APPEAL NO. 000161

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 3, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the claimant reached maximum medical improvement on December 13, 1997, with a 29% impairment rating and that the qualifying period for the third quarter for supplemental income benefits (SIBS) began on July 1, 1999, and ended on September 30, 1999. The hearing officer determined that during the qualifying period the claimant was unable to perform the type of work he was doing when he was injured because of the impairment from the compensable injury and that the claimant's unemployment was a direct result of his impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The claimant contended that he did not have to look for work during the filing period because he was not able to work. The hearing officer also determined that the claimant did not contact or avail himself of the assistance of the Texas Rehabilitation Commission (TRC) during the qualifying period, that he did not provide a narrative report from a doctor which specifically explains how his compensable injury caused him to be unable to work, that during the qualifying period he did not in good faith seek employment commensurate with his ability to work, and that he is not entitled to SIBS for the third quarter. The claimant appealed, urged that the hearing officer erred in admitting a report of a functional capacity evaluation (FCE) that was performed about two months after the end of the qualifying period in question and in permitting testimony about the FCE, contended that he did provide a narrative report from a doctor which specifically explains how the injury caused a total inability to work, urged that the determinations of the hearing officer are not supported by sufficient evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier responded, contended that the hearing officer did not err in admitting evidence, urged that the decision of the hearing officer is supported by sufficient evidence, and requested that it be affirmed.

DECISION

We affirm.

The SIBS rules effective January 31, 1999, apply to the case before us. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) provides in part:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
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> * * * *

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;

(3) 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; or . . . .

The claimant testified that he contacted the TRC in March and October 1999, that he had not attended a vocational rehabilitation program sponsored by the TRC during the filing period, and that he would probably begin participating in such a program in January 2000. The evidence is clearly sufficient to support the determination that the claimant did not contact or avail himself of the assistance of the TRC during the qualifying period. It would have been better had the hearing officer used the language in Rule 130.102(d)(2) in her determination, but the failure to do so was not error.

Both parties had medical records admitted into evidence. The claimant sustained closed head and neck injuries on _____. On December 13, 1995, he had a discectomy with fusion from C4 through C6. On February 17, 1999, he had surgery to remove hardware from the area that had been fused and a laminectomy and discectomy with fusion at C3-4. A progress report from Dr. L dated June 28, 1999, contains a history of the claimant's injury and treatment, a detailed diagnostic impression, and recommendations that he continue to take medication and receive psychiatric/ psychological care and orthopaedic care. It does not specifically comment on the ability of the claimant to work. The record contains similar progress reports dated August 25, 1999, and October 7, 1999. In a follow-up office visit note dated August 10, 1999, Dr. D stated that the claimant said that he was not doing well, that his major complaint was a severe headache, that the carrier had denied some medications, that the claimant was not sure why the headache medication was denied, that he was given an injection to calm down the headaches, that the claimant was taking pain medication, that the claimant was scheduled for an independent medical evaluation and an FCE the next day, and that the claimant remained disabled. The evidence is sufficient to support the determination that the claimant has not provided a narrative report from a doctor which specifically explains how his compensable injury caused him to be totally unable to work. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant contended that the hearing officer erred in admitting a report of an FCE dated November 24, 1999, that states that the claimant could not perform the tasks that he was performing in his preinjury job and that he could perform light lifting with restrictions. In numerous decisions concerning SIBS, the Appeals Panel has held that while it is preferable that medical evidence on the ability of the claimant to work during the filing or qualifying period be dated during that period, it is not error to admit medical reports dated close in time to the filing or qualifying period. Even if it was error for the hearing officer to have

admitted the FCE and permitted testimony related to the FCE, it would not have been reversible error. The claimant did not provide a narrative report from a doctor which specifically explains how his compensable injury caused him to be totally unable to work. The FCE may have been relevant concerning the other two provisions of Rule 130.102(d)(3), but the hearing officer did not commit reversible error concerning the FCE.

In his appeal, the claimant makes comments about other things that he does not agree with, but none of them have an impact on the hearing officer's determinations concerning the provisions of Rule 130.102(d) and whether the claimant proved that he made a good faith effort to seek employment commensurate with his ability to work during the qualifying period. We will not address those comments.

The appealed determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*; Pool, *supra*. We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge