APPEAL NO. 001668

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 July 10, 2000. The hearing officer concluded that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. The claimant challenges this conclusion and several underlying findings of fact, urging her contentions to the contrary. The respondent (carrier) asserts in response that the evidence is sufficient to support the challenged findings and conclusion.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on November 18, 1998, with an impairment rating (IR) of 16% and has not commuted any portion of her impairment income benefits (IIBs); and that the qualifying period for the third quarter began on January 8, 2000, and ended on April 7, 2000.

The hearing officer's decision contains a detailed recitation of the evidence with which neither party takes issue. Accordingly, we will limit our discussion of the evidence to that most germane to the points on appeal.

The claimant does not dispute findings that during the qualifying period she had some ability to work and that she returned to work earning less than 80% of her average weekly wage (AWW). The claimant, who indicated that she had worked as a seamstress for (employer) when she injured her right arm and knee in a slip-and-fall accident at work, testified that she knew that her treating doctor, Dr. M, who operated on her right elbow in August 1998, had released her "to return to work full duty" on September 30, 1999, with restrictions against heavy lifting and repetitive overhead lifting and repetitive squatting or kneeling; she said that in October 1999, she commenced employment with the local school system as a substitute kitchen assistant, commonly working 20 hours per week but sometimes more; and that after ending this employment on February 25, 2000, because she felt she could not continue to do that type of work, she opened up her own dress-making business from which she had realized no earnings by the end of the qualifying period. The claimant also acknowledged receiving various lists of job prospects from a vocational rehabilitation specialist hired by the carrier but said she did not pursue them because she "already had a job."

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. Tex. W.C.

Comm'n, 28 TEX. ADMIN. CODE § 130.102(c) (Rule 130.102(c)) provides with respect to the "direct result"criterion that "[a]n injured employee has earned less than 80% of the employee's [AWW] as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings." Concerning the "good faith effort" criterion, Rule 130.102(d) provides, in 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."

The carrier contended that the claimant met neither the "direct result" nor the "good faith effort" criteria because throughout the qualifying period she consistently failed to work commensurate with her ability, limiting both the type and hours of her employment. In her discussion of the evidence the hearing officer notes that in September 1999 Dr. M released the claimant for full-duty work with only restrictions against heavy lifting and overhead lifting due to shoulder weakness and also restricted the claimant from repetitive squatting and kneeling; that while the claimant said she could not return to the work she was doing when injured, she failed to establish just what her duties were and why she could no longer perform them; and that although the claimant quit her school kitchen work on February 25, 2000, because she felt she could no longer physically perform such work, Dr. M in March 2000 completed a work status report again releasing the claimant for work and restricting her from lifting more than 25 pounds more than occasionally and from frequently lifting a maximum of five pounds and carrying objects weighing up to 25 pounds. The hearing officer further states that the claimant failed to establish the duties she was performing for the employer at the time of the injury and how her restrictions prevented her from returning to that work. The hearing officer also states that "the work [claimant] performed on a part-time basis for the first seven weeks of the qualifying period was not relatively equal to her ability to work" and notes that the Appeals Panel has held that the statutory requirements for entitlement to SIBs "runs through the entire qualifying period."

The claimant had the burden to prove by a preponderance of the evidence that during the qualifying period at issue her underemployment was a direct result of the impairment from her compensable injury and that she made a good faith effort to obtain employment commensurate with her ability to work. These issues presented the hearing officer with questions of fact to resolve. 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 and we do not find them so in this case. 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). The hearing officer's discussion of the

evidence sets out her rationale for reaching her determinations and we find it neither factually nor legally incorrect.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge