APPEAL NO. 002430

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 September 27, 2000. The issue at the CCH involved whether the respondent (claimant), was entitled to supplemental income benefits (SIBs) for his fourth quarter of eligibility. The qualifying period under review ran from January 27 through April 27, 2000.

The hearing officer determined that the claimant did not have the ability to work as a direct result of his impairment, that his treating doctor explained in detail why he was unable to work, and that he thus fulfilled the good faith search for employment criterion for SIBs.

The appellant (carrier) has appealed and argues that the claimant can do some work (up to two hours a day) based upon "restrictions" and "limitations" that do not utterly preclude work. The carrier also argues that the hearing officer failed to address whether there were other records which showed an ability to work during the quarter under review. The carrier asserts that the subjective knowledge of the claimant about such a report is not the determining factor under the applicable rule. There is no response from the claimant.

DECISION

Affirmed.

The claimant was injured on _____, when picking up a concrete block. He had back surgery in November 1997 for this injury, and had a preinjury history of other back surgeries. He said he had been completely off work since his second surgery in November 1997. The claimant said he was examined by Dr. H for the insurance company on June 6, 2000, which included a functional capacity evaluation (FCE), and that Dr. H never discussed with him whether he could work. He said that it was not until the benefit review conference on August 15 that he became aware of an evaluation by Dr. H that he could do sedentary work. He said that his treating doctor, Dr. L, did not agree with this assessment. Since August 15, the claimant said he had been working to get computer training through the Texas Rehabilitation Commission (TRC). He had also been applying for work.

The claimant said that he had depression secondary to chronic pain, that he could drive for 20 minutes at a stretch, and that his maximum lifting ability was a gallon of milk. The claimant did not believe he could work sitting for two or three hours a day because he would be overcome by pain which would affect his ability to concentrate.

Dr. H reported on June 6, 2000, that the claimant had moderate range of motion of his lumbar spine. The claimant had significant tenderness around L4 and L5. The FCE was conducted after this report, and Dr. H did not review it and issue his conclusions on the FCE until July 18, 2000 (the FCE report was dated June 23, 2000). At that time, Dr. H

stated that the claimant had a sedentary work capacity with no lifting greater than 10 pounds, that he could sit or stand for 20 to 30 minutes at a time, and that he should change positions often during the day. According to facsimile transmission information stamped at the top of this letter, it appears to have been "faxed" to carrier representatives on July 24 and August 1, 2000. Neither Dr. H's report nor the FCE report purport to opine as to what the claimant's ability was before the examinations were conducted.

On September 17, 1999, Dr. L wrote a letter saying that the claimant would need extensive physical therapy (PT) to return to work and is unable to work at the present time. He noted that the claimant suffered from depression and debilitating back pain secondary to his back surgery. His letter then stated that the claimant should not lift, should not drive over (illegible) miles, or engage in prolonged standing, sitting, walking, bending, or pushing. On April 28, 2000, Dr. L wrote his response to a peer review report (not in evidence) that apparently asserted that the claimant could work. Dr. L said that as long as the claimant could not get the PT he needed, he would not be released to work. Dr. L noted on his examination that the claimant had bilateral weakness in his legs and required a cane. However, in records prior to September 8, 2000, Dr. L's assessment that the claimant would not be released to work was apparently tied to the failure of the insurance company to approve recommended PT. On September 8, 2000, Dr. L wrote that it was not realistic to expect the claimant to work for two hours a day since he could not do this without experiencing severe pain. He stated that in addition, no employer would hire the claimant to work for only two hours a day.

The hearing officer found that Dr. L had explained in great detail why the claimant was unable to work. He made no findings as to whether there were, for the period under review, any other records which "showed" an ability to work. However, his discussion indicates that he considered the September 17, 1999, letter of Dr. L which outlined restrictions for the claimant, and that he believed that the claimant had been seen by Dr. H outside the qualifying period. The hearing officer has not expressly indicated that he gave weight to the job market or extraneous factors cited in Dr. L's letter a year later.

The legislature has required that, as a condition for SIBs, the injured worker must make a good faith search for employment commensurate with the ability to work. Section 408.143(a)(3). This will not include in every case full-time employment. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines good faith as follows:

> Good Faith Effort. An 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;

(3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;

(4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

The hearing officer has taken the September 17, 1999, letter as the narrative required under Rule 130.102(d). The letter is minimally sufficient to explain how the claimant's conditions preclude work. Dr. L's reference to restricted functions plainly is meant to further explain his assessment that the claimant is unable to do any work, rather than to establish a limited release.

While we agree that the better practice would have been to make an express finding concerning whether there were other records showing an ability to work during the period under review, the hearing officer has correctly noted in his discussion that Dr. H's examination did not occur (and his reports were not issued) prior to the end of the qualifying period. Because an implied finding that no other records show an ability to work during this period may be affirmed, we need not address for this appeal whether the date a claimant first becomes aware of other records is the determining factor. Many of the carrier's other arguments go to records and assessments made for the following quarter, and do not constitute a great weight of evidence against the hearing officer's decision for this quarter.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge