APPEAL NO. 001199

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 3, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first or second quarter. The claimant appealed, arguing that she is unable to work at all and that this is supported by her doctor. She also argues that she would not be considered for employment without a doctor's release, and that she fears further reinjury if she did work. There are documents attached to her appeal. The respondent (self-insured) responded that claimant did not prove that she met the criteria of inability to work as set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102 (Rule 130.102) such that no job search was required.

DECISION

We affirm the hearing officer's decision.

Effective January 31, 1999, Rule 130.102 became the criteria for evaluating SIBs entitlement. Rule 130.102(d) defines "good faith" as follows:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;
>
> (3) 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; or
>
> (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

We note that the Appeals Panel has before stated that generalized fears or possibility of reinjury does not equate to an inability to work. *See* Texas Workers' Compensation Commission Appeal No. 970475, decided April 28, 1997. Full-time employment ability is not required; a claimant need only seek work commensurate with his/her ability to work. Section 408.142(a)(4).

The claimant injured her back on _____, while working as a recreational therapist for a public employer insured through the self-insured. She had surgery on her back on September 9, 1998. The claimant said that she continued to have pain that affected her ability to bend, drive, or climb stairs. She said that she could not do any work during the periods under consideration because of this pain, and had not been released to any type of work by her doctor, Dr. S.

The qualifying periods for the first and second quarters ran from August 18 through November 16, 1999, and from November 16, 1999, through February 14, 2000. The claimant did not search for employment during these times. However, she had returned to work after her surgery from January through April 1999, for the same employer, as a recreational therapist to replace a worker who was on leave. A December 1998 functional capacity evaluation (FCE) found that the claimant could work an eight-hour shift doing her previous job. The claimant said that a van driver quit shortly after she started, so she was forced to share driving duties of about 200 miles round-trip with another person. The claimant quit this job in April, a few weeks before it was scheduled to end, because of her inability to do the job as well as her belief that her mental stress made her a less effective teacher to her clients.

Dr. S signed a release form on August 2, 1999, that stated that there were a large number of functions such as crawling, climbing ladders, lifting, walking, pulling (as well as others) that the claimant could not do. This statement said that the claimant could operate motor vehicles for short distances and could write, see, and read. Release forms similar to this, with similar assessments, appear to be part of most of the reports in evidence for late 1999.

Ms. ST, a nurse practitioner in Dr. S's office, wrote a report on January 17, 2000, in which the claimant reported a pain level of 6 to 7 on a 10-scale all the time, increasing to 10 with activity. Ms. ST noted that the claimant had depression exacerbated by the on-going fight over workers' compensation. She was assessed as "totally disabled from gainful employment." Ms. ST recommended up to an hour of volunteer work on the claimant's less painful days to occupy her mind and body.

A report from an FCE that was done on October 29, 1999, reported that the claimant tolerated sitting well. Various functions could not be tested or completed due to pain. The evaluator found that the claimant had an unrealistic expectation that she should be pain free. There was no "bottom line" conclusion about the ability to work although it was recommended that the claimant go through vocational rehabilitation for a sitting job with possible computer training or work in a mental health area.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could conclude that the reports of Dr. S did not transcend simple pronouncements of total "disability" and explain why claimant could not perform *any* work. We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge