APPEAL NO. 001719

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 13, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the second quarter. Appellant (carrier) appealed, contending that this determination is against the great weight and preponderance of the evidence. The claimant responded that the decision is correct and the Appeals Panel should affirm it.

DECISION

We affirm.

Claimant sustained a compensable injury on _____. She reached maximum medical improvement on December 2, 1998, and was assigned a 16% impairment rating. Claimant made no job search efforts during the qualifying period, which was from October 22, 1999, to January 20, 2000. Claimant asserted that she had no ability to work during the qualifying period.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying periods is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. The Appeals Panel's standard of review in this case is also set forth in Appeal No. 000004.

The hearing officer was the sole judge of the credibility of the evidence and he considered claimant met her burden to prove that she had no ability to work during the qualifying period. The reports of Dr. G state that claimant's condition is worsening, that claimant fatigues easily and is weak, that claimant has an antalgic gait, and that she uses a cane. Dr. G said claimant is "unable to work" and that she is "permanently disabled." In December 1999, Dr. G said that it is "already known" that claimant "will not be able to seek employment at this time." We note that the medical record from 1997 that said claimant had some ability to work was written long before the qualifying period in question, before claimant had undergone two surgeries, and before claimant's treating doctor noted her worsening condition. Accordingly, the hearing officer could determine that this record had little relevance.

Regarding the functional capacity evaluation (FCE), the hearing officer determined that weight to give to this document. We note that this ambiguous FCE did not state that claimant could work. The hearing officer apparently considered the evidence and determined that no other records show that the injured employee is able to return to work. The hearing officer made his determinations regarding claimant's ability to work based on the evidence before him. The evidence is minimally sufficient to support this determination. The hearing officer's determinations in this regard are not so against the

great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we will not substitute our judgment for his. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCURRING OPINION:

I concur and write separately to note that the hearing officer has made fact findings on all elements of Rule 130.102(d)(3), *see* Texas Workers' Compensation Commission Appeal No. 000556, decided May 3, 2000, concerning whether other records show an ability to work for the qualifying period under review.

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I dissent.

At issue in this case is whether the claimant made the required good faith job search commensurate with her ability to work. The claimant made no job search efforts during the qualifying period, contending she was unable to work in any capacity. The analysis of SIBs entitlement under these circumstances must begin with an examination of Rule 130.102(d)(3), then in effect, which provides that an employee has made the required good faith effort to obtain employment if the employee "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[.]" We have stated that hearing officers should make express findings relating to each element of this rule when resolving issues of SIBs entitlement based on a claim of no ability to work, and have remanded for such findings when they were absent. *See* Texas Workers' Compensation Commission Appeal No. 000091, decided March 1, 2000. We have also stated that the hearing officer is to determine whether "other records show" an ability to work by looking at the records in evidence and evaluating their credibility and persuasiveness as showing or not showing such an ability. The question of whether another record shows such an ability is not

determined by balancing it against other records or "narratives" explaining an inability to work and deciding which record is more persuasive. Once a record is determined to show an ability to work, it is irrelevant that other records are in evidence that explain how the employee has a total inability to work. *See* Texas Workers' Compensation Commission Appeal No. 001252, decided July 14, 2000. Ultimately, a claimant can only prove an inability to work through medical evidence and we stress that the claimant must prove a total inability to work. Proof of an inability to return to the pre-injury employment or the inability to work full-time are of no avail.

The medical evidence in this case included the following:

(1) A functional capacity evaluation (FCE) dated February 17, 2000. The cover letter to the report of this FCE, signed by a physical therapist states: "The results indicate that [claimant] is unable to work at even the SEDENTARY Physical Demand Level for an 8 hour day. . . ." Comments throughout the actual report stated that various tests were invalid and concluded with the comment that the validity criteria suggested "very poor, voluntary submaximal effort not related to pain, medical impairment or disability."

(2) A February 23, 2000, letter of Dr. G, the treating doctor, in which he simply stated that he received and reviewed the FCE and that the claimant "is unable to work."

(3) A March 14, 2000, letter of Dr. G in which he states that the FCE "was essentially worthless as there was no effort put forward."

(4) A statement of Dr. G that the claimant has been unable to work and restricted from all work as of March 14, 2000.

(5) A December 21, 1999, comment by a physician's assistant, endorsed by Dr. G, that "[a]s far as the patient give [sic] a good-faith effort in returning back to work, it is already known that the patient is permanently disabled and will not be able to seek employment at this time," and that the claimant "is to continue off work as she is considered permanently impaired and unable to work." The same physician's assistant had written on September 22, 1999, that the claimant "has difficulty sitting, standing or walking for any prolonged amount of time. She is unable to do any heavy lifting greater that 10 pounds. She has difficultly in bending, stooping, twisting, etc." Dr. G endorsed this statement.

(6) A statement of November 2, 1998, by Dr. G that the claimant "is unable to return to work, unable to bend, push, pull, stoop or carry, and sitting tolerance is poor. We recommend disability to her."

(7) Comments by Dr. M, to whom the claimant was referred for a pain management program, that "[t]he 'secondary gain' issues here are manifold. Most importantly, the patient has a commitment to disability, employing an attorney to obtain SSDI (with the usual implications) . . . If a non-productivity status is her goal, avoidance of rehabilitation is predictable."

(8) A written statement of September 3, 1997, by a Dr. V, that the claimant "may work at extremely light-duty activities at this time."

The hearing officer made the following findings of fact pertinent to his conclusion of law that the claimant was entitled to second quarter SIBs:

**FINDINGS OF FACT**

14. On February 17, 2000, Claimant underwent a[n] [FCE], which disclosed she is unable to work (even at sedentary level). [Emphasis in the original.]

15. Claimant's treating doctor opined that Claimant was unable to work. Claimant has difficulty in sitting, standing or walking for any prolonged amount of time. She is unable to do any lifting (heavier than 10 lbs.), and will occasionally fall due to weakness in her legs.

16. Claimant met her burden of proof and established that she had a total inability to work and serious physical restrictions and limitations as a result of the compensable injury.

Despite the glib statement of the majority that the hearing officer has made findings on all the elements of Rule 130.102(d)(3), he clearly did not provide any rationale for these findings in his discussion of the evidence.

My concern, as raised by the carrier in its appeal, is that the hearing officer did not specifically address the evidence in terms of the provisions of Rule 130.102(d)(3). We have held that the narrative that explicitly explains how the claimant has a total inability to work need not be contained in one document, but may be found cumulatively in more than one. *See* Texas Workers' Compensation Commission Appeal No. 000384, decided April 6, 2000. Disregarding for the moment the comment in the FCE that the claimant's efforts were not related to her impairment, I point out that the cover letter to this FCE report expressly states that the claimant cannot work in a sedentary capacity for an 8-hour day. Thus, on its face, the FCE does not support Finding of Fact No. 14. In addition, Finding of Fact No. 15 is, in my opinion, contradictory in the sense that the first sentence states

that Dr. G's opinion is that the claimant was unable to work[1] while the second sentence actually reflects some ability, albeit perhaps minimal, that the claimant is able to do some limited work for limited periods.

A second important concern is that the hearing officer made no reference to the provision of Rule 130.102(d)(3) that a claimant has not demonstrated a total inability to work if any other record shows this ability. In evidence was a 1997 medical report which clearly on its face seems to "show" an ability to work. Also, Dr. G's letter of March 14, 2000, in which he repudiates the FCE, on which his earlier letter was based, can arguably be considered a record showing an ability to work. There is no way of knowing from the decision and order whether the hearing officer applied this provision of the rule to this evidence.

For the foregoing reasons, I would reverse the decision of the hearing officer that the claimant was entitled to second quarter SIBs and remand this issue for further express findings of fact on each element of Rule 130.102(d)(3) in light of the evidence already introduced at the CCH. The hearing officer should identify the narratives, if any, that singly or together explain an inability to work and why other records which on their face seem to show an ability to work either do or do not show such an ability. A conclusion of law based on these findings should then be reached. Candor demands that the majority opinion explicitly reject on behalf of the entire Appeals Panel the numerous cases where we have remanded for such express findings.

Alan C. Ernst
Appeals Judge

[1]I point out that a finding that a doctor's opinion is that the claimant is unable to work is not tantamount to a finding that the claimant is in fact unable to work.