APPEAL NO. 002786

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 3, 2000. With respect to the single issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter. In his appeal, the claimant argues that the hearing officer's determinations that he had some ability to work, that he did not make a good faith job search, and that he is not entitled to SIBs are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the claimant's unemployment was a direct result of his impairment and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury. The parties stipulated that the claimant reached maximum medical improvement on December 15, 1996, with an impairment rating of 51%; that the claimant did not commute his impairment income benefits; that the fourth quarter of SIBs ran from August 21 to November 19, 2000; and that the qualifying period for the fourth quarter ran from May 9 to August 7, 2000. The claimant acknowledged at the hearing that he did not look for work in the qualifying period; thus, his entitlement to SIBs is dependent upon his satisfying the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule130.102(d)(4)). Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "has been unable to perform any 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."

The claimant presented an August 7, 2000, letter from his treating doctor, Dr. M, that states that the claimant "remains completely disabled by his work related multilevel disc injury with three surgeries and persistent radiculopathy." In addition, Dr. M noted that the claimant's "condition has actually worsened over the past few months as evidenced by increasing stiffness, decreased walking tolerance and increased antalgia." The claimant also offered an opinion from Dr. F, his pain management doctor, stating that the claimant "is totally disabled" and "unable to do any work."

The carrier offered the opinion of its required medical examination doctor, Dr. D. In a March 2, 2000, report, Dr. D opined that the claimant could work in a sedentary category with restrictions and that he would need frequent breaks from a sitting or standing position. Dr. D relied on a January 24, 2000, functional capacity evaluation (FCE), which likewise concluded that the claimant could function at the sedentary level with restrictions

and frequent, unscheduled breaks. Dr. M responded to the FCE report, pointing to the problems he saw it.

The hearing officer determined that the claimant did not sustain his burden of proving no ability to work because other records in evidence show an ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As such, he was acting within his province in accepting the FCE findings and the report of Dr. D and in finding that the claimant had some ability to work in the qualifying period. As the claimant noted, there was evidence from Dr. M of problems with the FCE report and of a deterioration of the claimant's condition since the FCE and Dr. D's report; however, it was a matter for the hearing officer to determine the effect of such evidence on the credibility thereof. Nothing in our review of the hearing officer's decision demonstrates that his determination that the claimant had some ability to work is against the great weight of the evidence. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of that determination, and in light of the fact that the claimant acknowledged that he did not conduct a job search in the qualifying period, the hearing officer did not err in determining that the claimant did not satisfy the good faith requirement and that the claimant is not entitled to fourth quarter SIBs. Although another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a basis for us to disturb the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge