APPEAL NO. 002828

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 October 25, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first through fifth compensable quarters.

The claimant disagreed with that decision and sought to appeal, which we will consider a challenge to the sufficiency of the evidence. The respondent (carrier) responds that the documents sent to the Texas Workers' Compensation Commission (Commission) do not constitute an appeal and in the alternative, urges affirmance.

DECISION

Affirmed.

Records of the Commission indicate that the claimant is deemed to have received the hearing officer's decision on November 14, 2000, and that on November 21, 2000, the claimant went to the Commissions's field office "to get info on how to appeal the decision of his CCH." The claimant was given forms which he completed and had his signature notarized. While the forms given the claimant fall well shy of "clearly and concisely" rebutting the hearing officer's decision, the claimant clearly, by his actions, intended to appeal the hearing officer's decision and did as he was instructed by a Commission employee. Consequently, we accept the claimant's documents as an appeal of the sufficiency of the evidence to support the hearing officer's decision.

The claimant had been employed as a laborer (the claimant testified a carpenter's assistant) when he sustained a low back injury on _____. The parties stipulated that the claimant sustained a compensable injury on that date, that the claimant has a 15% impairment rating or greater, that impairment income benefits were not commuted, and that the filing/qualifying periods began on June 18, 1998 and ended on September 2, 1999. The hearing officer, and the parties, noted that the first three quarters were under the rules in effect prior to January 31, 1999, and the last two quarters were subject to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), the version in effect prior to November 28, 1999. The claimant proceeds on a total inability to work in any capacity theory.

Sections 408.142(a) and 408.143 and Rule 130.102 provide the statutory and regulatory requirements for entitlement to SIBs. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(3) provides that the statutory good faith requirement may be met if the employee:

(3) 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 January 31, 1999, a finding of no ability to work was still required to be based on medical evidence.

At issue here is whether the claimant had an ability to work. Although the claimant testified to what he could or could not do, and in his opinion he was unable to do any work because of pain, the medical evidence is conflicting. The claimant had been recommended for spinal surgery but the second opinion doctors had not concurred. The hearing officer commented that the medical records do not specifically explain how the claimant's injury caused a total inability to work. Many of Dr. J reports simply say that the claimant is not released to return to work. There was also medical evidence to the contrary from Dr. A, who examined the claimant at least three times and who thought that the claimant could return to work without restrictions.

The hearing officer made findings that during the filing periods for the first three quarters, the claimant "did have an ability to work" and for the last two quarters "there was no medical narrative showing Claimant's total inability to work and there were records showing the Claimant did have an ability to work."

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Finding sufficient evidence to support the hearing officer's decision and applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge