APPEAL NO. 991651

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, Tex. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 6, 1999, a hearing was held. She (hearing officer) determined that appellant (claimant) was not entitled to supplemental income benefits for the 10th compensable quarter. Claimant asserts that he did not know he was able to do some work until late in the filing period for the 10th quarter but adds that he nevertheless attempted in good faith to find employment. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when he tripped and fell at work. The parties stipulated that there was a compensable injury, that claimant's impairment rating is 38%, that he has commuted no benefits, and that the filing period for the 10th quarter began on July 14, 1998, and ended on October 12, 1998.

Claimant had been treated by Dr. K until August 20, 1998, when Dr. K, after viewing a video of claimant working, discharged him from his care. (Dr. K cited range of motion, freedom of movement, and claimant's ability to assume "awkward positions" as being in conflict with claimant's prior indications.)

Claimant also saw Dr. C in and around the filing period in question. While claimant states that he did not know the results of the functional capacity evaluation (FCE) performed on October 1, 1998, until just after the end of the filing period in question, Dr. C's notes prior to that time do not say that claimant could not do any work at all. On August 4, 1998, Dr. C discussed the possibility of more surgery, but said that there may be no further treatment available. He then said, "I doubt that he is going to be gainfully employed with these limitations based upon what he can do from a work standpoint, and if nothing else can be done to relieve his discomfort, then he should probably qualify for disability." On August 26, 1998, Dr. C commented about Dr. K having viewed a video of claimant and said that the video was of short duration, adding that the real question was whether claimant could do what was depicted "on a daily basis and under the direction of a supervisor." On September 11, 1998, Dr. C stated that retraining was a possibility for claimant. He suggested a "supervisory type position or work such as a private investigator." He added:

> The videotape . . . certainly shows that he can sporadically so some manual labor, but I would question seriously whether he could do this on a consistent basis and if there are no appropriate positions for retraining available, then disability would have to be a consideration.

As stated, the FCE of October 1, 1998, showed that claimant could do sedentary work. Dr. C thereafter did not dispute that sedentary work could be done. With claimant having done

some manual labor for some period of time in late June 1998, as shown on video, and with Dr. K and Dr. C having responded to that work as described herein, the hearing officer could reasonably question whether the results of the FCE, indicating some ability to do some type of work for some period of time, were a surprise to claimant.

Claimant provided evidence that he contacted four employers during the filing period. He also stated that he did home study and assisted his wife in maintaining several trailer houses. He indicated that prior to the filing period in question he had contacted the Texas Rehabilitation Commission. He added that during the filing period he contacted the Texas Workforce Commission (TWC), but did not divulge any leads he obtained from that agency. He did indicate that he repeatedly contacted the four employers listed during the filing period.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The evidence from Dr. K, Dr. C, and the FCE sufficiently support the hearing officer's determination that claimant has "some ability to work."

The question of whether or not a claimant has attempted in good faith to find work is also one of fact for the hearing officer to determine. The Appeals Panel will not disturb a hearing officer's determination unless it is against the great weight and preponderance of the evidence. The determination that claimant did not attempt in good faith to find work was not against the great weight and preponderance of the evidence even when considering that claimant contacted four employers and the TWC about work during the filing period in question.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge