APPEAL NO. 001877

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 July 24, 2000, in _____, Texas, with (hearing officer) presiding as hearing officer. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fifth compensable quarter as she had "sought employment, which was believed to be commensurate with her ability to work, during each week of the qualifying period for the fifth quarter of [SIBs] during which she had any ability to work." There was no appeal from the hearing officer's determination that the claimant's unemployment was a direct result of her impairment and that element will not be addressed further.

The appellant (carrier) appealed, complaining that the hearing officer had "issued a 'hybrid' decision," finding both a good faith job search (except for 3 weeks) and a total inability to work in any capacity. The carrier contends that the claimant did not meet the requirements of either Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) or (e) (Rule 130.102(d)(4) or (e)) and that the same medical records and other records cannot both show a total inability to work and an ability to return to work at the same time. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant urges affirmance.

DECISION

Reversed and rendered.

As the carrier states, this appears to be a hybrid case. The claimant initially contended that she had made a good faith effort to seek employment commensurate with her ability to work every week of the qualifying period "except for three" and would show good cause why she had not sought employment during those weeks. The carrier pointed out that there is no good-cause exception in Rule 130.102(e) and the claimant subsequently appeared to contend that she had a total inability to work in any capacity.

The claimant had been employed as a machine operator for a number of years and sustained a cervical lifting injury. The parties stipulated that the claimant sustained a compensable (neck) injury on _____; that the claimant had a 15% impairment rating; that impairment income benefits were not commuted; and that the qualifying period for the fifth quarter was from February 26 through May 26, 2000. The parties stipulated that the claimant had no earnings during the qualifying period. The statutory requirements set out in Sections 408.142(a) and 408.143 were recited in Texas Workers' Compensation Commission Appeal No. 000512, decided April 24, 2000 (where the Appeals Panel affirmed the hearing officer's decision on nonentitlement to SIBs for the third quarter) and will not be repeated here.

Similarly, both Texas Workers' Compensation Commission Appeal No. 001350, decided July 25, 2000 (where the Appeals Panel affirmed the hearing officer's decision on nonentitlement to SIBs for the fourth quarter) and Appeal No. 000512, *supra*, reference the "new" SIBs rules effective January 31, 1999, as amended effective November 28, 1999. Addressing the claimant's contention that she has a total inability to work in any capacity, Rule 130.102(d)(4), the version in effect for this quarter, provides that an injured employee has made a good faith effort to look for work 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 record includes several medical reports from Dr. T, including a report dated February 20, 2000 (just prior to the qualifying period), in which he tells the claimant:

> It is my opinion that you are not able to work in any capacity. You really cannot handle any weight routinely, meaning that you could not even handle ten pounds on a repeated bases [sic]. Any use of your arms, even for very light weights, exacerbates your neck pain.
>
> As you know, you have multilevel painful cervical disc degeneration which is not amenable to surgery because of the multiple levels involved. As I said, any use of your arms, even in the lightest conditions aggravates your neck pain and arm pain. It is my recommendation to you that you not work in any capacity. . . . I just want to reiterate that based on the evaluation done in our Physical Medicine Department, you do not show the physical capabilities to perform work, even in the sedentary work category. I feel that your attempt to work would only exacerbate your condition requiring you to take greater and greater amounts of medication, which would have very negative consequences. Because we know that your condition will not improve with time and surgery is not an option to you. I recommend that you not try to work in any capacity.

Those comments are repeated in other forms in reports dated March 30 and May 3, 2000. In addition, Dr. F, who is the claimant's treating doctor and also the claimant's nephew, is of the opinion that the claimant is unable to work in any capacity and explains why that is so in reports dated March 30 and May 15, 2000.

Evidence to the contrary is a functional capacity evaluation performed on June 30, 1999 (some eight months prior to the qualifying period), by Mr. B, a physical therapist, who, in letters to the carrier and Dr. M, is of the opinion that the claimant "does exhibit the physical capabilities of performing sedentary physical demand characteristics." (We leave it to the hearing officer to interpret what that means.) Dr. M, in a report dated June 14, 1999, commented: "I do not believe that [the claimant] is very motivated for returning to work, and, I doubt that she is a candidate for vocational retraining because of her age and lack of motivation." In a report dated February 15, 2000 (just prior to the qualifying period),

Dr. M writes that he agrees with Mr. B's assessment "and would agree with him that [the claimant] could do sedentary type work if such were available."

The hearing officer makes findings that the claimant "is restricted to modified, limited, part-time employment" (Finding of Fact No. 3) but also makes findings that the claimant "was totally unable to work" during certain weeks of the qualifying period. Finding of Fact No. 6. The hearing officer also states that the medical records "explain how Claimant's injury resulted in the temporary total inability to work." Finding of Fact No. 7. We hold that finding to be unsupported by the evidence. Dr. T (and to an extent that Dr. F's reports are credible) indicates that the claimant has a total inability to work in any capacity and makes no mention that this is "temporary," much less limited to certain weeks in the qualifying period. Similarly, the hearing officer finds in Finding of Fact No. 8:

> 8. The other records which indicate that Claimant is able to engage in some employment do not show that Claimant was able to work during weeks beginning March 27, 2000, April 10, 2000, and April 24, 2000.

We disagree. There is nothing in Dr. M's reports or Mr. B's letters which limit their comments to certain weeks to the exclusion of other weeks. Consequently, we reverse the hearing officer's decision on total inability to work in any capacity only during certain isolated weeks during the qualifying period, while finding an ability to work sedentary-level work in other weeks, as not being supported by the evidence. We stop short of saying, as a matter of law, that a claimant cannot have some ability to work during the qualifying period, then experience a deterioration of his or her condition, documented by medical evidence as contemplated in Rule 130.102(d)(4), and be unable to work in any capacity during other periods during the qualifying period, or vice versa. While the injured employee may change status during a qualifying period, that change in status must meet the requirements of Rule 130.102 for the specific period involved. In this case, there must be a narrative report from a doctor which specifically explains how the injury causes a total inability to work during the specific weeks claimed and no other records that show that the claimant was able to return to work for those specific three weeks.

Regarding the question of whether the claimant made a good faith job search, the claimant clearly did not believe she could do any work but, as she testified, the carrier's adjuster "kept harping on [the claimant] about looking for work" and she attempted to do so. In Texas Workers' Compensation Commission Appeal No. 000570, decided May 4, 2000, one of the cases cited by the carrier, the injured employee in that case testified that he believed himself incapable of performing any work but was told he had to search for a job "in order to qualify for SIBs." The Appeals Panel commented that the "avowed reason for searching for employment would appear to be contrary to the good faith desire to find employment and return to the workplace." The claimant made 20 contacts during the qualifying period for cashier and light clerical positions, which were thoroughly documented to include copies of applications and, in some cases, notes from prospective employers why the claimant was not hired ("didn't feel like she would be able to do the [work]"). The hearing officer commented that the claimant "made a sincere effort to identify, locate, and

apply for employment which was commensurate with her ability to work." Rule 130.102(e) provides that an injured employee who "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." In this case, it is undisputed that the claimant did not seek employment commensurate with her ability to work during the weeks of March 20, April 10, and April 24, 2000, and, therefore, the claimant did not meet the requirements of Rule 130.102(e).

We reverse the hearing officer's decision that the claimant was entitled to SIBs for the fifth compensable quarter and render a new decision that the claimant was not entitled to SIBs for the fifth quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge