APPEAL NO. 001154

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 May 1, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter because claimant had not made a good faith effort to obtain employment commensurate with her abilities.

Claimant appeals, contending that the functional capacity evaluations (FCE) relied on by the hearing officer were outside the qualifying period and that Dr. P, claimant's treating doctor who performed her surgery, is better suited to evaluate her than the personnel that performed the FCE. Claimant reiterates how the various medications affect her and her limited ability to perform daily activities. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds that claimant did not appeal the specific finding of lack of good faith effort and otherwise urges affirmance.

DECISION

Affirmed.

Claimant appeals the decision of the hearing officer that she is not entitled to SIBs for the second quarter on a sufficiency of the evidence basis and we will review the case on that basis. Claimant had been employed by the employer staffing agency and on _____, injured her low back lifting a bag of laundry. The hearing officer made the following undisputed findings: that claimant sustained a compensable (low back) injury on _____; that claimant has a 20% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the second quarter was from October 8, 1999, through January 6, 2000.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. There is no appeal of the hearing officer's finding that claimant's unemployment during the qualifying period was a direct result of her impairment.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) (the version then in effect), which requires the employee (claimant) to prove three elements,

namely (1) that she is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work."

The medical evidence establishes that claimant had spinal surgery in the form of a lumbar laminectomy and spinal fusion with instrumentation at L5-S1 on January 19, 1998. In a series of reports between July 21, 1999, and March 30, 2000, Dr. P, in various forms, states "In my opinion, the patient remains disabled and unable to return to any type of gainful employment at this time." A September 24, 1999, report notes "severe spasms producing a decrease in range of motion on flexion, extension, lateral bending and rotation." A November 5, 1999, report states that the fusion is not solid. A December 30, 1999, report states that claimant cannot return to work "due to the on-going complaints of discomfort." In his letter dated March 30, 2000, Dr. P notes an FCE which found claimant capable of a "sedentary level of work" and argues that claimant's preinjury job was at least medium-level work.

Evidence to the contrary includes an October 15, 1999, report from Dr. N who, after examining claimant, is of the opinion that claimant "may return to regular duty without restriction" and could return to her former "housekeeping status." An FCE performed on December 18, 1998, indicated that claimant demonstrated a light level of work ability with restrictions but that she could not return to her medium-level duties of a housekeeper. Claimant testified that her condition has gotten progressively worse over the last year. An FCE performed on March 2, 2000, indicated that claimant "demonstrated working at sedentary level of work" and that claimant could not return to her preinjury position.

The hearing officer did not specifically reference Rule 130.102(d)(3), the version then in effect, but clearly referenced the elements in her Statement of the Evidence. The hearing officer commented:

> The evidence established that [Dr. P's] opinion of total inability to work was not corroborated by the preponderance of credible evidence. [Dr. P] did not explain why he believed Claimant possessed a total inability to work despite her demonstrated abilities reported in the FCEs. Although the evidence seemed to indicate a deterioration in her physical condition and abilities, the preponderance of the evidence established that Claimant still possessed the ability to perform at least sedentary duty during the qualifying period. Furthermore, although Claimant may face significant adversities, such as language barriers, limited education, and limited skills, Claimant may not be excused from making an effort to seek employment based on these factors. Rather, she must focus on conducting a job search to obtain employment that will permit her to perform sedentary work, that is also commensurate with her skills, education, and training. The fact that such employment may be very difficult to find does not relieve her of the obligation to seek it. All the limiting factors are considered in determining whether the effort was made in good faith; but the effort must be made.

As previously noted, claimant disputes the hearing officer's findings based on the fact that both FCEs were outside the filing period and that Dr. P, as her treating doctor, "is the person best suited to evaluate [her]." The hearing officer obviously considered claimant's total condition and determined that she had some ability to work and that Dr. P's reports did not specifically explain how claimant's injury causes a total inability to 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). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. 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.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge