APPEAL NO. 002971

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 29, 2000. She determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter of eligibility. The qualifying period ran from May 3 through August 1, 2000.

The appellant (carrier) has appealed, and argues that the claimant's ability to function is consistent with sedentary ability.

DECISION

We affirm the hearing officer's decision.

The claimant was injured in a slip and fall at work on _____. His impairment rating was 33%. He had back surgery, and additional surgery was scheduled (after the second opinion process) for October 2000 but rescheduled for January 2001. The qualifying period under review ran from May 3 through August 1, 2000. The claimant was examined by Dr. D, a required medical examination (RME) doctor, on August 15, 2000, and Dr. D detailed the claimant's myriad pain and problems, noted that the claimant's condition had worsened considerably after back surgery, and found that the claimant had chronic pain syndrome, failed back surgery, and depression. Dr. D stated that this situation made the claimant totally unable to work. This was also the opinion of the treating doctor, Dr. H.

The claimant testified that Dr. H had restricted him as to various activities (not walking more than a block or lifting over 10 pounds), but these were not work restrictions but prohibitions on what he could do during rehabilitation and physical therapy.

The hearing officer did not err in determining that the claimant met the "good faith search for employment" requirement for SIBs entitlement. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), as applied to this case, 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[.]

A mere ability to function and perform some activities of daily living does not equate to ability to work. In this case, both the RME doctor (in August 2000) and the treating

doctor detailed the myriad physical problems that the claimant continued to have, which have resulted in a need for additional back surgery, and stated that the claimant was unable to work as a result. There were no other records which demonstrated an ability to work.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge