APPEAL NO. 001055

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 20, 2000. The hearing officer determined that the respondent (claimant) had no ability to work and is entitled to supplemental income benefits (SIBs) for the second quarter. The appellant (carrier) appeals, urging that the claimant did not provide any evidence of an inability to work during the qualifying period; that the medical evidence does not satisfy the narrative requirement of the SIBs rules; and that the hearing officer incorrectly placed the burden of proof on the carrier to show that the claimant is able to return to work. The claimant replies that the hearing officer's decision is supported by sufficient evidence and it should be affirmed.

DECISION

Affirmed.

The only issue in this case is whether the claimant made the required good faith job search effort. 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 parties stipulated that the claimant sustained a compensable injury on _____, and that the qualifying period for the second quarter began on November 9, 1999, and ended on January 26, 2000. The claimant testified that he is 73 years old; that he had a double bypass surgery and an aorta valve replaced when he was 68; that he went to work for the employer in 1997 as a security guard; and that he injured his back moving baskets on _____. The claimant testified that his treating doctor recommended shots in his back and possibly an operation, but that his heart doctor said it was too dangerous because he is on blood thinning medication. According to the claimant, no doctor has released him to return to work.

The claimant presented the report of Dr. Q to support his position that he had no ability to work. In a report dated October 26, 1999, Dr. Q states, in part:

> As you know, [the claimant] has been under my care for pain management relative to his back and shoulder. I would ordinarily recommend nerve blocks for effective control and increased capabilities for my patients with the type of back problems which [the claimant] has. However, [the claimant] would need to come off of his Coumadin (a blood thinner) in order to have such a

procedure done. He is not able to do that because he has had a heart valve replacement.

[The claimant] has a documented lumbar radiculopathy (meaning the nerves going to his legs from his spine are damaged). There is also a large amount of degeneration in his back and his discs. Due to his concurrent medical problems, there is no "fix" for his back and his condition will remain static.

At his age and condition, I do not believe [the claimant] to be capable of performing any type of work and that he will need to retire.

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. 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 report of Dr. Q states that the claimant is not capable of working due to his "age and condition." The claimant's "condition" includes his injury which Dr. Q describes and states cannot be treated because of a preexisting medical condition. The hearing officer found that the report of Dr. Q was a narrative that sufficiently explained the claimant's injury and why he was unable to work. Although the report of Dr. Q is dated approximately two weeks prior to the second quarter qualifying period, medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying period. *See* Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996; Texas Workers' Compensation Commission Appeal No. 941696, decided February 8, 1995. The hearing officer did not err in considering the report of Dr. Q.

At the CCH, the hearing officer stated the burden of proof was on the claimant. The hearing officer states that there is no other report that shows that the claimant is able to return to work; however, in light of her statement that Dr. Q's report is not conclusory and meets the requirements of the SIBs rules, we do not conclude that the hearing officer placed the burden to prove an inability to work on the carrier.

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 attempted in good faith to obtain employment commensurate with his ability to work because the claimant had no ability to work and that the claimant is entitled to SIBs for the second quarter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge