APPEAL NO. 012549
FILED NOVEMBER 30, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 20, 2001. With respect to the single issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter. In his appeal, the claimant essentially argues that the hearing officer's determinations that he had some ability to work, that he did not make a good faith effort to look for work commensurate with his ability to work, and that he is not entitled to SIBs for the second quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the second quarter. At the hearing, it was undisputed that the claimant had neither returned to work nor looked for work during the time period in question and that the claimant based his entitlement to SIBs for the quarters in dispute on an assertion of total inability to work. 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. The hearing officer determined that the claimant did not provide a narrative from a doctor specifically explaining how the injury caused a total inability to work. In addition, the hearing officer determined that another record showed an ability to work. Whether or not the claimant supplied a narrative or whether another record showed an ability to work were questions of fact for the hearing offer. The hearing officer's determinations that the claimant did not satisfy the requirements of Rule 130.102(d)(4), and that he, therefore is not entitled to SIBs for the second quarter are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The claimant forwarded an October 18, 2001, report from Dr. E, who examined him at the request of the carrier, to the Appeals Panel. In that report, Dr. E addresses the claimant's ability to work and opines that the claimant is "unable to return to gainful employment." Dr. E further states that "[i]f pain management can be successfully achieved, I opine that there is a reasonable probability of the examinee being able to return to sedentary work in a two to three month period of time." Generally, we will not consider

evidence that was not submitted into the record and which is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it is through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this instance, the report from Dr. E rather clearly satisfies the first three requirements of the test for newly discovered evidence. Thus, the question is whether the report is "so material that it would probably produce a different result." After reviewing Dr. E's report in the context of the hearing officer's decision and the evidence presented at the hearing, it certainly is possible that the report would produce a different result. However, we cannot say that it is probable that the evidence would produce a different result. As such, Dr. E's report does not meet the requirements to warrant a remand for the hearing officer to consider that evidence.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYER INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MARCUS MERRITT
ACE USA
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IRVING, TEXAS 75063.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge