APPEAL NO. 000612

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 February 17, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the third quarter, from September 18, 1999, through December 17, 1999. The hearing officer determined that the claimant was not entitled to SIBs for the third quarter. The claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in his favor. He argues that he proved he had the inability to work during the qualifying period. As part of this argument, the claimant argues that because he was not cleared by his doctor to work, he could not work. The respondent (carrier) responds, urging affirmance.

DECISION

We affirm the hearing officer's decision.

The qualifying period for the third quarter ran from June 6 through September 4, 1999. The claimant sustained a back injury on _____. Although he had surgery scheduled in January 1999, he canceled it and had not, since that time, had surgery. The claimant contended he had continuous pain which even woke him at night. He said that he returned to work for his employer after January 29, 1999, but worked for only three days. Thereafter, he did not work because he was tired from working regular hours and his doctor told him he should not work and he had several documents where this recommendation was made. Asked by the hearing officer what such documents were in evidence, the claimant pointed to a letter from his treating doctor, Dr. P, as well as various Specific and Subsequent Medical Report (TWCC-64) forms that were in his exhibits; his attorney pointed out that the preprinted section of those forms asking the doctor to list the anticipated date that the claimant could return to work were blank. He sought no employment during the qualifying period.

Numerous documents were put into evidence going back as far as 1997. However, records more pertinent to the qualifying period in issue included a functional capacity evaluation (FCE) report dated March 11, 1999, which stated that although the claimant would not be able to work his previous medium-duty job, he was able to function at a level consistent with light-duty work. The TWCC-64 filed by Dr. P on March 3, 1999, states that claimant could return to limited work. However, subsequent TWCC-64s state Ano@ under anticipated date of return to limited work. An October 11, 1999, letter from Dr. P briefly summarizes the history of treatment and ends with the assertion that the claimant cannot return to Aany type of gainful employment@ because he has been referred for a second opinion on his cervical surgical condition. The surgical recommendation was made on September 7, 1999.

Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)) defines 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;
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> (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.

The hearing officer found in effect that the letter of Dr. P did not constitute a narrative explaining why the claimant was unable during the qualifying period to perform any work at all. In the absence of medical evidence that the claimant=s physical condition was actually changed from the date he performed the FCE at a light-duty level to the qualifying period for this quarter, the hearing officer could believe that there were Aother records@ showing claimant had an ability to work.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We, therefore, affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge