position outside the home. Dr. W, a California psychiatrist, in a report dated June 22, 1999, comments:

> At the present time I view this individual as totally disabled for the forseeable interfere with her ability to relate to supervisors, meet job deadlines, or interact with peers. It is possible that she could work out of her home in some kind of a fairly straightforward and simple fashion, but at the present

> time she needs continuing psychological support and medication management to allow her to function.

The claimant was also examined by Dr. B, an independent medical examination psychiatrist, who, in a detailed 17-page report dated December 29, 1999, diagnosed the claimant with PTSD, major depression and "panic disorder with agoraphobia." Regarding the claimant's ability to work, Dr. B commented:

> The claimant is impaired because of severe panic and avoidance symptoms from being able to function in what might be described as typical work or office setting.
>
> * * * *
>
> The claimant should work in as stress free environment as possible. She should conduct most of her work from home. She should work across the Internet and through computer channels as much as possible, as well as through telecommunications, in order to gradually expose her to interacting with others.

Dr. B also recommended that the claimant "seek a psychotherapist and a psychiatrist in her local vicinity" rather than "speaking with her therapist [Dr. V] from California on a daily basis."

A surveillance report and a videotape taken April 30 and May 6, 2000 (well after the 12th quarter qualifying period), show the claimant entering, exiting and driving a vehicle; going to a Mexican restaurant, where she stayed just over 30 minutes; shopping at a large retail store; on May 6 going to a soft ice cream stand and standing in line several minutes before buying an ice cream cone; and working around her house. Ms. L, a long-time friend of the claimant's, testified that she pays part of the claimant's rent and that the claimant, on occasion, answers the telephone for Ms. L's business.

The hearing officer, in the Statement of Evidence, comments that there is little doubt that the claimant has been impeded "by her life altering experience," but that the claimant is not persuasive that she has no ability to work and "is capable of providing answering services and computer services." The hearing officer makes no reference to Rule 130.102(d)(3), but simply finds that the claimant failed to make a good faith effort to seek employment commensurate with her abilities. In our review of the evidence and interpolating the hearing officer's brief comments, we hold that the hearing officer found that the claimant was not "unable to perform any type of work in any capacity" and that there were some "records [which] show that [the claimant] is able to return to work," albeit in a very limited capacity out of her home, at her own pace, either on a computer or doing telephone answering services, as she has done for Ms. L.

On that basis, upon review of the record submitted, we find no reversible error and 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:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge