APPEAL NO. 011365
FILED JULY 25, 2001

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 May 22, 2001. With regard to the issues before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits for the sixth or seventh compensable quarter. The claimant appeals the determination of the hearing officer, challenging the sufficiency of the evidence. The respondent (carrier) responds and urges affirmance.

DECISION

Affirmed.

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 Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met 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[.]** (Emphasis added.)

The hearing officer determined that there were other records showing that the claimant did have the ability to work. Although the claimant testified to what he could or could not do, the evidence is conflicting. There were two functional capacity evaluations performed on the claimant, one of which indicated the claimant could perform sedentary work. There was also surveillance film of the claimant doing yard work, carrying groceries, and driving. Also, Dr. M report states, "After reviewing the video that you sent me dated 4/11/2000, It [sic] is of my opinion, that the video supports my original finding that the patient is able to work at a sedentary capacity . . . ." The claimant contends that Dr. M's report was before the qualifying period and should not be considered. There is no condition in Rule 130.102(d)(4) which necessarily limits the "other records" as to time of inception or as to when an examination is conducted.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In this case, the claimant presented evidence tending to demonstrate that he has no ability to work and the carrier presented evidence tending to demonstrate that the claimant has some ability to work. The hearing officer had to judge the credibility of the evidence before her in order to determine whether

the evidence presented was sufficient to meet the criteria of Rule 130.102(d)(4). The question of whether another record shows an ability to work is a factual question, just as the questions of whether the claimant is unable to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions.

The hearing officer's finding that there were records showing the claimant did have an ability to work is supported by the evidence. 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support this determination.

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

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge