APPEAL NO. 000570

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 2, 2000. The hearing officer determined that the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter but is entitled to SIBs for the ninth quarter. The hearing officer held that the claimant had some ability to work during the eighth quarter but failed to search for employment; and that the claimant made a good faith search for employment in the ninth quarter and documented a job search every week, except for three weeks when the hearing officer found that he was unable to work.

The appellant (carrier) has appealed. It argues that the treating doctor's assertion that the claimant had an inability to work is merely conclusory and was not based upon assessment of claimant's functional capacity or a thorough evaluation. The carrier further argues that the evidence showed that claimant did not cooperate with the carrier's vocational counselor (although it is unclear what the requested relief for this would be). The claimant responds that the decision of the hearing officer that the claimant could not work from August 10 through August 31, 1999, is sufficiently supported and the hearing officer's finding of fact cannot be reversed absent a great weight of evidence to the contrary.

DECISION

Reversed and rendered.

The claimant testified that he had dropped out of school in the seventh grade, joined the Army and, upon discharge, performed a lifetime of labor and semi-labor intensive jobs. He was 66 years old at the time of the CCH. The claimant worked for his employer, (employer), since 1980. On _____, he sustained a back injury which required surgery in December 1998, performed by Dr. S, a neurosurgeon. Claimant was initially treated by Dr. H after his injury, but switched to Dr. L.

The qualifying period for the ninth quarter (the one in issue on appeal) ran from August 14 through November 12, 1999. The claimant documented a search for employment during that period beginning on September 1, 1999. He said that he did not search, notwithstanding the results of his functional capacity evaluation (FCE), because neither Dr. L nor Dr. S had "released" him. He began looking for work when the insurance carrier told him it was required for SIBs. He maintained that the Texas Workforce Commission (TWC) would not register him to look for work because of his physical condition and they had to look out for employers as well as workers. The claimant said he declined to cooperate with the vocational counselor hired by the carrier because he did not believe they would be looking out for his interest. When the claimant found out that the vocational counselor had investigated some of his listed contacts and took the position that they had not been made, the claimant said he went back to some employers and found that the person he had originally talked to was no longer employed.

The claimant was examined on May 25, 1999, by Dr. B for the insurance carrier. Dr. B recorded that claimant told him that his leg pain had been relieved 75% and his back pain 50% by his surgery. Dr. B reported that claimant told him he had pain four to five hours a day, could stand for 10-15 minutes, could sit for 30 minutes, or lift an eight-pound object without experiencing discomfort. Dr. B referred him for an FCE, which was done on either May 17 or 27, 1999 (both dates are used and the report itself is not in evidence), during a four-hour period. The FCE (according to Dr. B) indicated that claimant could work at the sedentary level, eight hours a day. Apparently, after claimant took the position that this FCE caused a flare-up, Dr. B wrote the carrier that claimant was not forced to perform any maneuver and, when contacted the next day, reported no increase in his pain.

Dr. L testified that notwithstanding the finding on an FCE, claimant was completely unable to work. He disputed any medical evidence to the contrary. He noted that the FCE caused a flare-up in claimant's condition. Asked to identify why claimant could not work, Dr. L testified that claimant had chronic, continuing pain, could not sit for extended periods of time, and could not bend. At the time of the CCH, Dr. L had not treated the claimant actively since September 1999, although he had seen claimant the day before the CCH. Dr. L agreed that he referred the claimant to Dr. DS.

Dr. DS examined the claimant and, in a July 28, 1999, report, stated that he found no radiculopathy, and opined that as long as claimant could avoid prolonged sitting and excessive repetitive bending, he could perform a "sedimentary [sic]" job. Dr. L said he disagreed with this conclusion.

On August 10, 1999, Dr. L wrote a letter stating that claimant had "recently" had a significant flare-up as a result of his May 1999 FCE examination. He said that the FCE caused additional leg pain a decrease in claimant's range of motion and affected his ability to perform activities of daily living. He noted that the referral to Dr. DS resulted from this flare-up. Dr. L's letter makes no reference to any event or occurrence which on that day would have resulted in the inability of the claimant to perform any work. The primary purpose of the letter appears to be to request approval for physical therapy.

The claimant said that it was his subjective belief that he could do no work, not even on the sedentary level. He made clear that he sought employment because it was required to obtain SIBs. He said, however, that if offered a job he would take it and began to add a qualifying statement to his testimony before being interrupted. The claimant said that he would not specifically search for sedentary jobs, but that he would merely contact an employer to see if any jobs were available.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBs, set out in Section 408.143(a). The injured employee must prove that he or

she has earned less than 80% of the employee's average weekly wage as a direct result of the employee's impairment and has in good faith sought employment commensurate with the employee's ability to work. Good faith is a subjective concept and generally means honesty of purpose, freedom from intent to defraud, and being faithful to one=s obligations. Texas Workers= Compensation Commission Appeal No. 960107, decided February 23, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers= Compensation Commission Appeal No. 94150, decided March 22, 1994, but is also subject to the criteria listed in the new SIBs rules that were in effect here for the ninth quarter qualifying period.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)) lists considerations of good faith as follows:

> 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:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission 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
>
> (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

When a job search is conducted, Rule 130.102(e) sets out considerations of good faith:

> (e) Except as provided in subsections (d), (1), (2), and (3) of this section, an injured employee who has not returned to work and 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 and document his or her job search efforts.

The rule goes on to list various considerations to be considered by the hearing officer in finding good faith; among them are the number of jobs applied for, types of jobs sought, education and experience of the injured worker, amount of time spent to find employment, the employee's job search plan, and registration with the TWC.

What is troubling in this case is that the claimant stated not once but several times during the CCH that he was searching for a job only because he had been told he needed to in order to qualify for SIBs, and that he still believed himself incapable of performing any work. This avowed reason for searching for employment would appear to be contrary to the good faith desire to find employment and return to the workplace.

Furthermore, as the hearing officer noted, the claimant did not seek employment during every week of the ninth quarter qualifying period. The hearing officer attempted to bridge the period of inactivity of nearly three weeks by finding that the claimant was unable to work. Although the hearing officer found that the claimant was unable to perform any type of work for the period from August 10 through August 31, 1999, as documented by Dr. L's August 10th letter, this finding is against the great weight and preponderance of the evidence for the following reasons: Dr. L's letter attributed the claimant's inability to work to the May 17th or 27th FCE and stated that the "flare-up" occurred subsequently to that examination; however, the hearing officer expressly found that claimant had some ability to work for the eighth quarter. Except for the first one or two weeks, the eighth quarter qualifying period was after the May FCE. The hearing officer does not explain, nor is it apparent to us, how evidence found inadequate to support an inability to work for the eighth period could constitute sufficient evidence of inability for the first three weeks of the ninth quarter qualifying period. In any case, the evaluation of Dr. DS, done purportedly in response to claimant's contended "flare-up" after the FCE, stated that claimant had some ability to work, and, as such, constitutes a medical record which shows that the claimant was able to return to work during the period from August 10th through August 31st.

Because the claimant had the ability to work throughout the ninth period, but did not look for and document a search for employment every week of the qualifying period, we reverse and render a decision that the claimant did not prove entitlement to SIBs for the ninth quarter. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The contradictory evaluation of what is essentially the same evidence on

inability to work is manifestly unjust and against the great weight and preponderance of the evidence.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge