APPEAL NO. 010787

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 13, 2001. The hearing officer determined that the respondent (claimant) demonstrated that she had no ability to work during the qualifying periods for second and third quarter supplemental income benefits (SIBs) and, consequently, was entitled to SIBs for those quarters. The appellant self-insured (carrier) urges that these determinations are not supported by the evidence. The claimant urges affirmance.

DECISION

Reversed and rendered.

The claimant, a woman in her mid-40s at the time of the qualifying periods under review, worked as a custodian for the self-insured school district. She injured her back when she slipped and fell on _____; her treating doctor was Dr. M, who testified at the CCH. Dr. M said that he had treated the claimant primarily with pain medication, that she saw him once a month during the qualifying periods for the SIBs periods under review, which ran from June 27, 2000, through December 25, 2000. Dr. M said that he referred the claimant to Dr. T for epidural blocks. Dr. M also noted that the claimant had developed high blood pressure.

Dr. M testified at the CCH, but was asked largely about his treatment of the claimant rather than any specific, precise description of how her injury caused a total inability to do any type of work (including part-time work). Dr. M said that around October 2000, she had improved because epidural blocks had been approved by the carrier. He said that the claimant's pain revolved around her thoracic spine. When he was specifically asked how the claimant's thoracic condition precluded any ability to work, he answered generally in terms of what the function of the average individual's thoracic spine was and what functions were affected when it was hurt. Dr. M affirmatively answered a question asking if a thoracic injury would affect the claimant's ability to move.

Dr. M said that the claimant had abnormal sensation down each leg but did not explain how this would impact work-related activities. He said that he did not "foresee" that she could return to "any" type of work. He said that the medication she took would allow her to drive but not to operate heavy machinery. He said she might be able to return to work with consistent epidural blocks. Dr. M said that such blocks were typically done every 90 to 120 days. When asked generally to "share" any information regarding the claimant's ability to work, he said nothing further. He made clear that he viewed any job search by the claimant as a waste of time.

The claimant appeared to share Dr. M's bleak opinion of her prospects, and said she mainly spent her days indoors and in bed. Dr. M's October 25, 2000, letter, however, stated that the claimant could stand and sit for up to (but no more than) an hour and walk

for 30 minutes at a time. Dr. M identified this letter as his narrative as to why the claimant was totally unable to work.

On cross-examination, Dr. M said that the claimant could not perform a job where she would sit and answer the telephone because she would need "chronic" breaks. He doubted any employer would hire someone who needed breaks every "five to 10 minutes." Dr. M asserted that a sedentary job involved sitting for long periods of time. The claimant did not have, nor was she a candidate for, surgery. Dr. M thought he had provided, to the best of his ability, information describing why the claimant could not work. In summary, Dr. M pinpointed the thoracic spine and related deficits as the reason that the claimant could not work. However, the designated doctor assessed a 3% impairment rating (IR) for the thoracic spine and found range of motion (ROM) to be normal. No cervical IR was assigned for a specific condition but just for ROM. (The designated doctor's overall IR was 20%.)

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's 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 (emphasis added). At issue in this case is whether the claimant has satisfied the requirements of Rule 130.102(d)(4). We hold that the hearing officer erred by determining that either Dr. T or Dr. M had supplied such a narrative in this case, or that there were no other medical records which showed an ability to work.

Whether there is a narrative of total inability to work. A hearing officer is no longer at liberty under Rule 130.102(d)(4) to find an inability to work from a patchwork of various statements and doctor's notes. *See* Texas Workers Compensation Commission Appeal No. 000041, decided February 21, 2000. We have reviewed the narratives of Dr. M and Dr. T in the record, but they do no more than generally describe her condition or the treatment, and then pronounce that she cannot work. The missing link in these narratives, which the rule requires, is "how" the condition prevents <u>any</u> work, including sedentary and part-time work. Dr. M's testimony did not supply this either, perhaps because a great percentage of questions involved medical treatment issues rather than the claimant's abilities.

Dr. M expressed skepticism that an employer might want to hire a person who needed frequent breaks, and opined that the claimant could aggravate her condition if she worked, but we cannot agree that such expressions of doubt as to employability qualify as a narrative that explains from a functional standpoint how she can perform no work of any kind (which would include part-time employment.) Nor can we agree that a dire outcome to a job search may be assumed when no search for employment is actually conducted. The Appeals Panel has before found a recitation of medical conditions and treatment followed by a simple statement that the claimant could not work as inadequate under Rule

130.102(d)(4). Texas Workers Compensation Commission Appeal No. 002724, decided January 5, 2001.

Whether other medical records "show" an ability to work. We further believe that the hearing officer erred by finding that there were no other records which showed an ability to work. The hearing officer explained in his decision that although two functional capacity evaluations (FCE) performed at the request of Dr. S on April 23, 1999, and April 28, 2000, reflect that the claimant had an ability to perform light to moderate work, the hearing officer did not find these reports to be "credible."

In Texas Workers Compensation Commission Appeal No. 002196, decided October 24, 2000, we 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.

The hearing officer explained that he based his decision on several factors: that the FCE's were performed outside the qualifying periods in question; that the FCE results make constant mention of the claimant's complaints of pain being subjective; that Dr. S assigned a 2% IR in April 1999, while one month later the designated doctor assigned a 20% IR; and that Dr. S did not consider the effects of the claimant's medications when making his evaluation.

First of all, we cannot agree that the second report of Dr. S, dated April 28, 2000, is too remote. There was no evidence that the claimant's condition had worsened during the interval from that report to the date of the qualifying periods. Dr. M in fact said that claimant's pain had improved due to epidural blocks. Second, while the hearing officer faulted Dr. S for not considering the effects of the claimant's medications, no where did either Dr. T or Dr. M identify medication as a factor causing an inability to perform any function except operating heavy equipment. Third, Dr. S referred the claimant for an FCE in April 2000; the FCE report described how the evaluator found that the claimant exhibited inconsistent subjective pain behaviors and self-limiting behavior resulting in failure to complete some of her testing. Consequently, the observation of subjectivity was not that of Dr. S alone. Finally, we regard the comparison of Dr. S's 1999 IR with that of the designated doctor's as somewhat tangential and remote to the determination of whether the claimant was totally unable to work for the qualifying periods under consideration.

SIBs are intended as a transition benefit designed to support a worker in his or her return to the workforce following a compensable injury. *See* Texas Workers' Compensation Appeal No. 950114, decided March 7, 1995. A claimant need not seek full-time employment, but need only seek work commensurate with the ability to work. An

underemployed worker (one who works but for less than 80% of the preinjury average weekly wage) is still entitled to SIBs. There is no need for the claimant to return to custodial work or even full-time work; however, income benefits do not continue indefinitely.

For these reasons, we reverse the hearing officer's decision that the claimant had no ability to work as against the great weight and preponderance of the evidence. As the claimant did not meet the good faith job search requirement, she was not entitled to second and third quarter SIBs.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge