APPEAL NO. 002095

Following a contested case hearing held on August 21, 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 respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 14th quarter which was from April 27, 2000, through July 26, 2000. The appellant (carrier) appealed the hearing officer's findings that the medical evidence established that the claimant had no ability to work, that no other records showed that the claimant had the ability to return to work, that the claimant had a total inability to work during the qualifying period for the 14th quarter, and that the claimant's unemployment was a direct result of her impairment. The claimant responded that the hearing officer's decision was supported by the evidence and should be affirmed.

DECISION

We reverse and render.

This is a case of entitlement to SIBs under the "new" rules. The parties stipulated that the claimant had met some of the requirements to receive SIBs, particularly that she had sustained a compensable injury, had an impairment rating of 16%, and had not commuted any portion of the impairment income benefits. While there was no finding that the claimant was either unemployed or underemployed during the qualifying period for the 14th quarter, a finding on that fact can be inferred from the hearing officer's conclusion that the claimant was entitled to the 14th quarter of SIBs. It was undisputed that during the qualifying period, the claimant did not seek employment. The claimant predicates her entitlement to SIBs on a total inability to work theory. To prevail, the claimant was required to prove that the unemployment was a direct result of her impairment and that she had sought employment in good faith. Good faith, in a matter such as that before us now, is defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) as follows:

> (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
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> * * * *
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> (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 hearing officer made the following findings of fact:

4. [Dr. M] credible conclusion from the opinions of [Dr. P], the Carpal Tunnel surgeon and [Dr. Pa], the neurologist coupled with his own opinion, was that Claimant was not suitable for any type of work during the relevant qualifying period.

5. No credible other records in evidence showed that Claimant was able to return to work during the relevant qualifying period.

In her discussion, the hearing officer refers to an April 5, 2000, report by Dr. M on the claimant's ability to work. That report states, in full, as follows:

> [The claimant] has been under my care from April 1995 for a work related injury which occurred _____.
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> She continues to have prominent and active myofascial trigger points through the levator scapula, upper trapezuis [sic] and rhomboid muscles on the left side and to a lesser degree on the right side. [The claimant] under went [sic] carpal tunnel release surgery on June 30, 1999 performed by [Dr. P]. Left hand was successful. Right hand was partially successful.
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> [The claimant] is currently being seen by [Dr. Pa], neurologist who has obtained a cervical MRI which revealed moderately severe central canal stenosis and narrowing of the bilateral neural foramina at C3-4 and C5-6, as well as the left neural foramen at C6-7.
>
> It remains my opinion that she is not suitable for any type of employment at this time due to her multiple impairments and disabilities.

On June 7, 2000, Dr. M wrote a "To Whom It May Concern" letter which stated that the claimant continued to have moderate to severe headaches, neck and bilateral arm pain, and had been referred to Dr. Pa who had recommended several diagnostic tests, including and MRI of the brain, an MRI of the cervical spine, nerve conduction studies of the upper and lower extremities, and lab analysis. He noted that the claimant had been diagnosed with cervical myelopathy and was referred to Dr. Mac and was currently waiting for an appointment with him. Dr. M concluded his letter with the statement:

> She has been unable to work in any capacity from 01/01/00 to present. [Dr. Mac's] report and the other prescribed diagnostic studies will be very valuable in determining her prognosis.

Dr. M's report of April 5, 2000, when read in light of the other medical records, supports the hearing officer's determination that the claimant has no ability to work and is a narrative report which explains how the compensable injury results in a total inability to work.

The carrier asserts that the hearing officer "completely ignored the fact that there are other medical records that show that the claimant is able to return to work." In particular, the carrier asserts that a report by (Dr. H) dated December 14, 1999, is a record which shows that the claimant is able to return to work. In her statement of facts, the hearing officer discussed Dr. H's report. The hearing officer noted that Dr. H stated that if the claimant could find a suitable job, she could work. She then went on to state:

> A review of the report showed that [Dr. H] was referencing Claimant's ongoing myofascitis problem in her neck for which he recommended continued treatment.

In his report, Dr. H stated that he had examined the claimant on December 6, 1999, with regard to her neck and bilateral carpal tunnel syndrome. He reported that the claimant "is generally feeling quite well and really does want to get back to work; however, there is reportedly no job available at [employer]. She indicates that the insurance company will help her get a job, but she needs to be released. She herself feels that she could be released within the next month or two." Dr. H concluded his report with the following observations:

> I feel [the claimant] has reached maximum medical improvement, although it appears she will require some further treatment for the myofasciitis type of problem that she has in the neck. This, however, I think will require treatment for not more than two or three months - the same treatment she is currently receiving, neuromuscular stimulation.
>
> I think if a suitable job were available that the examinee could return to work now, since the treatment she is getting could probably be worked in after hours or some time that would not interfere with her job. We went ahead and arranged the functional capacity evaluation [FCE] with MedTest [FCE tester] (December 20, 1999 at 12:30 p.m.), which may help to determine if there are any limitations which might have to be applied when she returns to work. Frankly, however, I do not think there should be any.

The hearing officer found that the foregoing report was not credible. The hearing officer gives no basis for that finding, unless it was the fact that Dr. H found the claimant capable of returning to work but still opined that she would need several more months of treatment. While the potential necessity for ongoing treatment is a lynchpin in the provisions of the 1989 Act providing injured employees with the availability of lifetime medical treatment for a compensable injury, it does not foreclose employment.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant

evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only when we conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly unjust is there a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer's determination that Dr. H's report does not show that the claimant has some ability to work is clearly wrong and so against the great weight and preponderance of the evidence as to be manifestly unjust. We, therefore, reverse the hearing officer's finding of fact that there are no other records which show that the claimant is able to return to work.

The current SIBs rules are demanding and require that the elements of Rule 130.102(d)(4) must be met to establish good faith in a no-ability-to-work situation. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. One of those elements is that "no other records show that the injured employee is able to return to work." We have previously noted in a number of decisions that the requirements under Rule 130.102(d)(4) cannot be discarded without compelling reasons supported in the record. Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000. Here, the report of Dr. H was rendered shortly before the qualifying period and would qualify as an "other record" showing some ability to work. The evidence fails to meet the requirements of Rule 130.102(d)(4) for establishing good faith, and the hearing officer's determination that the claimant is entitled to SIBs for the 14th quarter 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).

Accordingly, we reverse the decision and order of the hearing officer and render a new decision that the claimant is not entitled to SIBs for the 14th quarter.

Kenneth A. Huchton
Appeals Judge

CONCUR IN THE RESULT:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge