APPEAL NO. 000667

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 2, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 15th quarter. The claimant appeals, expressing his disagreement with this determination. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury with multi-level herniation and radiculopathy. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought 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 Aqualifying 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 15th SIBs quarter was from October 24, 1999, to January 22, 2000, and the qualifying period was from July 11 to October 9, 1999.

At issue in this case is whether the claimant in good faith sought employment commensurate with his ability to work. He made no job search efforts in the qualifying period, contending that he was unable to work in any capacity. Rule 130.102(d)(3), then in effect, provides that an injured employee has made the required good faith effort if the employee Awas 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.@ A hearing officer should make express findings on each element of this rule. Texas Workers= Compensation Commission Appeal No. 991973, decided October 25, 1999.

The claimant underwent a lumbosacral fusion on August 24, 1998. On August 11, 1999, Dr. M performed an independent medical examination of the claimant at the request of the carrier. His report of this examination reflects claimant's complaints of lumbar pain and that the operation Adid not work.@ The claimant is also reported as saying he did not want any more surgery. X-rays showed that the fusion was not solid. The impression was chronic lumbalgia and failed back syndrome. Dr. M considered the claimant Aneurologically intact@ and that Amost importantly the claimant should be hopefully retrained and return to a gainful

activity.@ This included Adriving up to two hours, not lifting over 40 pounds, and only infrequent bending or stooping.@ He concluded that he believed the claimant should tolerate light-duty work within these restrictions. Both the claimant and his wife testified that Dr. M did not tell them the results of his examination. The carrier sent the examination report of Dr. M to Dr. T, a treating doctor, on September 16, 1999, and requested Dr. T fill out a functional capacity evaluation (FCE) form. Dr. T commented on the FCE form on October 8, 1999, that the claimant was Avery restricted in relation to sitting on a continuous basis. He has severe restrictions in every day work activities - not able to work 8 hrs a day.@ Dr. T did not otherwise release the claimant to limited work.

On September 1, 1999, the claimant had a trial spinal column stimulator implanted. It apparently proved somewhat successful and was removed on September 6, 1999. It was permanently installed in December 1999. On October 13, 1999, Dr. T wrote that the claimant was Anot a candidate for gainful employment. He continues to experience increasing amount of pain to his low back and right leg. The [claimant] may require some type of retraining prior to re-entering the work force after the eighteen months have passed.@ In a letter of October 10, 1999, Dr. C, the claimant's surgeon, wrote that he reviewed the evaluations of Dr. M and Dr. T as well as the claimant's history, including the use of the spinal column stimulator Aand at this point of time I agree with [Dr. T's] recommendation for sedentary level of work, as is supported by the [FCE].@ However, in a letter of December 29, 1999, Dr. C again recounted the claimant's history of surgery and the successful implantation of the spinal column stimulator and noted that it was recommended that the claimant maintain six to eight weeks of Arestricted activity@ level to prevent motion in the implementation site. He concluded that because of the claimant's chronic pain, he suffers from depression and Apsycho-emotional overlay and at this time and moment@ is Aunable to go back to work.@

The hearing officer considered this medical evidence and concluded that it was not sufficient to establish an inability to work in any capacity. In his appeal of this determination, the claimant questions the timing of the various reports outside or near the end of the qualifying period, asserts that he was not made aware of Dr. M's opinion that he could work in a light or sedentary capacity until the last week in September 1999 when the qualifying period was almost over, and contends that the various surgical procedures to remove a battery prior to the start of the qualifying periods and to insert and remove the trial stimulator during the qualifying period were not properly considered by the hearing officer. Whether the claimant established a total inability to work under the standards of Rule 130.102(d)(3) presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 000509, decided April 24, 2000; Texas Workers= Compensation Commission Appeal No. 000390, decided April 6, 2000. Section 410.165(a) further provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In this case, both parties submitted evidence that was not created in the qualifying period and was not objected to on this basis. We have held that such evidence may be considered by the hearing officer to the extent that the hearing officer believes it probative of the claimant's condition during the qualifying period.

See Texas Workers' Compensation Commission Appeal No. 000153, decided March 8, 2000. In this case, only Dr. C's letter of December 29, 1999, which was outside the qualifying period, could be construed as only reflecting the claimant's status at the time it was written. Nonetheless, the medical evidence generally reflected a history of the claimant's condition, including his various operations, and could be construed by the hearing officer as reflective of facts in existence during the qualifying period. With regard to the claimant=s further points on appeal, the claimant was not excused from meeting the statutory and regulatory provisions for entitlement to SIBs simply because Dr. M believed the claimant had some ability to work but did not timely communicate this information to the claimant. Given the fact that the various medical opinions reflect an awareness of the surgeries, we also cannot agree that the fact of the surgeries in itself establishes no ability to work in the absence of a medical opinion expressly linking the surgeries to no ability to work.

The medical evidence in this case was conflicting, with some opinions finding a limited ability to work, some not finding this ability, and some opinions seemingly changing on this question. 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 deemed credible and persuasive by the hearing officer sufficient to support her determination that the claimant had some ability to work during the 15th quarter filing period. Having failed to seek employment commensurate with this ability, the claimant was not entitled to 15th 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

Tommy W. Lueders
Appeals Judge