APPEAL NO. 002323

Following a contested case hearing (CCH) held on September 6, 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 second quarter. The claimant appealed, asserting that the hearing officer's determinations that she had some ability to work, that she did not provide a narrative specifically explaining how the compensable injury causes a total inability to work, and that a record showed some ability to work were against the great weight and preponderance of the evidence. The respondent (carrier) responded that the hearing officer's determinations were supported by the evidence, were correct, and should be affirmed.

DECISION

Affirmed.

The claimant was a charge nurse at a hospital emergency room on _____. As she was coming out of a room, she slipped and fell. She sustained a torn right rotator cuff and injury to her cervical spine. She was certified as having reached maximum medical improvement on July 15, 1998, with a 24% impairment rating. The claimant did not commute any portion of the impairment income benefits. At issue in this matter was whether the claimant was entitled to the second quarter of SIBs.

It was undisputed that the claimant had not sought any employment during the qualifying period for the second quarter, November 19, 1999, through February 17, 2000. The hearing officer therefore considered whether the claimant had made a good faith effort to seek employment commensurate with her ability to work under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) which states that an employee has made a good faith effort to seek employment commensurate with his ability to work if the employee:

> 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 determined that the reports from the claimant's doctor, Dr. D, were insufficient to show why the compensable injury prevented the claimant from working in any capacity during the qualifying period, that another record showed that the claimant had the ability to work in a sedentary capacity, and that the claimant had previously testified that she had at least a limited ability to work. The claimant asserts on appeal that each of the foregoing determinations was contrary to the great weight of the evidence.

The claimant asserts that Dr. D's reports constitute narrative reports which explain how the compensable injury causes a total inability to work. In particular, the claimant asserts that Dr. D provided two narrative reports which explain that the claimant is unable to work because she is experiencing chronic disabling pain and is unable to drive because of the medications she takes. At the hearing, the claimant asserted that she was relying on reports from Dr. D dated November 1, 1999; January 20, 2000; and June 1, 2000. Dr. D's reports of November 1, 1999, and January 20, 2000, both discuss the results of a functional capacity evaluation (FCE) which was done on March 26, 1999, and then go on to state:

> [O]ne thing that has not been considered is the fact that [the claimant] is still significantly disabled by chronic pain. She currently is taking Libitrol 10/25 one TID. Elavil 50 mgs. two at bedtime. Soma 350 mgs. po TID and prn spasm. Talwin NX 1 q 4 h prn pain. Oruvail 200 mgs. once a day. Darvocet N 100 q 4 - 6 alternating with her Talwin on a prn basis. In spite of all of that, she continues to have significantly disabling pain. She certainly is not a candidate for driving to and from work on those particular medications and in my opinion she remains substantially disabled and at this point is not ready to return to the work place.

Dr. D's report of June 1, 2000, gave a history of the claimant's injury and treatment, then stated:

> [I]n my opinion [the claimant] remains significantly disabled. She is in chronic pain. She takes multiple medications for her pain relief and we have been unable to relieve her discomfort without substantial medical intervention. She has been unresponsive to out-patient physical therapy and various other treatment modalities and is currently taking Darvocet N 100 one q 4 - 6 h for pain, alternating with Talwin NX on a prn basis.
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> She also takes Orudis on a regular basis and is on Soma BID. She takes Libitrol for associated depression and Flexeril for associated muscle spasm. She also takes Ambien for sleep at night and Prevacid for GI upset secondary to her medications. On that regimen she is somewhat functional, however she is not clear-headed. She certainly would not be trustworthy as far as working as a nurse and would be incapable of driving under the influence of these multiple medications, to and from work. In my opinion, it would be difficult for her to work at all with her chronic pain and the sedating effects of her medications, which also impair her judgment somewhat.
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> [I]n my opinion she will no longer be able to undergo any sort of meaningful employment. I do not feel that this is by her choice, I believe that it is dictated by her medical condition and by her subsequent treatment and these are the limiting factors as far as her returning to work.

We agree with the hearing officer that the foregoing information does not meet the requirements of Rule 130.102(d)(4). In Texas Workers' Compensation Commission Appeal No. 001984, decided September 26, 2000, we addressed similar concerns expressed by a doctor in a report and stated:

> 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.

The hearing officer found that the narratives are sufficient to meet the requirements of Rule 130.102(d)(4). That determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The hearing officer also found that there was a record which showed that the claimant had the ability to work during the qualifying period. That record is a March 26, 1999, report and accompanying FCE from Dr. V. The claimant asserts that Dr. V's report and the FCE which was used by Dr. V in forming his opinions is faulty, remote in time to the qualifying period, and should have been accorded no weight by the hearing officer. We have previously held that there is no condition in Rule 130.102(d)(4) that limits the "other records" as to time of inception, those created during the qualifying period of the quarters in issue. Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. The credibility to be given to the record is the province of the hearing officer as 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). 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).

The claimant asserted during the hearing that she had no ability to work. That testimony was in direct conflict with earlier testimony given in a CCH on February 28, 2000, wherein the claimant testified that she believed that she was able to work one or two hours a day, but not eight hours a day. That testimony was adduced only 11 days after the end of the qualifying period. We do not find that the hearing officer's determination that the claimant had some ability to work during the qualifying period was so clearly wrong as to be manifestly unjust when the claimant's sworn testimony supports the hearing officer's determination.

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 judgment 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 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, 244 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 in this matter, we decline to substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge