APPEAL NO. 001984

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 August 1, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 13th quarter from May 20, 2000, through August 18, 2000. The appellant (carrier) appealed on the grounds of sufficiency of the evidence contending that the claimant did have some ability to work during the qualifying period and that she failed to make a good faith effort to obtain employment commensurate with her ability to work. The carrier requested that the Appeals Panel reverse the decision and order of the hearing officer and render a new decision that the claimant was not entitled to SIBs for the 13th quarter. The claimant replied that the evidence was sufficient to support the determination of the hearing officer and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement (MMI) on June 21, 1996, with an impairment rating (IR) of 16%; and that impairment income benefits (IIBs) were not commuted. The parties also stipulated that the 13th SIBs quarter was from May 20, 2000, through August 18, 2000. There was no stipulation as to the dates of the qualifying period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) provides that the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. Therefore, the qualifying period for the 13th quarter would begin on February 5, 2000, and end on May 5, 2000.

Eligibility criteria for SIBs are set forth in Section 408.142(a) and Rule 130.102. Rule 130.102(b) provides that an injured employee who has an IR of at least 15% and has not commuted any IIBs is eligible to receive SIBs if, during the qualifying period, the employee has: (1) earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) made a good faith effort to obtain employment commensurate with the employee's ability to work. Rule 130.102(e) provides in part that, except as provided in subsections (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. Although the hearing officer's direct result finding was appealed by the carrier, its argument on appeal was focused primarily on the good faith criterion.

The hearing officer determined that during the qualifying period for the 13th quarter the claimant's unemployment was a direct result of her impairment. The Appeals Panel has on numerous occasions commented on the phrase "as a direct result of the employee's impairment" in Sections 408.142 and 408.143 and stated that the unemployment need only be a direct and not the direct result. Upon review of the record submitted, we find no reversible error and find the evidence sufficient to support the determination of the hearing officer that the claimant's unemployment was a direct result of her impairment from the compensable injury and we affirm that portion of her decision and order.

The claimant contended at the CCH that she had a total inability to work during the applicable qualifying period. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in 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)(4), the version in effect during the qualifying period. This rule 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)(4) must be established. Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999 (Unpublished).

Medical records reflect that the claimant sustained a cervical, lumbar and left knee sprain/strain on _____. The claimant was returned to work without restrictions by her then treating doctor, Dr. G, on October 25, 1995. Although there are no records from Dr. G regarding the date of MMI and IR, the designated doctor process was initiated and Dr. T, who was appointed by the Texas Workers' Compensation Commission (Commission), assigned the claimant an IR on June 21, 1996, for six months of medically documented cervical (four percent) and lumbar (five percent) pain and mild degenerative changes on x-rays. The claimant received a seven percent impairment for abnormal range of motion (ROM) in her cervical spine and one percent impairment for abnormal ROM in her lumbar spine. No impairment was assigned for the left knee. A 16% whole person impairment was derived using the combined values chart in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. During the interim between being released to work by Dr. G and the date of examination by the designated doctor, the claimant changed treating doctors to Dr. K.

A progress note from Dr. K reflects that by December 5, 1997, the claimant had undergone a functional capacity evaluation (FCE) and that she was limited to 30 pounds lifting and no sitting or standing for more than one hour at a time without changing positions. Based on the FCE results, Dr. K approved the claimant to work in a doctor's office. On December 8, 1997, Dr. K discussed returning to work with the claimant on a part-time basis until she became better conditioned. In 1997, Dr. K told the claimant that

her cervical and lumbar MRIs did not indicate any evidence of disc herniations or stenosis to account for her ongoing complaints of pain. The claimant was placed in a work hardening program, which included swimming and walking.

Records dated August 2, 1999, reflect that the claimant underwent a psychological evaluation for anxiety and depression. It was recommended to the claimant that swimming three times a week for 30 minutes would help relieve her stress. Medical records from Dr. K reflect that the claimant had surgery for carpal tunnel syndrome in September 1999, and that he was still following her for complaints of neck and back pain and migraine headaches from September 1999 through February 2000. By December 1999, the records do not contain any further mention of hand pain. The claimant continued to meet with Dr. P once a month through June 2000 to discuss her stress and anxiety and for monitoring of her medication. Most of these records are illegible.

The qualifying period began on February 5, 2000. On February 7, 2000, another lumbar MRI was performed and interpreted by Dr. B because of the claimant's complaints of left leg pain. The study indicated that the claimant had degenerative facet disease at L5-S1 and L4-5 and early degenerative changes at T12-L1 and L2-3. There was no evidence of disc protrusions or spinal stenosis. Progress notes dated February 14, 2000, from Dr. K reflect that he believed the claimant would benefit by being placed in a water therapy program and he noted that the claimant had been using an exercise bicycle which had helped with her mobility and strength. A lumbar evaluation was performed on March 21, 2000. On the basis of this examination, it was recommended to the claimant that she attend a gym exercise program for four weeks, three times a week. A progress note dated April 12, 2000, reflects that the claimant was walking for exercise and that Dr. K encouraged her to get out and walk every day. He wrote that he was going to give the claimant a prescription for exercise equipment. The qualifying period concluded on May 5, 2000.

On June 21, 2000, an FCE was performed. The results were not admitted into evidence for failure to timely exchange. The carrier did not assert error on appeal. A letter to the claimant's attorney from Dr. K dated July 18, 2000, contains the following statements:

> [The claimant] has continued to have back pain as well as headaches. Her back pain tends to increase the neck pain, and this neck pain will trigger her migraine headaches. This is a residual from her work-related injury of _____.
>
> I have ordered analgesics for her, and she is also taking Stadol to try to control the migraine headaches. Because of her ongoing pain, she is unable to work. The pain as well as her pain medication have caused her to limit her driving, especially driving to and from work.

Whether the claimant had no ability to work at all in the qualifying period from February 5, 2000, through May 5, 2000, was a question of fact for the hearing officer to resolve and is subject to reversal only if so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer concluded that the July 18, 2000, letter from Dr. K was a "narrative" and that Dr. K explained in the letter how the claimant's injury caused her to be totally unable to work. However, these determinations are not supported by the evidence. We view these findings to be against the great weight and preponderance of the evidence.

Dr. K stated in the July 18, 2000, letter that the claimant's pain in conjunction with her use of medication was preventing her from working and limiting her driving to and from work. Whether or not an injured employee has pain and can drive to work is not totally determinative of the status of his or her ability to work. There are other means of transportation to and from work. The "narrative" required by Rule 130.102(d)(4) must include a detailed analysis of a claimant's ability to work at any job in relation to the physical restrictions and limitations from the compensable injury.

In this case, Dr. K's letter did not explain why the claimant could not work at the part-time employment to which she had been previously released in 1997 when she was experiencing the same neck and lumbar pain and migraine headaches. The status of her back and neck condition did not appear to have changed from 1997 to the date of the CCH. Dr. K failed to specifically articulate why the claimant could not work at any job or clinically account for the continuing subjective complaints of neck and lumbar pain from sprain/strains that were incurred in 1995. His progress notes during the qualifying period reflect that the claimant was walking, swimming and using an exercise bike, and that an MRI performed at the beginning of the qualifying period demonstrated degenerative changes but no hernations or stenosis. Dr. K did not offer to explain why the claimant was capable of performing these strenuous activities on a regular basis but could not work in any capacity. When adopting the "new" SIBs rules, the Commission stated in the preamble that it was clarifying and applying the "no ability to work" criterion to only those "limited situations . . . where it is clear that the injured employee cannot return to work because of the compensable injury . . . and truly cannot work." In conclusion, we view the great weight of the evidence as establishing that the claimant did have some ability to work and that because she did not look for employment she did not make a good faith effort to obtain employment commensurate with her ability to work.

The decision and order of the hearing officer are affirmed in part on the direct result criterion and reversed and rendered on the good faith criterion and a decision entered that the claimant is not entitled to SIBs for the 13th quarter from May 20, 2000, through August 18, 2000.

Kathleen C. Decker
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge