APPEAL NO. 010713

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 March 16, 2001. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 13th and 14th quarters.

The claimant has appealed, asserting she had no ability to work during the qualifying periods for the 13th and 14th quarters, and the medical report of Dr. S should be disregarded pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110(e) (Rule 130.110(e)). The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Sections 408.142 and 408.143 and Rule 130.102 set out the statutory and regulatory requirements for SIBs. At issue in this case is the claimant's ability to work.

It is undisputed that the claimant sustained a compensable neck injury in the form of two herniated discs on _____, or _____, and has not returned to work. The qualifying period for the 13th quarter was from June 2, 2000, through August 31, 2000, inclusive with the qualifying period for the 14th quarter being from September 1, 2000, through November 30, 2000, inclusive. It is undisputed that during the qualifying periods for the 13th and 14th quarters, the claimant was not enrolled in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission or provided by a private provider, and she did not seek employment.

Rule 130.102 sets out the eligibility requirements for entitlement to SIBs. The standard of what constitutes a good faith effort to obtain employment commensurate with the ability to work is set out in Rule 130.102(d)(4) which provides that if an employee has been unable to perform any type of work in any capacity, the employee must provide a narrative report from a doctor which specifically explains how the injury causes the total inability to work, and no other records show that the employee is able to return to work. On June 22, 2000, the carrier sent Dr. R, the claimant's treating doctor, a letter inquiring whether the claimant could return to work. On July 5, 2000, Dr. R sent that letter back to the carrier with a handwritten note on its face, indicating that the claimant could do sedentary work with restrictions as to neck flexion and extension, lifting, and frequent breaks. On September 25, 2000, Dr. R sent the carrier a letter in which he references his July 5, 2000, note. In the letter, Dr. R stated that, "It is certainly very doubtful that the patient could find employment that could honor these restrictions." Dr. R goes on to recommend that the claimant remain off work. Also on the record is a November 13, 2000, functional capacity evaluation indicating that the claimant could do sedentary work, and a November 15, 2000, report from Dr. S indicating the claimant could return to work with restrictions as of November 15, 2000. Dr. S is not identified as a designated doctor appointed under Rule 130.110 whose report is afforded presumptive weight when received

by the Texas Workers' Compensation Commission. In his report, Dr. S states, "This TWCC appointed required medical exam was for the purpose of determining the patient's work ability." It does not appear that the hearing officer gave Dr. S's report presumptive weight, but instead considered it another record. We note that the hearing officer found the report from Dr. S shows the claimant could return to work during the qualifying periods for the 13th and 14th quarters. While Dr. S's report only shows that claimant could return to work with restrictions on November 15, 2000, which is almost at the end of the 14th quarter qualifying period, there was other conflicting evidence introduced as to the claimant's ability to work. The hearing officer considered the evidence from Dr. S and Dr. R and determined that another record showed the claimant had an 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). There is sufficient evidence in the record to support the hearing officer's determination.

The claimant asserts that the report of Dr. S should be disregarded pursuant to Rule 130.110(e), because he previously resolved an impairment rating dispute involving the claimant on November 20, 1996. There was no testimony or evidence presented at the CCH regarding this argument. The claimant raises this argument for the first time on appeal and we decline to consider it.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge