APPEAL NO. 001353

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 18, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 10th quarter. The claimant appealed, expressing his disagreement with this determination. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs depends on whether the employee meets the criteria during the prior quarter or "qualifying period." The 10th SIBs quarter was from December 29, 1999, to March 28, 2000, and the qualifying period was from September 16 to December 15, 1999.

At issue in this case was whether the claimant made the required good faith job search. He made no job search efforts and contended he had no ability to work in any capacity. The version of Rule 130.102(d)(3) then in effect provided that an injured employee has made a good faith effort to obtain employment commensurate with the 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 to work[.]"

The claimant had the burden to prove with medical evidence that he met the terms of this rule. To do so, he relied on the reports of Dr. W, his treating doctor, specifically a report of May 24, 1999, in which Dr. W explained both the claimant's back condition from his compensable injury, an unrelated pulmonary problem, his work history, educational training, and age (64) and concluded that "I do not think it would be in [the claimant's] long-term best interest to attempt to [a] return to any kind of gainful employment and it is for these reasons that I have advised him against return to work on medical grounds." On May 13, 1999, Dr. W also wrote that "I do not anticipate that [the claimant] will recover sufficiently to return to normal work or light duty work." Dr. W also checked the "no" block on a carrier form which asked if the claimant could return to work.

Other medical evidence included the opinion of Dr. D based on an examination of July 19, 1999, that due to the claimant's advanced age and his pulmonary problems "it is

very doubtful that he can return to the job [he] had previously. . . . A sedentary to light duty job would be most suitable in [the claimant's] situation."

Although in the past we have commented that hearing officers should make express findings on each element of Rule 130.102(d)(3) in reaching a SIBs entitlement determination (*see* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999), the hearing officer in this case made no express or implied finding that Dr. D's seven-page report of Dr. D was an "other" record which showed an ability to work. Instead, the hearing officer determined that the claimant's medical evidence was not sufficient to explain how the injury caused a total inability to work. He explained this conclusion with the comments that the reports of Dr. W "merely stated the Claimant could not work, listing a number of non-relevant factors without specifying how or why they, or his back injury, caused a complete inability to work." The claimant argues in his appeal that it is "very clear from [Dr. W] that the claimant did not have any ability to work during the qualifying periods for the two quarters [sic] in question." In our opinion, the claimant's evidence was subject to varying inferences and we cannot agree that it compelled a finding that the claimant had no ability to work. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. For the reasons stated in his decision and order, he did not find Dr. W's opinions persuasive on the ultimate issue.[1] We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the claimant had some ability to work during the 10th quarter qualifying period. Having failed to search for employment commensurate with this ability, he was not entitled to 10th quarter SIBs.

[1]To the extent that the claimant is arguing on appeal that Dr. W's opinion is "more credible" than Dr. D's, we observe that a simple balancing of the two opinions is not contemplated by the SIBs rule. Rather, if the "other record" is found to "show" an ability to work, that ends the inquiry and it does not matter that the "other record" is noted to be less credible than the narrative explaining an inability to work. *See* Texas Workers' Compensation Commission Appeal No. 001252, decided July 14, 2000.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge