APPEAL NO. 002008

Following a contested case hearing held on August 8, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by finding that during the qualifying period for the fourth quarter, the appellant (claimant) did not attempt in good faith to obtain employment commensurate with his ability to do light work and concluded that he is not entitled to supplemental income benefits (SIBs) for the fourth quarter. The claimant appeals, asserting that he was not aware until six days before the end of the qualifying period that a doctor had earlier released him to perform light-duty work. The respondent (self-insured) urges the sufficiency of the evidence to support the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned an impairment rating (IR) of 23% and did not commute any portion of his impairment income benefits (IIBs); and that the fourth quarter was from May 11 through August 9, 2000. Though the Decision and Order does not reflect a stipulation on the dates of the qualifying period, the hearing officer, when obtaining the stipulations, also stated that the qualifying period was from January 27 through April 17, 2000, and neither party took issue with that statement.

The claimant adduced evidence that the self-insured entered into an agreement to pay him SIBs for the first and second quarters and said the self-insured did not dispute his entitlement to SIBs for the third quarter. The claimant testified that he is 53 years of age, had only two years of education in Mexico and worked there in construction and ranch jobs, has been in the United States since 1972, has worked for the self-insured since 1982 as a sandblaster at first and later worked with tanks and valves, and speaks very little English. He said his neck and shoulders were injured on _____, when the lid of a tank filled with pressurized air came off and the escaping air blew him against some pipes. He said that Dr. T operated on his left shoulder in March 1999 and still treats it; that Dr. R treats his neck; and that during the fourth quarter qualifying period, he continued to have shoulder and neck pain for which he took medication. The claimant's fourth quarter Application for Supplemental Income Benefits (TWCC-52) reflects that the claimant had no earnings and did not seek employment during the qualifying period. The claimant indicated that he did not look for employment during the fourth quarter qualifying period because he was unaware he had been released for any work by any doctor and that when he did learn from his attorney, on or about April 21, 2000, that a doctor, apparently Dr. T, felt he could work at light duty, he began a job search, as evidenced by the 72 job contacts listed on his TWCC-52 for the fifth quarter.

Dr. M, an orthopedic surgeon, reported to the self-insured on October 28, 1999, that he saw the claimant the previous day for an independent medical examination; that neck surgery had not been done because the claimant remained neurologically intact; that the claimant said he did not get much relief from the shoulder surgery and continued to complain of bilateral shoulder pain; and that the diagnosis is degenerative cervical disc disease and osteoarthritis of the cervical spine; left shoulder impingement syndrome, surgically treated; and right shoulder supraspinatus tendinitis. Dr. M concluded that the claimant should pursue a home exercise program for both shoulders and that he could return to work at a light-duty position if he can qualify for one, given his language barrier and limited education.

Dr. T wrote the claimant's attorney on November 18, 1999, stating that in his opinion the claimant "is unable to resume work at this time." Dr. T's records reflect that on February 10, 2000, he received a letter from Dr. M reflecting that Dr. M had evaluated the claimant on October 28, 1999, stating the results of his evaluation and his recommendation, and further stating that Dr. M felt the claimant could return "to light duty work."

According to the functional capacity evaluation (FCE) report of February 11, 2000, the claimant's employment at the time of his injury was in the heavy physical demand category; that scores above 30 on a particular pain questionnaire tend to indicate symptom exaggeration and that the claimant's score was 43; and that the claimant displayed excessive pain verbalization upon light palpation at any location in the bilateral shoulder/ scapular areas and cervical region. The report concluded that while the claimant cannot currently function at his previous job working with tanks and valves, he did demonstrate a light physical demand capacity level. Dr. T wrote on February 21, 2000, that according to an FCE, the claimant is "unable to return to previous work." Dr. T wrote on March 24, 2000, that he received the FCE report and "released him to work within the limitation imposed by the [FCE]."

The claimant introduced an October 28, 1999, form letter from the Texas Rehabilitation Commission (TRC) stating that the claimant had come in for an appointment and services were discussed. The claimant also introduced TRC documents reflecting that he obtained an appointment at the TRC for June 19, 2000, to discuss vocational rehabilitation services.

Though not reflected in the hearing officer's Decision and Order, the self-insured called Mr. O, a rehabilitation counselor with (vocational rehabilitation company) and former TRC employee, for testimony about the job leads he sent to the claimant (in care of his attorney) after starting work on the claimant's case in January 2000. He indicated he never met the claimant before a Texas Workers' Compensation Commission proceeding as he had been instructed by the claimant's attorney not to contact the claimant. He further stated that his offers of assistance to the claimant with resume preparation and with training to complete job applications and for interviews were declined. Mr. O further stated that based on Dr. M's report to the effect that the claimant had the physical capacity for

light-duty work, in February 2000 he began to send the claimant (in care of the attorney) numerous light-duty job leads. The self-insured introduced a letter dated February 2, 2000, which, among other things, forwarded Dr. M's October 28, 1999, report to Dr. T. In evidence is a March 8, 2000, letter from Mr. L, a vocational counselor with the vocational rehabilitation company, stating that despite the claimant's having the physical capabilities reflected in the FCE report, he has refused to attend employment development training and report his job search efforts. A March 27, 2000, report of the vocational rehabilitation company details the extent of what the company regards as the claimant's failure to cooperate with the company's efforts to assist him in obtaining employment.

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.

The IR and non-commutation of IIBs criteria were stipulated. As for the "direct result" criterion, the hearing officer found that during the fourth quarter qualifying period, the claimant was unemployed as a direct result of his impairment.

The hearing officer found that the claimant did not attempt in good faith to obtain employment commensurate with his ability to do light-duty work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1)-(5) (Rule 130.102(d)((1)-(5)) provide for five methods by which an injured employee can meet the "good faith effort" criterion. With regard to those methods, the claimant does not contend on appeal, nor did he below, that during the fourth quarter qualifying period he had returned to work, or was enrolled in either a TRC-sponsored or a private provider's full-time vocational rehabilitation program, or that he made and documented a good faith effort to obtain employment. The hearing officer failed to make specific findings on the "good faith" elements of Rule 130.102(d) notwithstanding the Appeals Panel's consistent encouragement of hearing officers to do so. The claimant's contention seems to be that he had no ability to work because he was unaware of having been "released" to return to work by any doctor until a chart note of Dr. T was received by his attorney six days before the end of the qualifying period. However, it is well settled that the lack of a medical release to return to work is not the equivalent of the inability to work. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 941275, decided November 3,1994, and Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. Further, both Dr. M's October 28, 1999, report and the February 10, 2000, FCE could be considered as records showing that the claimant had an ability to return to work, albeit not to his former employment. *See* Rule 130.102(d)(4).

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual determination

of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it 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 decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge