APPEAL NO. 001383

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 May 18, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) failed to make a good faith job search commensurate with his ability to work and therefore was not entitled to supplemental income benefits (SIBs) for the 18th compensable quarter.

The claimant appealed, asserting as he had at the CCH, that he had a total inability to work as provided in certain medical reports, that he is 70 years old with a limited education, and that his "job searches are very limited." 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, a maintenance man, testified that he sustained a compensable right shoulder and low back injury when he fell from a step ladder against a wall. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has an impairment rating (IR) of 15% or greater; that impairment income benefits (IIBs) have not been commuted; and that the qualifying period for the 18th quarter was from November 19, 1999, through February 17, 2000. The medical reports indicate that the claimant has degenerative disc disease at all levels of the lumbar spine and "bulging disc at all levels," with encroachment of the nerve roots at all levels. The claimant has not had any spinal surgery. The claimant testified regarding his limited abilities but does drive a vehicle. The claimant's treating doctor is Dr. P and a referral doctor is Dr. M.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires of 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 initially, and mainly, contends that he has a total inability to work. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(3), the version then in effect. That rule provides that the

good faith element is met when the injured employee is (1) 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."

Dr. P, in a note dated February 10, 1999, released the claimant to light duty, eight hours a day with no lifting over 30 pounds and "no extensive standing or walking." (The claimant contends that report was outside the qualifying period and he has since gotten worse.) A functional capacity evaluation (FCE) performed on July 6, 1999, by Dr. S indicates that the claimant "gave minimal effort" but was able to do work in the light-duty category. Dr. S went on to comment:

> However, if the lifting restrictions could be modified somewhat and if the patient might undergo a work conditioning/hardening program, I believe that it is possible that he might be able to return to doing the maintenance work that he did previously.

Dr. M, in a report dated December 3, 1999, suggested an updated FCE, commenting that Dr. S's July 1999 FCE was "inconsistent." Another FCE was performed on February 24, 2000, by Dr. S which again noted "minimal effort" and "less than maximal effort on the part of the patient." Dr. S concluded by saying that the claimant could not return to his preinjury job; however, "he would be capable of returning to a job that met the requirements under DOT [Department of Transportation] Category Medium . . . ." (Emphasis in the original.) That FCE was provided to Dr. M, who in a report dated April 5, 2000, commented "[a]fter the FCE, it is my opinion that this patient is totally disabled from performing any type of work." No narrative specifically explains how the injury causes a total inability to work. In a note dated April 14, 2000, Dr. P stated:

> I examined [the claimant] yesterday April 13, 2000. I reviewed the reports by [Dr. M]. My findings were consistent with [Dr. M's]. In light of the MRI results of the cervical and lumbar spine, I am in agreement that [the claimant] is unable to be gainfully employed.

The hearing officer, in her Statement of the Evidence, specifically noted Dr. P's "very credible note" (the February 1999 report) which showed the claimant's restrictions. The hearing officer found that the claimant had an ability to work light to medium duty. Although not referencing Rule 130.102(d)(3), the hearing officer found the claimant had an ability to work and we can reasonably infer that she did not consider any combination of Dr. P's and Dr. M's reports as providing a sufficient narrative which explains how the injury causes a total inability to work. The hearing officer's findings on this point are sufficiently supported by the evidence.

The good faith requirement may also be met by complying with Rule 130.102(e), which provides, in pertinent part, that an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with

his or her ability to work every week of the qualifying period and document his or her job search efforts. Rule 130.102(e) goes on to list some of the factors which may be considered in the job search, such as the number of jobs applied for throughout the qualifying period, applications or resumes which document the efforts, cooperation with vocational rehabilitation services, the amount of time spent in looking for employment, and any job search plan by the injured employee. The claimant's Application for [SIBs] (TWCC-52) lists about 40 job contacts between November 29, 1999, and February 18, 2000. The claimant testified that he would just drive around and stop and ask for "anything light duty available." The hearing officer commented about the job search efforts:

> Claimant admitted that they were all cold calls and that none of the Employers were hiring. Claimant's records showed that he made no searches during the 5th week, December 20, 1999 through December 24, 1999.

Again, while not specifically referenced, it is reasonable to infer from the hearing officer's comments that she did not believe that the requirements of Rule 130.102(e) had been met.

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:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge