APPEAL NO. 002219

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 July 27, 2000. The hearing officer determined that the respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the 14th quarter, from December 18, 1998, through March 18, 1999; that the claimant was entitled to SIBs for the 15th quarter, from March 19, 1999, through June 17, 1999, and the 16th quarter, from June 18, 1999, through September 16, 1999; that the claimant was not entitled to SIBs for the 17th quarter, from September 17, 1999, through December 16, 1999; and, that the claimant was entitled to SIBs for the 18th quarter, from December 17, 1999, through March 16, 2000, to the extent that he had not exhausted a total of 401 weeks of benefits.

The appellant (carrier) appealed the adverse determinations regarding entitlement to SIBs for the 15th, 16th and 18th quarters on the grounds of sufficiency of the evidence. The appeals file does not contain a response from the claimant. The findings of fact and conclusions of law regarding the 14th and 17th SIBs quarters were not appealed and are therefore final by operation of law. Section 410.169.

DECISION

Affirmed as to entitlement to SIBs for the 15th and 18th quarters, reversed and rendered as to entitlement to SIBs for the 16th quarter.

The testimony adduced at the hearing was minimal. The claimant testified that he had worked as an oil field inspector when he sustained an injury to his lower back on _____, which required spinal surgery in 1993 and 1994. He testified that he looked for work during the filing periods for both the 14th and 15th quarters (over 50 in the 14th and about 38 in the 15th) and that during the filing period for the 15th quarter he was hospitalized for nine days due to depression. He could not recall why he did not have any searches during the first two weeks of December 1998, which were the first two weeks of the 15th quarter filing period. He asserted that he was not able to look for work during the 16th and 18th quarter qualifying periods; that his treating doctor, Dr. J, had him off work; and that a third surgical procedure was pending. The claimant testified that he could not drive and did not have any money to look for a job.

The claimant admitted that he had successfully completed a retraining program in either 1995 or 1996 which instructed him in bookkeeping, Lotus and Excel for six hours each day over a period of six weeks. The claimant testified that he had a computer at home and he had a certificate in data entry as well as a GED.

A functional capacity evaluation (FCE) performed on April 3, 1996, by Dr. P, the claimant's treating doctor until the 15th quarter, indicated that the claimant was capable of performing at a sedentary-light physical demand level. Dr. P found the claimant was not able to perform the duties of an inspector which required him to function at a medium-

heavy physical demand level. Dr. P also wrote in the same report that the claimant was unable to return to work or to any form of gainful employment and was totally disabled, but that if the claimant was allowed to return to his job he recommended restrictions of no lifting greater than 10 pounds, no sitting for periods greater than 15 minutes, no standing for periods greater than 30 minutes and no walking for periods greater than 40 minutes.

Dr. S evaluated the claimant on June 26, 1996, and he wrote that the claimant was able to return to work at full duty. Dr. S also wrote, "short of that [the claimant] is certainly capable of sitting at a desk and performing some type of work or even some other job that would require only light duty."

Dr. P reevaluated the claimant on August 25, 1998, by performing an FCE over the course of about 5 hours. Dr. P wrote in his report that the claimant was capable of functioning at a light physical demand level and that he exhibited a good effort when performing all tests. Dr. P considered the test to be valid. Dr. P opined that the claimant should be considered for retraining because he was not able to perform the physical demand requirements of his preinjury employment.

At two prior CCHs for the 12th and 13th quarters, another hearing officer determined that the claimant had the ability to work at light duty during both filing periods. The hearing officer in the present case found that during the filing period for the 14th quarter (which was not appealed) the claimant also had the ability to work at light duty, made a job search, but did not make a good faith effort to obtain employment commensurate with his ability to work. Both hearing officers predicated their findings on the FCEs from Dr. P and Dr. S.

The filing period for the 15th quarter began on December 18, 1998, and ended on March 18, 1999. At the CCH the claimant contended that during this filing period he made a good faith job search commensurate with his ability to work. He asserted that his good faith was established by the job search he conducted by faxing resumes to various businesses. He explained that he could not look for work during the period of time that he was hospitalized in February but that he reinitiated his job search when he was released. During the CCH the hearing officer asked the claimant why he did not begin looking for work until January 1, 1999, to which the claimant had no response. The hearing officer, despite this testimony and Dr. P's August 1998 FCE, found that during the entire 15th quarter filing period the claimant's medical records established that the claimant had a total inability to work. She apparently based her decision on progress notes from Dr. P during the filing period. She made no finding that the claimant did or did not make a good faith effort to obtain employment commensurate with his ability to work but we have held that an implied or inferred finding may be made where the evidence supports such a finding. Texas Workers' Compensation Commission Appeal No. 950696, decided June 20, 1995.

The claimant offered a progress note from Dr. P dated December 18, 1998. Dr. P indicated that the claimant presented for low back and leg pain and for depression and anxiety. Dr. P stated that the claimant would continue to be seen on an "as needed" basis and that he was "totally disabled." Chiropractic modalities were administered and Dr. P

wrote, "in [my] opinion, the patient is unable to work from a physical point of view. He is not able to sit for periods of longer than 20 minutes. There is really no reasonable type of work which he can maintain concentration on for any significant time . . . due to the level of pain which he is experiencing. . . . It is a very unfortunate situation, however, it is my opinion it is not reasonable to expect this patient would ever become significantly gainfully employed in the future." Dr. P did not address the FCE that he had previously performed three months earlier in August 1998.

The claimant was hospitalized for depression from February 3, 1999, through February 9, 1999. He began looking for work again on February 15, 1999, by faxing resumes to potential employers. The claimant changed treating doctors from Dr. P to Dr. J. Nonetheless, by letter dated February 12, 1999, in response to an earlier Texas Workers' Compensation Commission (Commission) inquiry asking why he thought the claimant was totally disabled, Dr. P wrote:

> I do not feel that there is anything significant that [the claimant] can do regarding gainful employment. He is not able to stand or walk for periods greater than thirty minutes or so without high probability of substantial flare-up of his condition which has been known to set him back several days at a time. Any bending whatsoever has basically been intolerable, and lifting is out of the question obviously. There apparently is not much that he can do. He does have some depression. He is taking quite a bit of medication from time to time for his pain which obviously is affecting his mental faculties as well while under the influence of his medications.

Dr. J created an initial report dated February 15, 1999, in which she indicated that the claimant was "off work" due to back pain and depression and recommended that he be entered into a pain management program. A work-status slip was checked "off work" until the next appointment in two weeks. By letter dated March 1, 1999, Dr. J noted that the claimant was still complaining of back pain and she offered that "this patient, in my opinion, is totally disabled from work at this time." Another work-status slip was checked "to remain off work" through the next scheduled appointment on March 15, 1999.

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. Prior to amendment on January 31, 1999, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the version in effect for the 15th quarter, provided that the quarterly entitlement to SIBs was determined prospectively and depended on whether the employee met the criteria during the prior quarter or "filing period." Under Rule 130.101 (prior to the November 28, 1999, amendment), "filing period" was defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS] for any quarter claimed."

The Appeals Panel, for purposes of "no ability to work" cases prior to January 31, 1999, held that if an employee established that he or she had no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. Under these circumstances, a good faith job search was "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

In this case the hearing officer apparently chose to give more weight to the progress note of December 18, 1998, the letter dated February 12, 1999, from Dr. P, and the work-status slips from Dr. J than to the claimant's own testimony that he was looking for work and Dr. P's prior FCE of August 28, 1998, in deciding whether the claimant had some ability to work during the filing period for the 15th quarter. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determination that the claimant had no ability to work during the quarters on appeal and the inferred finding that he made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the 15th quarter were not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant asserted at the CCH that the good faith criterion for the 16th and 18th quarters of SIBs was satisfied under the "no ability to work" provisions of Rule 130.102(d)(3), the version then in effect for these time periods. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Rule130.102(d). The requisite good faith effort to obtain employment commensurate with the ability to work could be asserted by meeting the requirements of Rule 130.102(d)(3). This rule provides that the good faith element may be met by the injured employee if: (1) he has been unable to perform any type of work in any capacity; (2) he has provided a narrative from a doctor which specifically explains how the injury causes a total inability to work; and (3) no other records show that the injured employee is able to return to work. We have held that all three elements of Rule 130.102(d)(3) must be established. Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999. We have also held that Rule 130.102(d)(3) is "generally more demanding" than the prior rule in what is required of a claimant to establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000.

The hearing officer, in her Statement of the Evidence, wrote that for the 16th quarter the medical evidence by Dr. J sufficiently set out the activities the claimant could not perform and explained why the claimant could not work. The hearing officer did not point to any specific "narrative report" and did not refer to any of the "other" records such as the multiple FCEs offered by the parties. The hearing officer made the following finding of fact for the 16th quarter:

> 5. During the 16th quarter qualifying period, Claimant's medical records sufficiently established that Claimant had a total inability to work and no other credible records established that Claimant could work.

The 16th quarter qualifying period began on March 6, 1999, and ended on June 4, 1999. We note that the hearing officer's stipulations in the Decision and Order reflect that the period began on March 6, 1998, but believe this to simply be a typographical error and reform the stipulation to correspond to the record adduced at the hearing.

The claimant offered several progress reports from Dr. J dated March 29, April 13, and April 28, 1999, which reflect that the claimant was still having low back pain radiating to his left leg and having difficulties with activities of daily living and sleeping at night. None of these documents were attached to the 16th quarter Application for [SIBs]. The March 29, 1999, report discusses the claimant's current medications and finalizes with "he has not been released to return to work since he is totally disabled and has reached maximum improvement statutorily." The April 13, 1999, report discusses the claimant's irritable bowel and need for a pain management program. Dr. J indicated that the claimant was not a candidate for further spinal surgery. Medications were refilled and the claimant was referred to Dr. D for a consult regarding steroid injections. This report again finalizes with the statement, "patient has not been released to return to work and has reached maximum

medical improvement statutorily." The April 28, 1999, report reflects that the claimant's condition had remained unchanged and the work-status slip noted that the claimant was "off work." A follow-up note from Dr. Si notes that the claimant may be a surgical candidate due to his lack of response to steroid injections. Dr. Si did not mention the claimant's work capacity. A discharge sheet from the claimant's hospitalization for depression was admitted for dates of care from May 10, 1999, through May 12, 1999. This document does not mention the claimant's capacity for work.

Whether the claimant satisfied the requirements of Rule 130.102(d)(3) for the16th quarter was a question of fact for the hearing officer to resolve and is subject to reversal only if so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer apparently concluded that one or more of the above documents offered for the 16th quarter was a "narrative report" from a doctor which included an explanation as to how the claimant's compensable injurious condition caused him to be totally unable to work although she did not specifically identify any of the documents or specifically articulate the reasons for the inability to work.

The "narrative report" required by Rule 130.102(d)(3) must include an explanation of a claimant's ability to work at any job in relation to the physical restrictions and limitations from the compensable injury. Texas Workers' Compensation Commission Appeal No. 001984, decided September 26, 2000. None of the documents offered for the 16th quarter provided an explanation of the claimant's ability to work at any job in relation to his physical restrictions and limitations from the compensable injury and we conclude that the claimant failed to satisfy the "narrative report" criteria of Rule 130.102(d)(3). Because the claimant did not otherwise look for work, we reverse the hearing officer's Finding of Fact No. 5 and render a determination that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work. The claimant is therefore not entitled to SIBs for the 16th quarter as he failed to meet the good faith requirement of Section 408.142(a)(4) of the 1989 Act.

The qualifying period for the 18th quarter began on September 4, 1999, and ended on December 3, 1999. The hearing officer made the following finding of fact:

> 7. During the 17th quarter qualifying period, Claimant's medical records sufficiently established that Claimant had a total inability to work and no other credible records established that Claimant could work.

Finding of Fact No. 7 immediately follows the finding for the 17th quarter (which was not appealed) and we conclude that the finding contains a typographical error and should properly reflect the determination for the 18th quarter. Again, there was no corresponding finding as to whether the claimant made a good faith effort to obtain employment commensurate with his ability to work. However, we infer from her discussion of the evidence and Finding of Fact No. 7 that the claimant made a good faith effort to obtain employment commensurate with his ability to work.

In her Statement of the Evidence the hearing officer wrote that the medical evidence included an MRI dated October 1, 1999, reflecting a large herniated disc at L5-S1. She also stated that an FCE dated February 3, 2000 (two months after the close of the 18th quarter qualifying period), showed that the claimant's condition had worsened since the 1996 and 1998 FCEs demonstrating a sedentary to light ability. She determined that the February 3, 2000, FCE established that the claimant had a total inability to work.

As support for entitlement to SIBs for the 18th quarter, the claimant offered five work-status slips signed by Dr. J with the box checked "to remain off work until next appointment" entered on each of the documents. Under the "Other Restrictions" portion of each document, the words "totally disabled; unable to work due to injury sustained at work" or "totally disabled" are submitted in handwritten form. A "To Whom It May Concern" letter was signed by Dr. J dated December 2, 1999, in which she discussed the claimant's diagnosis of a failed back surgery syndrome and a L5-S1 herniation. Dr. J opined that the claimant's consumption of narcotic-based medication affected his cognitive abilities and therefore he should remain off work because it could interfere with any activities that he may have to perform while working.

The FCE dated February 3, 2000, contains a statement from Dr. V, the doctor who performed the test, that "[the claimant] is presently functioning at a sedentary physical demand level." Dr. V wrote that the claimant's condition had worsened since the FCEs performed in 1996 and 1998 and, in comparison, the claimant's overall abilities and general-handling skills had decreased. He wrote "[the claimant's] present status is total disability and he is unable to return to any type of activity at present. He should follow-up with his treating physician to determine his level of employability." Although this document may have been considered internally inconsistent by another hearing officer, it was for this hearing officer to place the weight and credibility of the document and to interpret the statements contained therein. Although the hearing officer did not discuss the letter from Dr. J dated December 2, 1999, she could have determined that the document was insufficient as a narrative or simply believed that the FCE standing alone satisfied the "narrative report" requirement of Rule 130.102(d)(3).

The hearing officer found that no other credible records established that the claimant could work during the qualifying period for the 18th quarter. The hearing officer wrote in her Statement of the Evidence that the FCE dated February 3, 2000, showed the claimant's condition had worsened since the 1996 and 1998 FCEs and apparently decided that the two prior FCEs were too remote in time to show an ability to work during the 18th quarter. We have previously held that in determining whether an "other record" shows that the injured employee is able to return to work, factors such as a worsening of medical condition and when the other record was prepared in relation to the qualifying period could be considered. Texas Workers' Compensation Commission Appeal No. 002129, decided October 27, 2000. The hearing officer's finding of fact for the 18th quarter was not so against the great weight and preponderance of the evidence as to be manifestly unjust. King, *supra*. Since we find the evidence sufficient to support the determination of the

hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer determined that during the filing period for the 15th SIBs quarter and the qualifying periods for the 16th and 18th SIBs quarters the claimant's unemployment was a direct result of his impairment. The Appeals Panel has on numerous occasions commented on the phrase "as a direct result of the employee's impairment" in Sections 408.142 and 408.143 and stated that the unemployment need only be a direct and not the direct result. Upon review of the record submitted, we find no reversible error and the evidence sufficient and affirm the determination of the hearing officer that the claimant's unemployment was a direct result of his impairment from the compensable injury.

We affirm the hearing officer's decision and order that the claimant is entitled to SIBs for the 15th and 18th quarters and reverse and render that the claimant is not entitled to SIBs for the 16th quarter.

Kathleen C. Decker
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge