APPEAL NO. 002498

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 September 8, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 12th and 13th quarters. The claimant appealed the adverse determinations that the claimant did not make a good faith effort during the applicable qualifying periods to obtain employment commensurate with her ability to work on the grounds of sufficiency of the evidence. The claimant contended that the hearing officer failed to appoint a designated doctor for the purpose of determining the claimant's ability to work. The respondent (carrier) filed a response urging that the evidence was sufficient to support the determinations of the hearing officer, replying that the claimant could not request the appointment of a designated doctor on appeal when the request was not made at the CCH. The findings that the claimant's unemployment or underemployment during the qualifying periods was a direct result of the claimant's impairment from the compensable injury of _____, were not appealed and are final by operation of law. Section 410.169.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable right extremity, left foot reflex sympathetic dystrophy (RSD), whole body RSD, depression and anxiety injury on _____, with an impairment rating (IR) of 15%, and that impairment income benefits were not commuted. The parties stipulated that the 12th SIBs quarter qualifying period began on November 27, 1999, and ended on February 25, 2000, and the 13th quarter qualifying period began on February 26, 2000 and ended on May 26, 2000.

We first address the claimant's contention that the hearing officer erred in failing to appoint a designated doctor to examine and provide an opinion as to the claimant's ability to work during the qualifying periods for the 12th and 13th SIBs quarters. Section 408.151(b), effective September 1, 1999, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110), effective November 28, 1999, address whether an injured employee whose medical condition prevented him or her from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work. Rule 130.110 provides that upon request by the injured employee or insurance carrier, or upon its own motion, the Commission shall appoint a designated doctor to resolve the dispute.

The claimant's argument that the hearing officer erred in failing to appoint a designated doctor is asserted for the first time by the claimant on appeal. The record is devoid of any such request by the claimant during the CCH although the carrier did make the request as an alternate theory of defense during the hearing. Therefore, the claimant failed to preserve the asserted error when such request was not propounded during the CCH or no assertion made that the Commission failed to carry out a legislative mandate during the dispute resolution process. The Appeals Panel generally reviews only the record developed a the CCH. Section 410.203(a). Texas Workers' Compensation

Commission Appeal No. 93682, decided September 20, 1993; Texas Workers' Compensation Commission Appeal No. 000745, decided May 22, 2000.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the 1st 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 Rule 130.102(b) the quarterly entitlement to SIBs depends on whether the employee meets the criteria during the qualifying period. 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 effort. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work.

The claimant did not look for employment during the applicable qualifying periods and contended at the hearing that she had a total inability to work. 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. Rule 130.102(d)(3), which was amended to become Rule 130.102(d)(4), effective November 28, 1999, 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. All the elements of Rule 130.102(d)(4) must be established. Texas Workers Compensation Commission Appeal No. 001525, decided August 8, 2000.

The claimant testified that Dr. J was her treating doctor since the inception of the injury in _____ and that she regularly sees Dr. J about once a month for treatment of tremors, muscle spasms, jerks with her legs and arms, pain and headaches. The claimant testified that she had no ability to work, did not look for work and that Dr. J had her in an off-work status during the qualifying periods for the 12th and 13th quarters. She explained that Dr. J left it up to her discretion as to whether she could drive and that although she was constantly in pain she drove to several different stores in order to do errands, did laundry, cooked, kept the house , walked to the post office, fed the horses and dogs, and attended some of her child's concerts. The claimant stated that she experienced a "blackout" once during the summer of 1999 while driving and became involved in an automobile accident. The claimant testified that she was being treated by Dr. L for her depression and that she did not contact the Texas Rehabilitation Commission

or Texas Workforce Commission during the applicable qualifying periods because she had not been released back to work by her doctor.

The claimant offered the designated doctor's report of August 30, 1997, from Dr. F. Dr. F stated that he had examined the claimant on a prior occasion to assign an IR for a fracture of the second left toe injured on _____, and that the claimant was subsequently presenting with multitude complaints of generalized symptoms which he felt were predominantly psychiatric in nature. Dr. F noted that the claimant had a positive history for hypertension and psychiatric dysfunction prior to the injury. Nonetheless, he assigned a 15% IR applying the rating assigned by Dr. L for emotional and mental deterioration secondary to a diagnosis of RSD. He assigned the IR leaving it to the Commission to determine whether the psychological condition was compensable. Dr. F found no clinical evidence to substantiate the diagnosis of RSD and believed the symptomatology arose specifically from the psychiatric disorder. No additional impairment was assigned. Dr. F did not offer an opinion as to the claimant's ability to work.

In evidence are three letters from Dr. J dated May 14, 1998, October 28, 1998, and February 1, 1999, which all state:

> [the claimant] is unable to work due to numerous difficulties resulting from her reflex sympathetic dystrophy. My patient will probably never return to work due to unrelenting pain. She literally hurts over every major muscle group of her body.

A letter from Dr. L dated March 29, 1999 (eight months before the beginning of the qualifying periods), reflects that he had interviewed the claimant because of suicidal ideation due to chronic pain and lack of enjoyment in her life. Dr. L opined that the claimant exhibited symptoms of depression and therapy was recommended.

In evidence is a prescription pad note from Dr. J dated March 8, 2000, containing "pt's level of intolerable pain due to diffuse complex regional pain syndrome prevents her from holding a job. She can't drive or work yet. Syncope still persists."

A report dated June 2, 2000, from Dr. J reflects that he was requested to update the claimant's current condition. Dr. J explains that the claimant's complex regional pain syndrome had intensified, progressing from Stage I where she could leave home and conduct activities outside to that of Stage II where she was homebound, and, due to pain could not participate in outside activities. Dr. J noted that the claimant was experiencing bladder and bowel problems, shortness of breath, unsteady gait, unexplained weight gain and skin ulcers. He wrote that the claimant had been suffering from depression to the extent of frank suicidal ideation. Dr. J concluded with the statement that, "[i]t is my medical opinion that [the claimant] is completely disabled from multiple standpoints" and recommended that physical therapy and a pain management program be initiated.

The carrier offered a Physical Capacities Assessment form apparently created to document an evaluation of the claimant some time prior to November 30, 1999. Ms. B, a

vocational specialist, testified that she obtained the document from Dr. J. Ms. B related that she attempted to meet with the claimant in December 1999, to obtain a vocational assessment and to set up a plan but that the meeting did not take place until February 3, 2000. Other attempts to meet with the claimant after this date were unsuccessful. The assessment form prepared by Dr. J reflects that in an eight-hour day the claimant could sit, stand, walk and drive for an hour; lift and carry up to 24 pounds occasionally and up to 10 pounds frequently; push/pull 10 pounds occasionally; and, that she could occasionally bend, stoop, squat, kneel, balance, twist and reach, but could not crawl or climb. Dr. J opined that the claimant could perform simple grasping, fine manipulation and pushing/pulling with both hands. The claimant could perform repetitive foot movements with her right foot but not her left foot.

Written interrogatories to Dr. Li contain the following questions to which Dr. Li supplied answers on August 24, 2000:

> Question: From the physical standpoint, in reasonable medical probability as opposed to mere speculation, conjecture, or guess, it is your opinion that the claimant can perform some work during the qualifying periods of the 12th and 13th quarters of SIBs (3/11/00-6/9/00 and 6/10/00-9/8/00)?
>
> Answer: Yes.

The carrier also offered a peer review report dated May 4, 2000, from Dr. G, a consulting neurologist and psychiatrist. In this report Dr. G provides a summary of the documents tracking the history and treatment of the claimant's injury. On the basis of these documents and a videotape that was submitted for her to review which contained various taped activities of the claimant, Dr. G opined that the claimant was able of working. Dr. G found the claimant capable of bending, standing, sitting, walking and stooping without evidence of restriction or physical discomfort. She believed that the claimant was capable of talking and interacting with other people comfortably without any apparent physical or emotional distress and, that the claimant was capable of safely operating a motor vehicle. Dr. G concluded that the medical records would not support a diagnosis of RSD because three other doctors, including the designated doctor, indicated the negative findings in their reports.

Whether the claimant had no ability to work at all in the qualifying periods from November 27, 1999, through May 26, 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 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 determined that the claimant had the ability to perform some work during the applicable qualifying periods although he did not make specific findings as to whether there was a narrative report from a doctor which specifically explained how the injury caused a total inability to work, or whether there were other records which showed that the

claimant was able to return to work. From our review of the record there is evidence to support a finding that other records show the claimant able to work during the applicable qualifying periods. In Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000, the Appeals Panel stated:

> While we agree that the hearing officer is the trier of fact and not only has the authority but the obligation to weigh the evidence presented, in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record.

We assume that the hearing officer in the present case found the records of Dr. Li, Dr. G and the Physical Capabilities Assessment form from Dr. J to be "other records which show" the claimant having some ability to work. In any event, this evidence was all presented to the hearing officer and was subject to differing interpretations. 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). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*. Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge