APPEAL NO. 001619

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 April 17, 2000. The hearing officer concluded that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the seventh and eighth quarters. The appellant (carrier) appeals, asserting both that there are insufficient findings of fact to support these conclusions and that the evidence did not establish that the claimant had no ability to work during the two qualifying periods. The claimant asserts, in response, that it is the function of the hearing officer to weigh the evidence.

DECISION

Reversed and remanded.

We note at the outset that the tape recording of the hearing is of exceptionally poor quality, particularly in recording the claimant's attorney, and nearly required a remand for reconstruction of the record.

The parties stipulated (Finding of Fact No. 1) that the claimant sustained a compensable injury on _____, had an impairment rating (IR) of 15% or greater, and has not commuted any impairment income benefits (IIBs); that the seventh quarter was from September 17, 1999, through December 16, 1999, with the qualifying period being from June 5, 1999, through September 3, 1999; and that the eighth quarter was from December 17, 1999, through March 16, 2000, with the qualifying period being from September 4, 1999, through December 3, 1999.

The sole unstipulated finding of fact made by the hearing officer is as follows:

> 2. The Claimant was not released to return back to work during the seventh and eighth quarters.

The claimant testified that she injured her low back lifting heavy boxes of literature; that she had spinal fusion surgery in 1997 and further spinal surgery in 1998; and that she was in the hospital for three days in mid-November 1999 for the implantation of a spinal cord stimulator which was removed because it provided insufficient pain relief. She also said that she takes medications for pain, muscle spasm, nerves, and depression; that her treating doctor, Dr. S, has not released her to return to work; and that during the qualifying periods at issue, she did not look for employment because she feels she cannot work due to her back and right leg pain and the effects of medications and because Dr. S has not released her for a return to work. She also stated that Dr. S has discussed additional surgery but that she does not want to undergo further surgery. The claimant further testified that she was seen by Dr. M and that after Dr. M said she could perform "very sedentary" work, she began looking for work and apparently continues to do so, mostly by phone and fax. The claimant, who said she is 42 years of age, conceded that there has

been no change in her condition between the end of the qualifying periods in issue and her commencement of her job search efforts. However, she maintained that she has no ability to work.

The records of Dr. S, who is specialized in anesthesiology and pain management, stated the following diagnoses: lumbar radicular syndrome, bilateral sciatica, chronic; chronic intractable pain, secondary to failed back surgery syndrome; bilateral cervical radicular syndrome; bilateral greater occipital neuritis, causing headaches, secondary to above; and depression, secondary to above.

Dr. S wrote a letter on October 29, 1999, addressed "To Whom It May Concern," stating that the claimant underwent extensive lumbar spine reconstructive surgery with a 360E fusion/decompression on April 25, 1997; that she had a "re-do"procedure on April 16, 1998, at L4-5 and L5-S1 with removal of hardware; that she is tentatively scheduled for a trial spinal cord stimulator on November 15, 1999; and that her medications for pain management include Talwin, Neurontin, and Zanaflex "which may interfere with her ability to concentrate and to perform job duties." Dr. S signed an identical letter on December 10, 1999.

Dr. M, an orthopedic surgeon, reported on December 9, 1999, that on December 7, 1999, he examined the claimant and reviewed her medical records; that the claimant underwent "a 360 fusion and decompression" on April 25, 1997, by Dr. H and another operation by Dr. H on April 16, 1998, to remove the hardware and explore a nerve root; and that the claimant has had aqua therapy, an unsuccessful trial of a spinal cord stimulator, and various conservative pain control measures including injections and medications. Dr. M further reported that the claimant is barely able to walk and is not able to straighten up and that her diagnosis is degenerative disc disease of the lumbar spine and postoperative status following laminectomy and fusion, L4 to S1. Dr. M further reported as follows:

> It is my opinion that [claimant] could function well enough to participate or be able to perform a job with very sedentary functions. It is my recommendation that she be referred for a functional capacity evaluation to determine whether my assessment of her ability to function in a very sedentary occupation is appropriate.
>
> Regarding her prognosis, it is a very difficult case, and it is my opinion she simply should be treated for her flare-ups and her medications be monitored, so hopefully she will be able to return to the work force in some capacity.

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.

As noted above, the parties stipulated to the 15% or greater IR and non-commutation of IIBs requirements and there is only one finding of fact to relate to the "direct result" and "good faith" criteria.

Though never mentioned by either attorney or the hearing officer throughout the hearing or on appeal, the "new SIBs rules" apply to this case. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.100 - 130.110 (Rules 130.100 - 130.110); Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). Rule 130.102(b) sets out the eligibility criteria for SIBs. Rule 130.102(c) addresses the "direct result" criterion. The hearing officer made no findings of fact relating to this rule. Rule 130.102(d) addresses the "good faith" criterion. The claimant's theory of meeting the "good faith" requirement was that during the qualifying period at issue she had no ability to work.

The version of Rule 130.102(d) then in effect provides, in pertinent part, 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: . . . (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 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)(3) must be satisfied. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; and Texas Workers' Compensation Commission Appeal No. 001153, decided June 30, 2000.

Section 410.168(a) requires a written decision to include findings of fact and conclusions of law. The Appeals Panel has repeatedly encouraged hearing officers to make specific findings of fact addressing each element of Rule 130.102(d)(3). *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999; Appeal No. 992692, *supra*. While the carrier raises the point on appeal that the claimant did not introduce into evidence her applications for SIBs, that point is raised for the first time on appeal and will not be addressed.

We reverse the decision and order and remand to the hearing officer for such further consideration and further findings of fact and conclusions of law as may be appropriate and consistent with this opinion, the 1989 Act, and the Texas Workers' Compensation Commission's (Commission) SIBs rules.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a

request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Susan M. Kelley
Appeals Judge