APPEAL NO. 002885

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 27, 2000. With respect to the issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 7th 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 effort to look for work, and that he is not entitled to 7th quarter SIBs are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on February 1, 1998, with an impairment rating of 18%; that he did not commute his impairment income benefits; that the 7th quarter of SIBs ran from August 14 to November 12, 2000; and that the qualifying period for the 7th quarter ran from May 2 to July 31, 2000. The claimant testified that he underwent cervical surgery to treat his injury in December 1996 and that in 1998 he had a second surgery to remove hardware. In May 1999, the claimant returned to work. The claimant stated that he began to develop increasing pain and marked difficulty with range of motion, which his treating doctors attributed to his working. In January 2000, Dr. V, one of the claimant's treating doctors, took the claimant off work and referred him to physical therapy. The claimant attended two therapy programs in the period from January to March 2000, which were not successful in providing pain relief. In a March 9, 2000, progress note, Dr. V recommended a multidisciplinary pain management program for the claimant. The claimant testified that he had his initial evaluation for the pain management program on April 17, 2000; that he began the program on May 22, 2000; and that he attended the program until July 27, 2000, eight hours per day, Monday through Friday. The claimant stated that he did not look for work in the qualifying period because Dr. V had him off work pending his completion of the pain management program. On July 26, 2000, Dr. K examined the claimant at the request of the carrier. In a report dated July 28, 2000, Dr. K opined that the claimant could return to work as a van driver, which was the job he performed in the period from May 1999 to January 2000.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.120(d)(4)) provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work if the employee "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." The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and

inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). A hearing officer's determination will not be disturbed unless it is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the evidence establishes that the claimant returned to work in May 1999 and that by January 2000, his condition had deteriorated to the point that a treating doctor determined it was medically necessary to take the claimant off work. Thereafter, Dr. V started the claimant on a course of physical therapy. From January to March 2000, the claimant attended two physical therapy programs which proved unsuccessful in reducing his pain. In March 2000, Dr. V decided that more intensive treatment was indicated in order to alleviate the effects of the compensable injury and to enable the claimant to return to work. Thus, Dr. V recommended that the claimant undergo a multidisciplinary pain management program. By mid-April, the claimant had had his initial evaluation for that program. In the portion of the qualifying period from May 2 to May 21, 2000, the claimant was waiting to begin the pain management program prescribed by his doctor and he attended the pain management program from May 22 to July 27, 2000, five days per week, eight hours per day. That is, for the portion of the qualifying period from May 2 to July 27, 2000, the claimant was either waiting for the treatment prescribed by his doctor to begin or attending that program full-time. As such, he had no ability to work due to the effects of the compensable injury and the off-work restrictions imposed and treatment directed by a treating doctor to foster his rehabilitation and his eventual return to work. We also note that in the first 20 days of the qualifying period prior to the start of the pain management program, a job search on the part of the claimant would have been futile as he was about to start a full-time, two-month, treatment program and would have been largely unavailable to work. In addition, contrary to the observations of the hearing officer at the hearing, nothing in the statute or rules required the claimant to search for work in the evenings or on weekends, while he was attending the full-time pain management program. If the hearing officer's imposition of such requirements were to be upheld, it would have the effect of making the claimant relinquish his entitlement to SIBs in order to follow the rehabilitation protocol prescribed by his treating doctor. The hearing officer's determination that the claimant had some ability to work, at least for the portion of the qualifying period from May 2 to July 27, 2000, is reversed as being so against the great weight of the evidence as to be clearly wrong or manifestly unjust. The claimant's status arguably changed on July 27, 2000, after the pain management program ended and Dr. V opined that the claimant could work; however, the claimant's failure to look for work in the remaining four days of the qualifying period did not defeat his entitlement to SIBs for the 7th quarter. The last week of the qualifying period ran from July 25 to July 31, 2000, and as noted above, the claimant had no ability to work for a portion of that week. Conversely, and more to the point, the claimant only had the ability to work for part of the

final week of the qualifying period. Because Rule 130.102(e) speaks in terms of a weekly job search obligation, it follows that where, as here, there is no period of a week that the claimant has the ability to work, the job search requirement is not triggered. Accordingly, we reverse the hearing officer's determination that the claimant is not entitled to SIBs for the 7th quarter and render a new decision that he is entitled to those benefits.

At the hearing, and in its response to the claimant's appeal, the carrier cites Texas Workers' Compensation Commission Appeal No. 000337, decided March 23, 2000, and argues it is controlling. The carrier's reliance on Appeal No. 000337 is misplaced. In Appeal No. 000337, the claimant only attended the pain management program for a month of the qualifying period while the claimant in this case was waiting for the program to start and then attended the program for all but four days of the qualifying period. The claimant's participation in the pain management program here satisfied the requirements of Rule 130.102(d)(4). The same cannot be said about the claimant's participation in the pain management program in Appeal No. 000337. As such, our affirmance of the hearing officer's determination that the claimant was not entitled to SIBs in that case does not counsel for affirmance in the case at bar.

The hearing officer's determination that the claimant is not entitled to SIBs for the 7th quarter is reversed and a new decision rendered that the claimant is entitled to those benefits.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge