

APPEAL NO. 980105

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 December 16, 1997. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 12th, 13th, and 14th quarters. In his appeal, the claimant essentially argues that the determinations that he did not make a good faith job search commensurate with his ability to work in the filing periods, that his unemployment during the filing periods is not a direct result of his impairment, and that he is not entitled to the quarters of SIBS at issue are against the great weight and preponderance of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, when he was struck from behind by a bull and thrown over a fence; that he reached maximum medical improvement on January 14, 1992, with an impairment rating of 40%; that the 12th, 13th and 14th quarters ran from February 1, 1997, to October 31, 1997; and that the relevant filing periods ran from November 3, 1996, to August 1, 1997.

The claimant testified that, in the filing period for the 12th quarter, he did not look for work because his treating doctor, (Dr. H), had not yet released him to return to work. The claimant testified that he kept a record of all of the employers with whom he had contact on the sheets he attached to his Statements of Employment Status (TWCC-52) and that if a contact is not listed on either the TWCC-52 or an attached paper, it did not occur. The TWCC-52 that the claimant filed for the 12th quarter does not list any potential employers with whom he had contact in the filing period for the 12th quarter.

With respect to the 13th quarter filing period, the claimant testified that in March 1997, Dr. H advised him that he could do light to sedentary work, about a month before the April 16, 1997, functional capacity evaluation (FCE) demonstrated that he could do part-time sedentary work, with the notation that "this is not an accurate representation due to the patient's invalid participation." He stated that, after he spoke with Dr. H in March 1997, he began looking for work. The contact sheet attached to the claimant's TWCC-52 for the 13th quarter lists some five contacts all made in March 1997. The claimant also testified that he registered with the Texas Workforce Commission (TWC) in the filing period for the 13th quarter and that he contacted the ranchers in the small town where he lives to see if they had any work for him.

The claimant stated that during the filing period for the 14th quarter, he was not able to look for work because both of his vehicles were not working and, therefore, he did not have any transportation to permit him to conduct a job search. His TWCC-52 likewise

does not reveal any job contacts in the 14th quarter filing period. On cross-examination, the claimant acknowledged that during that period, he came to (city 1) three to four times per week for therapy. He stated that he relied on neighbors for rides.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In addition, we have stated that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. 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 may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony and the other evidence before him, and resolves conflicts and inconsistencies in the testimony and 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 Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer determined that, during the filing periods for the 12th, 13th and 14th quarters of SIBS, the claimant had some ability to work. Our review of the record does not demonstrate that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists to disturb it on appeal. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer further determined that "[d]uring the filing period for the twelfth, thirteenth and fourteenth compensable quarters, Claimant did not make any efforts to look for work commensurate with his ability." The claimant acknowledged that he did not look for work in the filing periods for the 12th and 14th quarters. He testified that he did make employment contacts in the filing period for the 13th quarter; however, the hearing officer apparently did not believe that testimony. In that regard, the hearing officer found that the "claimant's testimony was inconsistent and non persuasive." The hearing officer need not accept the testimony of the claimant, an interested witness, at face value; rather, that testimony raises questions of fact for the hearing officer to resolve. Bullard v. Universal

Underwriters Ins. Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). While another fact finder might have found that the claimant made some employment contacts in the filing period for the 13th quarter from the evidence before him, the hearing officer's determination that the claimant made no such contacts is not so contrary to the great weight and preponderance of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*. The evidence is also sufficient to support the determination that during the relevant filing periods the claimant's unemployment was not a direct result of his impairment from the compensable injury and that determination is likewise affirmed. Because we affirmed the determinations that the claimant did not satisfy either the good faith or direct result criteria in this instance, the hearing officer did not err in determining that the claimant was not entitled to SIBS for the 12th, 13th and 14th quarters.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge