APPEAL NO. 001777

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 14, 2000. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 13th compensable quarter. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant made a good faith effort to look for work commensurate with her ability to work; that her unemployment was a direct result of her impairment from the compensable injury; and that she is entitled to SIBs for the 13th quarter are against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she was assigned an impairment rating of 15% or greater; that she did not commute her impairment income benefits; that the 13th quarter of SIBs ran from April 5 to July 4, 2000; and that the qualifying period for the 13th quarter of SIBs ran from December 22, 1999, to March 21, 2000. The claimant testified, and her Application for [SIBs] (TWCC-52) reflects, that she contacted 19 employers in the qualifying period about potential employment. The TWCC-52 also indicates that those employment contacts were made in each week of the qualifying period except the weeks of December 22 to December 28, 1999; December 29, 1999, to January 4, 2000; and February 16 to February 22, 2000. The claimant stated that all of her employment contacts were made by telephone; that she did not complete any job applications in the qualifying period; that she identified the employers she contacted either in the newspaper or the telephone book; that she attempted to register with the Texas Rehabilitation Commission (TRC) in January 2000 but the TRC would not accept her because she did not have a release from her doctor; and that she is also registered with the Texas Workforce Commission. The claimant explained that in the weeks she did not look for work she was not able to do so because she was "in a very deep depression." She stated that she was depressed because of her constant pain and because she could not do the things she wanted to do. She further testified that she felt "locked up and caged in."

Dr. D testified at the hearing that he is a licensed psychologist and that he has treated the patient in individual psychotherapy since January 1999 for depression secondary to chronic pain emanating from the claimant's compensable injury. Dr. D stated that during the qualifying period, the claimant was doing poorly; that she had vegetative symptoms of depression, namely appetite and sleep disturbances. Dr. D further testified that the claimant was withdrawn, that she isolated herself from others, and that she had suicidal thoughts which were characterized by locking herself in a closet with a gun and speaking in terms of jumping off buildings or overpasses. Dr. D stated that there were

fluctuations in the claimant's depressed mood and that when she had an exacerbation she was incapable of looking for a job. On cross-examination, Dr. D testified that on December 13, 1999, the claimant came to his office on an emergency basis because she was acutely suicidal. Dr. D acknowledged that the claimant was "distressed" about losing SIBs; however, he further testified that it was incorrect to state that the claimant's loss of SIBs "precipitated" her depression. Dr. D maintained that the claimant's suicidal ideation is a result of her general depressive condition and that the while administrative issues related to difficulties with the carrier and loss of benefits certainly have not helped her condition, those factors are not the precipitant of her suicidal ideas. Rather, he attributes her depression to her chronic pain and its affects on her functional abilities. Finally, Dr. D opined that the claimant was not able to function normally in the period when she did not look for work because of her depression and accompanying suicidal thoughts.

Dr. D's progress notes were also admitted in evidence. Notes from a November 29, 1999, appointment reflect that the claimant had locked herself in a closet with a gun and threatened to commit suicide. Dr. D's December 13, 1999, progress notes state that she presented as "acutely suicidal," that she is "quite distressed" over losing her SIBs, and that she "is very frustrated" with the workers' compensation system and "extremely angry." Dr. D's January 10, 2000, progress notes reflect that the claimant was frustrated about not being able to find a job and having constant pain despite the pain medication she takes. In addition, the January 10 notes state that the claimant is angry about not being able to do the things she did prior to her injury. A note dated February 8, 2000, states that the claimant is in the hospital because she hurt her foot; however, the reason for and the duration of the claimant's hospitalization are not clear from the record. In a February 21, 2000, progress note, Dr. D states that the claimant reported that "Thurs. night [February 17, 2000] she was try [sic] to figure out how to commit suicide. She is very angry about her injuries."

The carrier argues that the hearing officer erred in determining that the claimant satisfied the good faith requirement in the qualifying period for the 13th quarter. The hearing officer determined that the claimant had satisfied the good faith requirement under a hybrid theory. Specifically, he found that she made a good faith job search in 10 weeks of the qualifying period under and that she was not able to look for work in the other three weeks of the qualifying period; thus, she satisfied the good faith requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). In Texas Workers' Compensation Commission Appeal No. 001877, decided September 18, 2000, the Appeals Panel noted that a claimant could satisfy the good faith requirement by demonstrating that she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period. However, in order to prevail, the claimant must produced evidence that establishes the requirements of Rule 130.102(d)(4) which is specific to the portion of the qualifying period where no ability to work is claimed. That is, the claimant must produce a narrative report that explains how the injury causes a total inability to work and no other record can show that the claimant had some ability to work in the part of the qualifying period during which the claimant asserts that she had no ability to work. In this instance, the hearing officer determined that the claimant was not

able to work in the three weeks of the qualifying period where she did not conduct a job search. The progress notes from Dr. D and his testimony when considered in conjunction with each other are sufficient to constitute a narrative specifically explaining how the claimant was unable to work because of the compensable injury, which included her depression. If Dr. D's testimony on the issue of inability to work could not be considered by the hearing officer as the dissent suggests, the purpose of the hearing would be less than evident. By requiring a narrative, what seems critical is the explanation of how the injury causes a total inability to work rather than the form of that explanation. The factors that the carrier emphasized at the hearing, namely the claimant's full participation in a prior hearing on December 17, 1999, and her looking for work on January 5, 2000, which both occurred in the period of time when Dr. D testified that the claimant was not able to work, were factors for the hearing officer to consider in deciding what weight to give to Dr. D's testimony. The hearing officer further determined that the claimant's efforts of making 19 telephone contacts with potential employers in the other 10 weeks of the qualifying period rose to the level of a good faith job search. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not demonstrate that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In addition to arguing that the evidence was insufficient to establish that the claimant had no ability to work in the weeks of the qualifying period that she did not conduct a job search, the carrier also contends that it is "clear that the claimant's condition during those weeks was not due to the impairment from the compensable injury, but was due to a non-compensable condition, i.e., frustration with the workers' compensation system." We find no merit in this assertion. Dr. D acknowledged that the claimant was angry and frustrated as a result of her dealings with the carrier and her loss of SIBs in prior quarters. Nonetheless, Dr. D testified that those administrative difficulties only served to exacerbate the claimant's underlying depression which was caused by her chronic pain related to her compensable injury. Dr. D maintained that the claimant's suicidal ideation was a result of her depression which he opined was secondary to her compensable injury. The cases cited by the carrier are not controlling here because there is evidence that the depression is a result of the compensable injury and not merely traceable to the circumstances related to the claimant's dealings with the carrier and the workers' compensation system.

Finally, we briefly consider the carrier's challenge to the hearing officer's direct result determination. Rule 130.102(c) provides that a claimant has satisfied the direct result criterion "if the impairment from the compensable injury is a cause of the reduced earnings." We have long recognized that a direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects such that she cannot reasonably perform the duties she was doing at the time of her compensable injury. The hearing officer decided to credit the evidence to that effect in the record and his determination in that regard is not so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

Rule 130.102 (d)(3), (subsequently amended to 130.102(d)(4) on November 30, 1999) provides that a good faith effort to obtain employment commensurate with the employee's ability to work may be established if the employee: 1) has been unable to perform any type of work in any capacity; 2) 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.

In the present case the claimant submitted the progress notes of Dr. D as evidence of her inability to work during the first two weeks of the qualifying period. On their face, they wholly fail to provide the required "narrative" specifically explaining how the injury caused a total inability to work. In other words, the substance of the documents do not support a "no ability" finding as they do not discuss the claimant's ability to work in general and clearly establish that the claimant was depressed because she had lost entitlement to SIBs for the preceding quarter rather than because of her injury. The claimant herself testified that her depression was "in and out" and she was able to look for work when she was not depressed. Thus, under the requirements of Rule 130.102(d)(3), the claimant could not establish an inability to work during these two weeks and is not entitled to SIBs for this quarter.

In order to get around the "narrative" requirement, the majority state that "the progress notes from Dr. D and his testimony (emphasis added) when considered in conjunction with each other are sufficient to constitute the narrative specifically explaining how the claimant was unable to work because of the compensable injury, which included her depression." This holding creates an exception to the requirement of the rule that a document describing the inability to work accompany the TWCC-52 and allows the injured

worker to submit an unsupported TWCC-52 to the reviewing authority, be it the Commission, for the first quarter determination of entitlement, or the carrier, for subsequent quarters. With no supporting documentation, I find it difficult to believe that any reviewing authority is going to make a determination in favor of the injured worker. Since entitlement is now "in dispute" the application must now go through the dispute resolution process.

The "new" SIBs rules were adopted on January 7, 1999, and became effective on January 31, 1999. The preamble to the adoption of the SIBs rules reflects that the new rules were created in response to the ever-increasing number of disputes related to the entitlement to supplemental income benefits and the need to simplify the language contained in the rules to increase the level of understanding by the system participants. Commission staff had determined that many of the disputes were the result of the lack of specific direction provided in the existing provisions of the Act and Commission rules, and, they noted that many of the decisions regarding entitlement to SIBs were left to the discretion of the fact finder in the dispute resolution process which caused inconsistencies in decisions with similar factual situations. They believed that such inconsistencies encouraged parties to pursue a dispute through the formal dispute resolution process because of the possibility of securing a favorable decision despite previous decisions to the contrary in similar cases.

The Commissioners anticipated that by providing additional direction, procedures and standards the number of administrative proceedings would decline because the insurance carriers would benefit from being provided the information necessary to properly determine entitlement or non-entitlement to SIBs, thereby avoiding the need to proceed through the dispute resolution process. The majority's decision today now ensures just the opposite result, and I anticipate that once the decision is circulated, the requests for benefit review conferences and contested case hearings will become two-fold, especially when a claimant is represented by counsel who has a vested interest in obtaining an order awarding SIBs; as with that order comes the award of attorney fees which a carrier must pay if it disputes entitlement and loses. Citing the majority opinion as authority, a claimant in the future may simply not submit any documentation for no ability to work with the TWCC-52 and rely on testimony at the hearing or other documentation (such as an affidavit) that was created after the filing of the application. The carrier has already "disputed" and the dispute resolution process has been initiated.

New Rule 130.101 added the definitions of "qualifying period" and "first quarter" and "subsequent quarter." In so doing it was noted that previously an injured employee was required to submit his/her Statement of Employment Status (TWCC-52) before the final two weeks of the filing period had occurred. With the new changes it was believed that the employee would provide all information regarding wage and his/her job search efforts for the full applicable period so that a carrier could make the required determination to pay or dispute based upon complete record. The preamble recites, "the change which aligns the end of the qualifying period with the time the Application for Supplemental Income Benefits is filed allows complete information to be reported and corrects this procedural problem."

The preamble contains the following statement: "[While] the actual question of whether or not a person has the ability to work is a factual issue, the inclusion of a requirement for a medical report which explains how the injury causes a total inability to work helps to ensure that there is documentation, in addition to the injured employee's testimony, that can be evaluated by the reviewing authority." This statement was followed by the statement that new Rule 130.102(d)(4) (amended to (d)(5)), acknowledged situations other than those contemplated in (d)(1), (2) and (3) " where the injured employee provides sufficient information and documentation to support a finding of entitlement." These statements make it absolutely clear that a tangible writing must accompany the TWCC-52 in those instances where a claimant is relying on a total inability to work to satisfy the good faith requirement in SIBs cases. To simply hold that medical documentation establishing no ability to work need not be submitted with the application for SIBs and that the requirement of a "narrative" may be supplied by testimony at the contested case hearing by a medical care provider is contrary to the intent and requirements of the rule.

Under Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), the majority have exceeded the authority granted to them by the 1989 Act and I respectfully dissent.

Kathleen C. Decker
Appeals Judge