APPEAL NO. 001868

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 July 13, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the sixteenth and seventeenth quarters. The claimant appealed the adverse determination that she did not make a good faith effort to obtain employment commensurate with her ability to work during the qualifying periods for the sixteenth and seventeenth quarters on the grounds of sufficiency of the evidence and thus was not entitled to SIBs for the sixteenth and seventeenth quarters. The claimant requested the Appeals Panel reverse the decision and order of the hearing officer and render a decision that she is entitled to SIBs for the sixteenth and seventeenth quarters. The respondent (self-insured) replied that the evidence was sufficient to support the decision and order of the hearing officer and should be affirmed. The finding that the claimant's unemployment during the qualifying periods for the sixteenth and seventeenth quarters was a direct result of her impairment from the compensable injury was not appealed and is final by operation of law. Section 410.169.

DECISION

Affirmed as reformed.

The hearing officer found that the two qualifying periods for the sixteenth and seventeenth SIBs quarters began on September 10, 1999, and ended on March 11, 2000. 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 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 her ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

The claimant contended that she had a total inability to work during the applicable qualifying periods. 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 in effect for the sixteenth quarter and Rule 130.102(d)(4), the version in effect for the seventeenth quarter. The rule was revised on November 30, 1999, which redesignated the pertinent provision with no substantive modification. The prior designation will be used in this document for both periods in question.

Rule 130.102(d)(3) provides that the good faith element is met when the injured employee is unable to perform any type of work in any capacity; a narrative from a doctor 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 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 testified that she worked as a clerk for the self-insured and sustained an injury to her left ankle and right knee on _____, which subsequently required two surgeries to repair the fractured ankle and repair torn ligaments in her knee. The claimant testified that she did not return to work after her injury and no doctor has told her that she could return to work. The claimant stated that her treating doctor was Dr. K and that she was receiving social security benefits and a pension from the self-insured since her retirement from the self-insured in 1995. The claimant testified that she drove to the CCH and did not look for work during either of the contested qualifying periods.

The claimant offered a report dated June 10, 1999, from an occupational therapist, Ms. F, who performed a functional capacity evaluation (FCE). Ms. F reported that the claimant at 68 years of age had a "no safe work capacity level" because she was unable to complete any of the testing secondary to decreased mobility. Ms. F noted that the claimant was retired and did not plan to return to work.

A letter from Dr. K dated August 30, 1999, reflects that the claimant sustained a left ankle fracture requiring an open reduction with internal fixation. She had since then developed severe arthritis. He stated that the claimant developed an antalgic gait which caused a torn meniscus of her right knee also requiring surgery and that the claimant's current symptoms included sciatica affecting her right lower extremity. Dr. K opined that the claimant was completely disabled as a result of her ankle osteoarthritis, her right knee chondromalacia and sciatica. He believed that the claimant would require an ankle fusion in the future. Another letter from Dr. K dated December 6, 1999, contained the exact language from the August 30, 1999, letter.

An FCE and IR were performed by Dr. S on November 3, 1999, who reviewed the claimant's medical records and prior FCE of June 10, 1999. Dr. S concluded after testing that the claimant exhibited less than maximal effort and that she had the ability to perform work in a sedentary capacity.

Office notes dated January 5, 2000, from Dr. K contain statements that he felt the claimant was completely disabled and light duty would not be appropriate for her based upon the claimant's requirements of needing to get up and move around frequently during the day and the fact that she had difficulty rising, standing and walking.

A letter dated February 23, 2000, from Dr. T reflects that he evaluated the claimant and reviewed her medical records at the request of the Texas Workers' Compensation Commission (Commission). Dr. T found the claimant to be severely obese with decreased

mobility which required the use of a cane (quadripod). The claimant demonstrated poor mobility getting in and out of a chair and maneuvering to the examining table. Dr. T wrote, "[in] summary, I do not believe it is practical to consider [the claimant] a candidate for re-entering the workforce even in a sedentary capacity at this time or into the foreseeable future."

By letter dated May 31, 2000, Dr. T wrote that "I personally doubt that [the claimant] is able to tolerate prolonged periods of desk work. However, I also note that her back condition may not be deemed relevant to the occupational injury in question. If that is the case then, technically and in the restricted perspective of her occupational injury, she does qualify for sedentary work. From the perspective of the total patient however, I feel it is unlikely that she could tolerate same. It remains for others perhaps at the Commission to determine whether her back should receive consideration in this context."

The hearing officer, after reviewing the medical documentation admitted at the CCH, concluded that the FCE of November 3, 1999, indicated that the claimant could work at a sedentary capacity. He wrote that Dr. K's report of December 6, 1999 (and presumably August 30, 1999, since it is the same letter), did not show how the impairment from the August 15, 1994, injury caused a total inability to work and that Dr. S's and Dr. T's medical reports showed that the claimant could work in some limited sedentary capacity.

The medical evidence of whether "other records show that [the claimant] is able to return to work" was presented for the hearing officer's consideration. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

We note that Finding of Fact No. 9 (although unappealed) discusses the hearing officer's findings as to the claimant's ability to work and job search during the sixteenth and seventeenth quarters and the last sentence reflects that the claimant did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period for the "seventh" quarter. We believe the finding as to the "seventh" quarter to be a typographical error and reform the sentence to read as follows: "Claimant did not make a good faith effort to seek employment commensurate with her ability to work during the qualifying period for the sixteenth and seventeenth quarters."

Upon review of the record submitted, we find no reversible error and we affirm as reformed the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge