APPEAL NO. 002235

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 August 30, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the fifth quarter from June 16, 2000, through September 14, 2000. The claimant appealed the findings regarding her ability to work and whether she made a good faith effort to obtain employment commensurate with her ability to work on the grounds of sufficiency of the evidence. The respondent (carrier) replied that the decision was correct and should be affirmed. The finding as to direct result was not appealed and has become final by operation of law. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable injury to her low back and left shoulder on _____, for which she was assigned a 30% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment, and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBs quarter and consists of the 13 previous consecutive weeks. The qualifying period for the fifth quarter began on March 4, 2000, and ended on June 2, 2000.

Although the claimant documented a job search during the qualifying period, she contended at the hearing that she had no ability to work in any capacity. Rule 130.102(d)(4), the version in effect for all pertinent times, provides 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. . . . " We have previously held this rule to be "generally more demanding" than the prior rule in what is required of a claimant to establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000.

The claimant testified that during the qualifying period she could do little more than lie in her bed and was incapable of sitting or standing for any length of time. She testified that she assisted her child in getting ready for school and would read to the child at night.

She also testified that each week she looked in the newspaper for work, and had sent out resumes and made telephone calls to approximately 22 businesses; however, she conceded that these efforts were made in order to fulfill what she believed to be required of her in order to obtain SIBs. She testified that the only reason she looked for work was "because I need my money. And I was told that I had to look for work to be able to get a job, I mean to get-- to look for a job to be able to get money from the carrier." The claimant did not assert at the hearing that she made a good faith effort to obtain employment as the result of her job search and the hearing officer apparently believed that although the claimant offered a documentation reflecting 22 job contacts, the search was not conducted in good faith in order to satisfy the provisions of Rule 130.102(d)(5) and (e).

A functional capacity evaluation (FCE) was performed on August 30, 1999, and by report dated September 1, 1999, the physical therapist noted that the claimant demonstrated acute symptomology and subjective complaints of discomfort and pain which did not allow her to perform most of the tasks required for the FCE. He wrote that the claimant also demonstrated an inconsistent effort. Nonetheless, he wrote that "it is this evaluator's opinion that the examinee cannot function independently in the competitive labor market with or without accommodations." The therapist also concluded that the claimant qualified for the sedentary-work category.

The carrier offered a report from Dr. C dated February 10, 2000, in which he stated that he had reviewed the claimant's medical records and performed a physical examination. Dr. C believed the claimant's condition was compatible with a release to work at a sedentary-duty level with no repetitive lifting greater than 10 to 15 pounds. He found that the claimant had failed to meet the straight leg raise and validity criteria as applied to lumbar flexion/extension and range of motion and that her efforts were inconsistent with his observations during testing. On neurologic testing, Dr. C found no objective and measurable evidence of motor or sensory deficits.

The claimant offered a report from Dr. M, her treating doctor, dated February 23, 2000. In this report Dr. M wrote that the claimant had significant arachnoiditis and that her fusion appeared to be solid. A dorsal column stimulator was recommended to assist the claimant in dealing with her pain. Dr. M disagreed with Dr. C's report and wrote: "[Dr. C] found her fit for work which is absolutely absurd and inappropriate. . . . This lady could not work if she tried. She is [sic] a debilitating problem that is a pain management problem. Any additional efforts for medical treatment in this lady will be for pain management and making her life more comfortable as opposed to functional restoration to return to work. . . . She is totally and permanently disabled."

By report dated April 10, 2000, Dr. M opined that the claimant was "not fit even for sedentary employment. She requires recumbency throughout the day. There is no way this lady could be able to perform any type of work or pass a pre-employment physical. . . . She has a failed back syndrome with severe arachnoiditis. The bottom line is that she is totally and permanently disabled and this is not going to change." Another report was prepared by Dr. M on June 30, 2000, which discussed that the claimant had a

significant pathology with the same empty sac findings and that she had significant epidural fibrosis. He again indicated that the claimant was unable to work and that she could not stand, sit or walk for more than 10 minutes at a time and could not do any bending, lifting, or twisting. The claimant also offered records from Dr. T and Dr. B reflecting that she was unable to work.

The hearing officer determined that there were "other records" which "showed" that the claimant had an ability to work at a sedentary level and that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work. 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).

In a case such as the one before us where both parties presented evidence on the disputed issue, 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. Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer's decision and order are affirmed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge