APPEAL NO. 002750

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 November 1, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 20th compensable quarter as the claimant had some ability to work and did not seek employment during the qualifying period.

The claimant appealed, attacking a functional capacity evaluation (FCE) ordered by one of the claimant's doctors as being "incomplete" and focusing on elements of the report with which the claimant disagreed. The claimant emphasizes another doctor's report. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a janitor at one of the self-insured's schools when he sustained a slip-and-fall injury, injuring his back, neck, left arm, and right knee. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has an impairment rating of 15% or more; that impairment income benefits have not been commuted; that the qualifying period for the 20th quarter was from May 30 through August 28, 2000; and that during the qualifying quarter the claimant earned no wages.

The claimant's treating doctor is Dr. P, who performed spinal surgery in April 1997 and subsequently referred the claimant to Dr. N for knee replacement surgery.

Sections 408.142(a) and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. Code § 130.102 (Rule 130.102) contain the statutory and regulatory requirements for SIBs. At issue in this case is the statutory requirement that the claimant make a good faith effort to obtain employment commensurate with his ability. (The hearing officer's finding on direct result in favor of the claimant has not been appealed and will not be addressed further.)

The standard of what constitutes a good faith effort to obtain employment in cases of total inability to work is addressed in Rule 130.102(d)(4), which provides that the statutory, good faith requirement may be met if the employee:

> (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[.]

Specific and Subsequent Medical Reports (TWCC-64) from Dr. N dated April 28, June 30, and September 5, 2000, list the claimant's various injuries and indicate the claimant could return to limited type of work on March 30, 1999, but could "NEVER" return to full-time work. Dr. N referred the claimant for an FCE, which was performed on April 13, 2000, and which tested certain functions. The FCE indicated that the claimant "is presently retired and does not plan on returning to work." The FCE states that the claimant "did not give full effort during lifting tests" and concluded that the claimant can work at the light-duty level. Dr. P, in a report dated September 14, 2000, lists the claimant's restrictions, stresses the claimant's "major low back injury," and concludes that "this 71 year old gentleman, whose residual low back complaints and knee complaints remains unable to engage in any labor occupations and he is definitely restricted of any lifting, pulling, or pushing heavy objects." Dr. P also considers the claimant's age and limited education in arriving at his opinion.

The hearing officer applied Rule 130.102(d)(4), finding that the reports of Dr. N showed that the claimant was able to return to limited type of work "as of 3-30-00" and that the requirement of Rule 130.102(d)(4) had not been met. The claimant's appeal attacks the FCE (which was not the basis of the hearing officer's decision) and argues that Dr. P's opinion should prevail and that Dr. P "admonished [claimant] not to attempt to work because it would probably aggravate [his] low back condition."

We find no error in the hearing officer's decision and application of Rule 130.102(d)(4).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge