APPEAL NO. 001295

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 10, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) had not attempted in good faith to obtain employment commensurate with his ability to work and was therefore not entitled to supplemental income benefits (SIBs) for the sixth compensable quarter, February 21 through May 20, 2000.

The claimant appealed, contending that he had made a good faith effort by working through the Texas Rehabilitation Commission (TRC), claiming entitlement under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a brick and block mason and sustained a compensable low back injury on _____. The claimant testified that he had an eighth-grade education and that he has had two spinal surgeries, the most recent being "about six months ago." The parties stipulated to the compensable injury, that the claimant had an impairment rating (IR) of 15% or greater, that impairment income benefits (IIBs) were not commuted, and that the qualifying period for the sixth quarter was from November 9, 1999, through February 7, 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 the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

The claimant contends that he had made a good faith effort by working through the TRC to obtain retraining as a truck driver. The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(2) (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:

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period[.]

Exactly what happened during and just before the qualifying period is a little unclear. The claimant was apparently in some kind of therapy/work hardening before the start of the qualifying period. Therapy progress notes dated November 5, 1999, indicated that the claimant "is unsure of his vocational goals," and "is a reluctant participant in work hardening." The claimant had a 30-pound lifting restriction. The claimant requested and was approved for a TENS unit on November 11, 1999, and a therapy progress note of that date comments:

> [The claimant] has a dysfunctional perceptions of himself as permanently disabled.
>
> COMPLICATING FACTORS:
>
> Inconsistencies in [the claimant's] performance suggests that a return to work in the near future may not be [the claimant's] goal.

The claimant continued to have a 30-pound frequent lifting restriction and in a report dated November 17, 1999, the claimant was released to return to full-time work by his treating doctor, Dr. S. The claimant at some point had apparently applied for and possibly been accepted for retraining by the TRC; however, in a letter dated December 29, 1999, the TRC wrote the claimant that he was "not eligible for vocational rehabilitation services" because he had been "released to regular full duty work with no limitations or restrictions." In a report dated January 3, 2000, Dr. S corrected his report and indicated that the claimant was released to "modified duty." However, at this point, the claimant testified that he had a "flare up" in his back which precluded him from going to classes at the TRC. A chart note dated February 3, 2000, states that the claimant "is not sure if he wants to drive a truck." There was some testimony regarding the claimant's ability to drive a car and perhaps not being able to drive a truck. Testimony and evidence indicate that if the claimant could get in the truck, the claimant would qualify for the truck driving position. Dr. S, in a report dated February 14, 2000, wrote:

> As soon as the therapy is completed [the claimant] is going to re-apply to begin his truck driving school. He has made good attempts at finding employment, except for this most recent exacerbation of lower back pain which has postponed the beginning of his truck driving school.
>
> The hearing officer, in his Statement of the Evidence, commented:
>
> Therapy was finally started right at the end of the qualifying period, and Claimant never enrolled in trucking school.

> Other than his attempts to retrain with TRC, Claimant did not seek work during the qualifying period for the sixth quarter. He was released to work during that period. Since he was not actually attending classes, under the Commission's [Texas Workers' Compensation Commission] rules he was required to look for work every week during the qualifying period [Rule 130.102(e)], and did not do so. Getting ready to go to school is not "good faith" under the rules.

The claimant contends that his attempts were in good faith as he was working with the TRC and was in therapy. We note that the claimant's testimony was that therapy was 45 minutes to an hour three times a week. The claimant asserts that he was working with the TRC and was not "just intending to go to school."

Rule 130.102(d)(2) is fairly clear and specific and requires that the claimant have "been enrolled in, and satisfactorily participated in," (emphasis added) a full-time rehabilitation program. It is clear that the claimant, for one reason or another, never satisfactorily participated in a full-time rehabilitation program. *See* Texas Workers' Compensation Commission Appeal No. 000750, decided May 15, 2000, for a case with similar facts and the same result. We cannot say that the hearing officer's finding of nonentitlement to SIBs under these facts is against the great weight and preponderance of the evidence.

Upon review of the record submitted, we find no reversible error. 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:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge