APPEAL NO. 002788

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 7, 2000. The hearing officer considered all evidence and held that, according to our current rules governing supplemental income benefits (SIBs), the appellant (claimant) had not proven a total inability to work for his 14th through 17th quarters of SIBs.

The claimant has appealed. Facts in support of the claimant's inability to work are recited. In addition, the claimant argues that the hearing officer erred by finding that the designated doctor's opinion had no presumptive weight. There is no response from the respondent (carrier).

DECISION

We affirm the hearing officer's decision.

It was stipulated that the claimant's qualifying periods for the quarters in issue ran from July 19, 1999, through July 17, 2000. The claimant had four surgeries for his _____, back injury. The claimant stated that he had done no work in his life other than plastering, which he had done for over thirty years. He said that he had not gotten better since his last surgery in November 1996.

The claimant's treating doctor from the date of injury through October 1999 was Dr. N. The claimant said that Dr. N told him he could do no work of any kind. However, Dr. N wrote on March 24, 1999, that the claimant could perform no work above the sedentary level. The claimant changed his treating doctor to Dr. G, who wrote on October 15, 1999, that the claimant was unable to work in any capacity due to his multiple failed back surgeries. In response to various questions propounded on December 7, 1999, by the claimant's attorney, Dr. G stated that the claimant was restricted from lifting, climbing, stooping, prolonged sitting, or standing. Dr. G also wrote a note in which he opined that, notwithstanding the outcome of the functional capacity evaluation (FCE), the claimant could not be employable eight hours a day, five days a week. He disputed that an FCE would accurately assess the cumulative effects of four back surgeries.

More questions were answered by Dr. G on October 2, 2000. In this set of questions, Dr. G assessed various sustained functional abilities of the claimant as no greater than the "0-1" hour, the lowest category. Only keyboarding was assessed at "2-3" hours. Dr. G said that the claimant could work three hours a day maximum, and various other restrictions were listed.

The claimant had an FCE on July 13, 1999, which reported that he was at the low end of medium-duty level of work. The claimant said that he was completely "down" after this FCE and could not get out of bed. The claimant said he would not be able to repeat

the things he did during the FCE on a daily basis. The report noted that the claimant told the evaluators he was receiving Social Security disability and retirement and had no plans to return to work. The claimant testified that he understood that income would affect his Social Security benefits.

The claimant was eventually examined by a designated doctor, Dr. D, for his return to work on August 3, 2000, and consequently Dr. D's report was not filed with the Texas Workers' Compensation Commission until after the end of the 17th quarter filing period. Dr. D said that he considered the claimant to be totally disabled due to age, medical condition, and training. However, he also said that the claimant could probably do sedentary work.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBs, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than eighty percent of the employee's average weekly wage as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), *effective November 28, 1999,* 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:
>
> (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[.]

Prior to November 28, 1999, the same rule was in effect as Rule 130.102(d)(3). It is worth noting that one must search for work commensurate with one's ability to work, which need not and will not in all cases be an eight-hour, five-day-a-week job.

We have reviewed the evidence and must affirm the hearing officer. Except for Dr. G, there is no doctor stating that the claimant cannot perform any work whatsoever. Even Dr. D indicates that the claimant could probably do sedentary work. The hearing officer correctly held that Dr. D's report came too late to be given presumptive weight,

one way or the other. Rule 130.110(a). Consequently, the hearing officer's determination that there are other records that show an ability to work for the time periods under review is not against the great weight of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) We affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge