APPEAL NO. 002596

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 28, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. The hearing officer determined that the claimant was not entitled to SIBs for the 11th and 12th quarters and the claimant appealed the adverse determination that he had not made a good faith effort during the qualifying periods for both of the SIBs quarters to obtain employment commensurate with his ability to work on the grounds of sufficiency of the evidence. The respondent (carrier) filed a response urging that the evidence was sufficient to support the determinations of the hearing officer and that the decision and order should be affirmed. The finding that the claimant's unemployment was a direct result of the impairment from the compensable injury was not appealed and is final by operation of law. Section 410.169.

DECISION

Affirmed.

We note that the claimant's treating doctor presented a letter to the panel which was drafted after the decision and order were sent to the parties. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case the letter from the treating doctor is cumulative of the evidence adduced at the hearing; thus, it simply does not rise to the level of necessitating a remand for consideration of that evidence. Accordingly, the evidence was not considered on appeal.

Eligibility criteria for SIBs entitlement are set forth in Sections 408.142(a) and Tex. W. C. Comm'n, 28 TEX. ADMIN CODE ANN. § 130.102 (Rule 130.102). At issue on appeal is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work during the relevant SIBs qualifying periods. The claimant testified at the hearing that he had no ability to work during the relevant qualifying periods and offered medical documentation in support of his contention. The carrier asserted that the claimant had some ability to work and introduced into evidence a functional capacity evaluation (FCE) and a report from a doctor who had examined the claimant. The hearing officer evaluated the evidence and found that both the FCE and the doctor's report provided evidence that the claimant had some ability to work, albeit very limited.

The determination of whether the claimant made a good faith effort to obtain employment commensurate with his ability 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 manifestly unjust. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Accordingly, after review of the record and the evidence adduced at the CCH, we conclude that the findings of the hearing officer are not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company , 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Kenneth A. Hutchton
Appeals Judge

Susan M. Kelley
Appeals Judge