APPEAL NO. 010207

Following a contested case hearing held on January 8, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the second quarter and that the claimant's compensable injury did not extend to an injury of the left shoulder. In his appeal, the claimant asserts that the hearing officer's determinations are against the great weight and preponderance of the evidence. The respondent (carrier) filed a brief urging that the hearing officer's determinations be affirmed.

DECISION

Affirmed.

The evidence reflects that the claimant sustained compensable injuries on _____. Following rotator cuff surgery on his right shoulder on April 30, 1997, and spinal surgery on July 27, 1998, the claimant was found to have reached maximum medical improvement on April 29, 1999. He was assigned an impairment rating of 21% and received impairment income benefits for 63 weeks. The Texas Workers' Compensation Commission determined that the claimant was entitled to SIBs for the first compensable quarter, July 19, 2000, to October 17, 2000. The qualifying period for the second quarter of SIBs ran from July 6, 2000, to October 4, 2000. On October 12, 2000, the carrier notified the claimant of its determination of non-entitlement to SIBs for the second quarter. The carrier stated as its reason for the determination of non-entitlement that "FCE [Functional Capacity Evaluation] shows [claimant] has some limited ability to work, but he did not make a good faith effort to obtain employment commensurate with his ability." In addition, the carrier submitted an Interim TWCC-21 form, Payment of Compensation or Notice of Refused/Disputed Claim, dated September 26, 2000, giving notice that the carrier "disputes [claimant] sustained a left shoulder injury in course & scope of employment and that compensable cervical spine & right shoulder injuries extend to the left shoulder."

Regarding the first issue, the claimant testified that he was unable to perform any type of work at all; presented statements from two doctors who opined that the claimant was, and is, totally incapacitated for any kind of work; and argued that the FCE does not qualify as a "record" which "shows" that the claimant is able to return to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)) sets out the eligibility requirements for SIBs as follows:

> (b) Eligibility Criteria. An injured employee who has an impairment rating of 15% or greater, and who has not commuted any impairment income benefits, is eligible to receive supplemental income benefits if, during the qualifying period, the employee:

(1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and

(2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d) provides in relevant part:

(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:

* * * *

(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 note first that the claimant argues that the hearing officer failed to make findings concerning all three prongs of Rule 130.102(d)(4) (the claimant's appeal cites Rule 130.102(d)(3) in error). We disagree. Our review indicates that the hearing officer followed the applicable law in making his determinations. The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work during the qualifying period for the second quarter. To the extent an injured worker seeks to satisfy the requirements of Rule 130.102(d)(4) with a contention that he is unable to work, a detailed narrative must be produced from a doctor which describes how an injury results in the total inability to work. The hearing officer could find from the evidence that this requirement is not satisfied by a conclusory statement from a doctor that a worker is "totally disabled." *See* Texas Workers' Compensation Commission Appeal No. 000911, decided June 7, 2000. The hearing officer was not persuaded that the evidence from Dr. T and Dr. H was sufficient to demonstrate that the claimant had no ability to work in the second quarter qualifying period. He viewed the statements as lacking detailed explanation as required by Rule 130.102(d)(4), or, when detail was provided, as failing to be supported by the other evidence. We conclude that the hearing officer could weigh the evidence from Dr. T and Dr. H and decide that the narratives provided did not sufficiently explain why the claimant could not work at all. We note also that a September 2000 FCE stated that claimant "has the ability to perform frequent light physical demand characteristics of work," and a May 1999 FCE likewise indicated that claimant "demonstrated the ability to perform at the Light/Med[ium] physical demand level." The hearing officer wrote about both of the FCEs, recognizing that while one was old, the other was performed during the qualifying

period. He considered and determined that the FCEs were "other records" within the meaning of Rule 130.102(d)(4) which show that the claimant could return to work. The rule does not, of course, require that an injured person return to the exact same work that he or she was doing before he or she was injured, but rather to work that is commensurate with the claimant's 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In considering all of the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Regarding the second issue, the claimant contended that his left shoulder should be included as part of his compensable injury. There is some support from Dr. T for this position, but the hearing officer could consider that there was a lack of any complaint about an injury to the left shoulder at the time of the compensable injuries or even at any time during the next two plus years after the compensable injuries. With the evidence in this posture, the hearing officer could determine that the claimant had failed to meet his burden of proof. We will not reverse a factual determination of a hearing officer unless that determination 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge