APPEAL NO. 000665

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 March 3, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. In his appeal, the claimant argues that the hearing officer's determinations that he had some ability to work in the qualifying period for the third quarter of SIBs and that he is not entitled to SIBs for that quarter are against the great weight of the evidence. The appeals file does not contain a response to the claimant's appeal from the respondent (carrier).

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____; that he reached maximum medical improvement on May 5, 1998, with an impairment rating of 17%; that he did not commute his impairment income benefits; that the third quarter of SIBs ran from October 27, 1999, to January 25, 2000; and that the qualifying period for the third quarter ran from July 15 to October 13, 1999. The claimant acknowledged that he did not look for work in the qualifying period for the third quarter. He maintained that he had no ability to work during that period.

A July 8, 1997, MRI of the claimant's lumbar spine revealed herniation at L4-5 and L5-S1. On September 30, 1997, Dr. R performed back surgery at L5-S1. In April 1998, the claimant began treating with Dr. T, a chiropractor. In a letter dated July 19, 1999, Dr. T stated that the claimant began treating with him on April 6, 1998, and that from that date on the claimant was not released to any type of work. Dr. T noted that the claimant complained of low back pain and radiating pain with numbness and weakness in the left leg and further noted that the claimant's "symptoms are aggravated by sitting or standing for any sustained period of time or physical activity." In a September 17, 1999, "To Whom it May Concern" letter, Dr. T stated that the claimant has reached a plateau in his treatment and referred the claimant to Dr. P, an orthopedic surgeon. The claimant submitted an Employee's Request to Change Treating Doctors (TWCC-53) on September 17th, and on September 23, 1999, the Texas Workers' Compensation Commission (Commission) approved the change in treating doctors from Dr. T to Dr. P. On October 14, 1999, one day after the end of the qualifying period, Dr. P submitted a Recommendation for Spinal Surgery (TWCC-63), seeking approval for a 360E lumbar laminectomy, decompression, foraminectomy and spinal fusion and instrumentation from L4 to S1. A lumbar MRI of November 15, 1999, demonstrated a large disc herniation at L4-5 which "is significantly larger and more prominent when compared with July 8, 1997." The carrier did not request a second opinion appointment within the time provided for doing so and on December 3, 1999, the Commission sent a letter to the claimant advising that the carrier was, therefore, liable for the reasonable and necessary costs of the spinal surgery. The claimant underwent spinal surgery on February 28, 2000.

In a January 21, 2000, "To Whom it May Concern" letter, Dr. P noted that he had recommended that the claimant undergo a 360E fusion and concluded as follows, with respect to the claimant's ability to work:

> He has a very unstable back that produces severe pain and disability secondary to pain. The patient would only aggravate his existing problem further if he returned to any type of gainful employment. For that reason he had been unable to return to work and I feel that the patient will not be able to return to work until his ongoing conditions are addressed.

In a February 24, 2000, letter, Dr. P again noted that surgery was pending and opined that the claimant is "totally disabled at present and due to the upcoming procedures that are necessary he will not be able to return to any type of gainful employment."

The carrier introduced a June 24, 1999, functional capacity evaluation (FCE), which was apparently ordered by Dr. T. The FCE report noted observations of symptom exaggeration during the examination and concluded that the claimant "is currently functioning at a light physical demand level."

The claimant's entitlement to SIBs for the third quarter is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)), applicable to this case, provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work 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." We have recognized that the questions of whether a narrative report specifically explains how the injury causes a total inability to work and whether another record "shows" an ability to work are questions of fact for the hearing officer, as the fact finder and the sole judge of the weight and credibility of the evidence under Section 410.165(a), to resolve. In this instance, the hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the qualifying period for the third quarter. In so doing, the hearing officer found that the reports from Dr. T and Dr. P "are conclusory in nature." In addition, she specifically found that the claimant "possessed a light duty ability to work" in accordance with the FCE. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165 in so finding. Our review of the record does not reveal that the hearing officer's determination that the claimant had the ability to work light duty in the qualifying period for the 11th quarter is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination, or the corresponding determination that the claimant is not entitled to SIBs for the third quarter based on his failure to conduct a good faith job search. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709

S.W.2d 175, 176 (Tex. 1986). Although another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge