APPEAL NO. 001536

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 June 5, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth and fifth compensable quarters. The claimant appeals, contending that during the qualifying periods at issue the claimant "had returned to work in a position which was relatively equal to her ability to work and was actively participating in a full-time vocational program sponsored by the Texas Rehabilitation Commission [TRC]." The respondent (carrier) urges in its response that the evidence sufficiently supports the challenged determinations.

DECISION

Affirmed in part; reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement with an impairment rating (IR) of 15% or greater and did not commute any portion of the impairment income benefits (IIBs); that the qualifying period for the fourth compensable quarter was from October 18, 1999, through January 16, 2000; that the qualifying period for the fifth compensable quarter was from January 17 through April 17, 2000; and that during these qualifying periods the claimant earned less than 80% of her preinjury average weekly wage (AWW).

The hearing officer's Decision and Order contains a detailed recitation of the evidence with which neither party takes issue. Accordingly, we will set out only so much of the evidence as is necessary to support our decision.

Claimant testified that on _____, while working as a cashier at a convenience store, a television monitor fell off the wall striking her head on the right side; that her injuries included post-traumatic stress disorder and depression; that her IR was determined to be 35%; that she underwent a functional capacity evaluation (FCE) in July 1999; and that her treating doctor, Dr. H, told her after the FCE that she could return to work but not to full manual labor and restricted her from lifting more than 10 pounds, from repetitive lifting, and from stressful jobs. In evidence is a letter from Dr. F indicating that an additional rating for the claimant's short-term memory loss and depression was added to the IR previously assigned bringing her total IR to 35%.

The claimant further testified that during the fourth quarter filing period she sought work as a painter's helper and housekeeper with (company), a contracting business belonging to a friend of her roommate, and that she actually was employed by the company for a few days doing various tasks within her restrictions such as pulling trash out and taping wall fixtures and mirrors preparatory to painting. She could not recall the dates of the few days she worked for the company nor the dates in October and November that she contacted that company for employment. She indicated these jobs were just one-day

jobs. According to her Application for Supplemental Income Benefits (TWCC-52) for the fourth quarter, the claimant also contacted an electric business on January 13, 2000, for a job as an assembler. This document also reflects that the claimant earned $70.00 for a week ending in November 1999 and the same amount for the week ending December 3, 1999. The claimant's TWCC-52 for the fifth quarter reflects that she made one job contact when on March 9, 2000, she contacted the owner of the company for work as a painter's helper and cleanup person. This document also shows that the claimant earned $120.00 for the week ending March 17, 2000, and $72.00 for the week ending March 24, 2000.

The claimant further testified that on August 4,1999, she contacted the TRC about retraining since she could not return to her former occupation as a sales associate; that her medical records had to be obtained; that for one week in January 2000 she underwent testing and evaluation from 10:00 a.m. to 3:00 p.m. to determine if she was going to be admitted to a special TRC rehabilitation program for brain-injured persons called "Project ReEntry"; and that she was accepted, an individualized plan was prepared for her on March 14, 2000, and she commenced classes and voluntary work activities on March 20, 2000. In evidence is a TRC form letter of "8/4/99" stating that the TRC has requested the claimant's medical records from her doctors to find out if she is eligible for TRC services. A TRC letter of January 21, 2000, scheduled the claimant for a five-day vocational evaluation commencing on January 24, 2000. A TRC letter of February 8, 2000, advised the claimant of a one-hour appointment on March 8, 2000, to go over her test results. A March 30, 2000, letter from Dr. P states that the claimant began attending Project ReEntry as a full-time vocational client on March 20, 2000; that she attends the program Mondays through Thursdays from 9:00 a.m. to 4:00 p.m.; and that she is fully participating in all the facets of the program.

The claimant further testified that after Dr. H released her to return to work with restrictions on August 3, 1999, she understood she needed to look for work weekly and she agreed that she did not do so as her TWCC-52 forms reflect. She said she worked less than five days during each of the qualifying periods. She also said she was able to drive a car during the qualifying periods and that after the week of TRC testing in January 2000, she was told it would be several weeks before she would know whether she was admitted to the program.

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 AWW 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. The hearing officer found that the claimant's unemployment during the qualifying periods at issue was a direct result of the compensable injury.

The versions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) in effect for the fourth and fifth quarter qualifying periods provide, in pertinent part, that "[a]n 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 [TRC] during the qualifying period; . . . ."

The hearing officer found, among other things, that the claimant had the ability to work light duty during the two qualifying periods at issue; that during the fourth quarter qualifying period, she sought employment with two potential employers, worked for the company on two days, and had no contact with the TRC which she initially contacted in August 1999; that during the fifth quarter qualifying period she worked for the company on two occasions, did not seek other employment, did not know until on or about March 14, 2000, if she would be accepted into a TRC program, and began a full-time TRC program with the TRC on March 20, 2000. The hearing officer further found that the claimant's work with the company was sporadic and that she had a duty to look for other work based on the nature of that job; that she had a duty to seek employment until she was advised that she had been accepted by TRC; and that based on the totality of the evidence, she did not make a good faith effort to look for work during the qualifying periods.

The claimant had the burden to prove that during both qualifying periods she made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We are satisfied that the evidence sufficiently supports the hearing officer's determination of the good faith criterion for the fourth quarter.

As for the fifth quarter, we determine that the great weight of the evidence establishes that the claimant was enrolled in and satisfactorily participating in a full-time vocational rehabilitation program sponsored by the TRC "during the qualifying period." It was not disputed that the TRC program was a full-time program (*see* Rule 130.101(8) for the definition of full-time vocational rehabilitation program) and the unrefuted evidence establishes that the claimant was enrolled in, and from March 20, 2000, through the remainder of the qualifying period, and was satisfactorily participating in the TRC Project ReEntry program. We do not construe the word "during" in Rule 130.102(d)(2) to mean

that the claimant had to have been enrolled in and satisfactorily participating in that program from January 17 to April 17, 2000. Had the framers of Rule 130.102(d)(2) intended such, they could easily have inserted the word "entire" before "filing period." As for the claimant's having made only one job contact from January 17 through March 19, 2000, we note that Rule 130.102(e) provides, in pertinent part, that "[e]xcept as provided in subsection (d)(1), (2), (3), and (4) of this section, 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. [Emphasis supplied.]" A claimant need not satisfy Rule 130.102(e) if such claimant has satisfied one of the good faith elements in Rule 130.102(d). *See* Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000.

We affirm so much of the hearing officer's decision and order as determines that the claimant is not entitled to SIBs for the fourth quarter. We reverse so much of the hearing officer's decision and order as determines that the claimant is not entitled to SIBs for the fifth quarter and render a new decision that she is entitled to SIBs for the fifth quarter.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge