APPEAL NO. 002033

Following a contested case hearing held in on July 25, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. The claimant has appealed, asserting first that a designated doctor should have been appointed to resolve this dispute pursuant to Section 408.151. The claimant next asserts that the hearing officer erred in determining that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The respondent (carrier) contends in response that the evidence is sufficient to support the hearing officer's determination and that the designated doctor issue is raised for the first time on appeal.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on December 15, 1996, with an impairment rating (IR) of 51% as certified by Dr. M and did not commute any portion of his impairment income benefits (IIBs); and that the qualifying period for the third quarter started on February 8 and ended on May 8, 2000.

The claimant testified that he sustained a low back injury in a lifting accident at work; that Dr. H performed a 360E lumbar spinal fusion from L3-S1 in 1997, a partial revision and insertion of a spinal cord stimulator in 1998, and a removal of the hardware and stimulator in 1999; that he, the claimant, continues to receive chiropractic treatment from Dr. M, as he has for the past five years; and that Dr. F is his pain management doctor. The claimant also stated that during the qualifying period, he made no job search efforts; that he had no contact with the Texas Rehabilitation Commission or the Texas Workforce Commission; that he had low back pain together with pain in his hips, legs, and feet; that he sometimes walks a little outside but "spasms up" afterwards, as he does when he attempts to do anything around the house; that he is 55 years of age and weighs 283 pounds; and that when he is not going to doctor's appointments he spends most of his time watching TV in a recliner or in bed. He also said he takes a variety of medications and has "good days and bad days."

Dr. M testified that the claimant has been certified as 100% disabled by the Social Security Administration; that he cannot bend or twist; that he can walk 140 feet with a cane on a good day; that his pain varies from 6 to 8 on a 10-point scale; that his weight gain can be attributed to steroids; that he has nerve damage in both legs; and that he has increased pain after sitting up for more than 30 minutes. Dr. M further commented that the claimant's fifth grade education level adversely affects his ability to be retrained for something he could potentially do, and that even if he could be retrained, he would have to be able to

work by alternating positions and reclining, and that "that is not exactly a work position that most employers offer."

In her January 4, 2000, independent medical evaluation report, Dr. D, a specialist in physical medicine and rehabilitation, recounts the claimant's extensive course of conservative and surgical treatment including 30 epidural steroid injections and the three surgeries. She states that since July 1995, when Dr. M took him off work, he has had continual passive modality treatments from Dr. M; that although the claimant was not considered a candidate for surgery by a neurosurgeon, he underwent surgery by Dr. H; and that the 51% IR from Dr. M was grossly miscalculated with double impairments for the extremities. Dr. D notes in her clinical exam that the claimant's "lumbar range of motion was markedly guarded and unrealistic in all planes while his observed spontaneous movements in the room showed he can comfortably sit in a chair." Dr. D further states that a functional capacity evaluation (FCE) was to be done and that she would review it. She also recommended that the claimant walk daily and increase his activities.

The February 9, 2000, FCE report from Mr. B, states that the claimant obviously advocates the chiropractic style of intervention "and yet the reports postulate a dependency relationship being formed with his 5 years of acute intervention without any long term (more than 12 months) relief"; that some "dramatic inconsistencies were noted here, that indicate volitional holdback of his best effort" during the heavy grasp testing; and that the claimant "indicates 5 of 5 positive Waddell Signs for inappropriate behaviors." The report further stated that the claimant is capable of performing up to about 30 minutes of sitting before requiring a break; that he will be able to go between sitting and standing for approximately two-thirds of a workday; that he will be incapable of bending, reaching, stair or ladder climbing, squatting, kneeling, crawling, or balancing during a normal workday; that he will be able to walk approximately 140 feet at about 1.2 mph with a single point cane before having to take a break for about 45 seconds; that he will be capable of doing repetitive hand and foot control operations once he either stands for up to to five minutes or sits for up to 30 minutes; and that he will need frequent and unscheduled breaks while performing these tasks.

Dr. D wrote on March 2, 2000, that the claimant underwent the FCE on January 24, 2000, and that, as she had noted in her exam, the claimant had extensive overlying pain behaviors with 5/5 positive Waddell's signs indicating that he has a significant psychometric chronic pain profile which is the primary limiting factor in his function. Dr. D further stated that the FCE "does have [claimant] in the sedentary category without any bending, reaching, stair climbing, squatting, or balancing during the day and no kneeling" and that he will need frequent breaks from standing and sitting positions. Dr. D recommended a chronic pain program "rather than further short term modalities, such as have been previously administered for a grossly extended time period."

In his February 9, 2000, report, Dr. M stated that the claimant remains completely disabled by his work-related multilevel disc injury with three surgeries and severely persistent radiculopathy; that he is unable to maintain any position for long and spends

90% of his days alternating between sitting and lying down; that he struggles to stay as active as possible to prevent further deconditioning but that his pain prevents most activities; and that he was unable to work during the last year and is not expected to be able to work in the next year as a result of his multiple discal injuries, three operations, and persistent radiculopathies and spasms. Dr. M wrote on April 24, 2000, that"while [claimant] may be able to perform modified sedentary level activities for an hour or two on a good day, he is certainly not capable of returning to any form of competitive employment of which I am aware." Dr. M went on to say that given the claimant's limited formal education and his employment background in heavy-duty jobs, he, Dr. M, is "not aware of any potential retraining options nor of any viable employment options." In his May 26, 2000, detailed critique of Mr. B's FCE report, Dr. M stated, among other things, that "[Mr. B's] assessment of [claimant's] maximum work ability did not allow for or suggest that there would be a two week worsening [sic] his already devastating injury and recovery time for every few hours of modified sedentary duty work with grossly restricted walking, standing, and lifting." Dr. M acknowledged that he has been providing chiropractic treatment for the claimant for five years.

Dr. F wrote on May 17, 2000, that he does "not feel that [claimant] will be able to hold any kind of duties secondary to this chronic low back pain" nor "be able to gain employment secondary to this pain." Dr. F's June 15, 2000, report states that he has been treating the claimant since September 9, 1999; that the claimant has chronic low back pain with failed back surgery syndrome; that the claimant's activities are limited to sitting two and one-half hours a day, standing two hours a day, walking one hour a day, driving thee and one-half hours "with no bending or lifting maximum to 2 hrs per day." Dr. F further stated that the claimant needs frequent breaks to change positions in that this helps to relieve his pain.

On July 21, 2000, Dr. M forwarded to the carrier a typewritten resume of the claimant, apparently prepared by Dr. M, which sets out the claimant's education and work experience and his "work abilities" obviously taken from the FCE. Included among those abilities are the following: maximum potential limit of five hours per day of alternating standing or sitting; maximum standing is less than or equal to five minutes and sitting is 30 minutes; needs frequent and unscheduled breaks; needs to lie down intermittently and on a variable schedule; can walk at 1.2 mph for up to 140 feet using a cane; and occasionally lifting with non-dominant left hand above the waist up to ten pounds. The resume further stated more of the physical limitations from the FCE report.

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. The parties stipulated to the IR and non-commutation of IIBs elements and the hearing officer found that the claimant's unemployment during the qualifying period was a direct result of the impairment from his compensable injury.

Concerning the "good faith effort" criterion, the hearing officer found that the claimant did not seek any employment during the qualifying period; that the claimant did not establish each requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)); that "there are 'other records' showing that the Claimant has some limited ability to work"; and that the claimant "did not make a good faith effort to obtain employment commensurate with his ability."

We find no merit in the claimant's first contention on appeal that pursuant to the provision of Section 408.151, a designated doctor should have been appointed to resolve this dispute. This matter was not a disputed issue below and is raised for the first time on appeal.

Rule 130.102(d)(4) 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: . . . (4) 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 claimant asserts in his appeal that the hearing officer's comment in his discussion of the evidence that the claimant's testimony, coupled with that of Dr. M, is sufficient to establish that the claimant is unable to perform any type of work in any capacity contradicts the finding that there are "other records" showing that the claimant has some limited ability to work as well as the finding that the claimant did not make a good faith effort to obtain employment commensurate with his ability. However, the Appeals Panel has stated that all three prongs of Rule 130.102(d)(4) (and its predecessor 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; Texas Workers' Compensation Commission Appeal No. 001153, decided June 30, 2000; and Texas Workers' Compensation Commission Appeal No. 001294, decided July 20, 2000.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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 could conclude that both the FCE report of Mr. B and Dr. D's report reviewing the FCE report were indeed "other records" showing that

the claimant is able to return to work, albeit sedentary work with frequent, unscheduled breaks to alternate sitting and standing positions.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge