APPEAL NO. 000923

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 April 6, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 15th quarter. The appellant (carrier) appeals, urging that the claimant failed to meet the good faith and direct result requirements for entitlement to SIBs. The claimant replies that sufficient evidence supports the hearing officer's decision and it should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable lower back injury on _____, when he lifted a bag of onions. The claimant had a lumbar laminectomy performed at L5-S1 in 1996. The qualifying period for the 15th quarter began on September 3, 1999, and ended on December 2, 1999. The claimant testified that he had no ability to work during the qualifying period and that his treating doctor, Dr. M, has said that he cannot work in any capacity. Dr. M, in a narrative report dated November 22, 1999, states that the claimant is unable to perform any work; has severe pain to his lower back and weakness to his lower extremities; has limited range of motion of his lumbar spine; and is unable to bend at the waist level, stand or sit for longer than 15 minutes at a time; and should not lift or carry objects.

The claimant testified that he is 48 years old, his work experience is limited to picking crops, he has no education, he can speak only the Spanish language, and he cannot read or write English or Spanish. The claimant submitted an Application for Supplemental Income Benefits (TWCC-52) for the 15th quarter indicating that he made 18 job contacts in an effort to obtain employment. The carrier argues that the claimant had an ability to work during the qualifying period as evidenced by medical opinion, the claimant's search for employment, the claimant's omissions on the TWCC-52, the claimant's testimony that he would have attempted to work if had been offered a job, the claimant's ability to drive, and the claimant's ability to sit at the CCH. The hearing officer's finding that the claimant did not seek employment during every week of the qualifying period has not been appealed and has become final.

On September 20, 1999, the claimant was examined by Dr. K. Dr. K concluded that the claimant had reached maximum medical improvement, and stated "I believe that a Work Fitness Test will be necessary to project his Functional Capacity." On September 29, 1999, the claimant had work fitness testing. During the work fitness test, the claimant was unable to pass the aerobic portion of the test because he was unable to walk at the speed necessary to reach his target heart rate for adequate testing. The testing concluded that the claimant was not ready to perform the same type of work he performed prior to the injury and that the claimant was free of pain only while performing activities corresponding

to the sedentary to light category. On March 22, 2000, Dr. K completed a work capacities form stating that the claimant could attend light to medium work training and then get a job. The claimant testified that Dr. M reviewed the work fitness test results and reiterated that he was unable to work in any capacity.

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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), the version then in effect, provides that an injured employee has made a good faith effort to obtain employment 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 work.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In this case, the claimant presented evidence tending to demonstrate that he has no ability to work and the carrier presented evidence tending to demonstrate that the claimant has some ability to work. The hearing officer had to judge the credibility of the evidence before her in order to determine whether the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(3). The question of whether another record shows an ability to work is a factual question, just as the questions of whether the claimant is unable to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions. Texas Workers' Compensation Commission Appeal No. 992920, decided February 9, 2000; Texas Workers' Compensation Commission Appeal No. 000098, decided March 3, 2000; Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000; and Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000.

The hearing officer considered all of the evidence and concluded that based on the work fitness test and the reports of Dr. M and Dr. K, the claimant had a total inability to work, and that no other record showed that the claimant was able to return to work during the qualifying period. The hearing officer could believe that the functional capacity evaluation was not a record that showed an ability to work because claimant could not complete several exercises he was asked to perform.

The carrier asserts that the claimant's unemployment during the qualifying period for the 15th quarter was not a direct result of his impairment. The claimant's testimony, in conjunction with the medical evidence, reveals that the claimant cannot return to the work of a field laborer that he was performing at the time of his injury.

As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the claimant put forth a good faith job search commensurate with his ability to work, since he had a total inability to work; that the claimant's inability to find work commensurate with his ability to work was as a direct result of his impairment; and that the claimant is entitled to SIBs for the 15th quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would remand this decision to the hearing officer to make an express finding of fact that Dr. K reports do or do not constitute "other records" that "show" an ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). I am unwilling to infer such a finding from any of the other findings of fact. If anything, I would infer from Finding of Fact No. 18 that the hearing officer is making a finding that Dr. K's records show some minimal ability to work.

Alan C. Ernst
Appeals Judge