APPEAL NO. 000153

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 December 3, 1999. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first and second quarters. The claimant appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The respondent (self-insured) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a custodian for the self-insured. She has a prior history of asthma. On _____, she sustained a compensable aggravation of her asthma after being exposed to cleaning chemicals at work and was assigned a 15% impairment rating (IR). Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The first SIBS quarter was from June15 to September 13, 1999, and the qualifying period was from March 3 to June 1, 1999. The second SIBS quarter was from September 14 to December 31, 1999, and the qualifying period was from June 2 to August 31, 1999.

At issue in this case was whether the claimant made the required good faith job search effort commensurate with her ability to work. She made no job search efforts during either qualifying period, taking the position that she had no ability to work at all. The version of Rule 130.102(d)(3) in effect at the pertinent times in this case provided that an injured employee has established the required good faith effort to obtain employment 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[.]" Dr. G began treating the claimant for her asthma in 1991 and became her treating doctor for her compensable asthma aggravation injury. On August 1, 1997, he released her to return to light work effective August 4, 1997. He last saw the claimant on December 29, 1998, at which time he apparently still had not changed this work release. On November 12, 1999, he answered an interrogatory of the self-insured that the claimant

could do part-time, sedentary work, but had to avoid an environment with lung irritants. The claimant herself responded "possible light office filing" to the self-insured's interrogatory, which asked if she believed she could go back to work in a sedentary or light-duty part-time job. She argued that this was merely an expression of a desire to return to work, not of an ability to do so.

On May 10, 1999, the Texas Workers' Compensation Commission approved the claimant's request to change treating doctors to Dr. B. In an office note of August 17, 1999, Dr. B wrote that he "dictated a letter at her request addressing issues with regards to why she is unable to work at this time." The letter itself, of the same date, mentions the exposure incident which caused the exacerbation of her asthma, describes her medications, and concludes that the claimant "is weak and becomes short of breath with any activity. She has a constant harsh cough. She has difficulty sleeping secondary to her respiratory problems. She sleeps sitting in a recliner and is unable [to lie] down because of her breathing problems. She requires medications on a daily basis to control her asthma. I respectfully request you consider her disability based on the above noted information." In a prior letter of July 2, 1999, Dr. B wrote the claimant "was forced to remain [off] work because of severe shortness of breath with any exertional activity."

The claimant had the burden of proving she had no ability to work, and whether she established this under the criteria of (then) Rule 130.102(d)(3) was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 992554, decided December 22, 1999 (Unpublished). Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, the hearing officer had the responsibility to determine under Rule 130.102(d)(3), if Dr. B specifically explained how the injury caused a total inability to work during the qualifying period and whether Dr. G's statement was a record which showed the claimant was able to return to work. Texas Workers' Compensation Commission Appeal No. 992933, decided January 26, 2000. The hearing officer considered this evidence and concluded that the claimant had not met her burden of proof. Both at the hearing and on appeal, the claimant argued that Dr. G's opinion that the claimant could perform limited work was not credible because he had not seen the claimant for almost a year and he was not the current treating doctor. We have said that evidence outside the qualifying period may be probative of conditions during the qualifying period. Texas Workers' Compensation Commission Appeal No. 992462, decided December 20, 1999, and Texas Workers' Compensation Commission Appeal No. 991298, decided July 29, 1999. In this case, there were reports of Dr. G from before and after the qualifying periods consistently expressing his opinion that the claimant had some ability to work. The hearing officer found this evidence more probative and credible than Dr. B's opinion. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the claimant had some ability to

work during the filing periods in issue. Having failed to look for employment commensurate with this ability, the claimant was not entitled to first or second quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge