APPEAL NO. 980131

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 29, 1997, a contested case hearing was held. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh compensable quarter. Claimant asserts that he had no ability to work, that his 19 contacts with employers constituted a good faith attempt to find work, and states that conclusory medical opinions may be considered. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant testified that his low back was injured on _____, when he and another person lifted an air conditioner while claimant was turning. He has had three surgeries with the last, to remove hardware, occurring in November 1996. The parties stipulated that his impairment rating is 15%, that he has commuted no benefits, and that the seventh quarter began on August 23, 1997. (The filing period during which the claimant's activity is examined to determine whether SIBS are payable for the quarter comprises approximately 90 days immediately preceding the August 23, 1997, date.)

While claimant did not record any job contacts on his Statement of Employment Status (TWCC-52) used to request payment of SIBS, he testified to 19 contacts during the filing period. The record contains no documentary evidence of these 19 contacts, but claimant testified that he made them either by phone or in person. The job contacts included sales positions which claimant testified was a type of work he has done in the past. The claimant testified that he was not sure he could do every job if he had received an offer, but he could try. According to claimant's testimony, his job search was spread throughout the filing period and not limited to just a few days. Nevertheless, the hearing officer, as fact finder (*see* Section 410.165) is the sole judge of the weight and credibility of the evidence. She found that claimant's job search did not reflect a good faith effort and her determination is not against the great weight and preponderance of the evidence - the standard the Appeals Panel applies in reviewing determinations of a factual nature. *See* Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, which affirmed a determination that SIBS were not due when a claimant had made either 32 or 40 job contacts. The number of contacts neither assures payment of SIBS, nor denies payment of SIBS.

Claimant also asserts that he had no ability to work, citing the medical opinion of his treating doctor, (Dr. V). While claimant cites two Appeals Panel cases (Texas Workers' Compensation Commission Appeal No. 961483, decided August 28, 1996, and Texas Workers' Compensation Commission Appeal No. 970159, decided March 13, 1997) which

appear to say that uncontradicted medical evidence of an inability to work calls for a finding of an inability to work, the medical evidence in the record is not uncontradicted. In addition, the fact finder may always determine whether or not to believe conclusions reached by an expert. *See* Gregory v. Texas Employers' Ins. Assoc., 530 S.W.2d 105 (Tex. 1975). As to the appealed assertion that Dr. V's opinions were labeled as conclusory, the hearing officer may well choose to give less weight to opinions that are conclusory, just as she may choose to give such conclusory opinions weight in reaching a different determination, when warranted. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

In the case under review, the hearing officer pointed out that Dr. V provided several opinions indicating that claimant is unable to work, with two opinions in the filing period (generally from May 24, 1997, through August 22, 1997), but another, in May 1997 limited such inability to work "until he completes the pain management program," which the hearing officer also observed had not been completed as of December 29, 1997. In addition, Dr. V stated in August 1997 that claimant had been referred to (Dr. S) for pain management and also referred to claimant having completed an ARCON testing program. In an October 1997 letter, Dr. V then refers to both Dr. S and (Dr. M) regarding pain management, the ARCON test showing that claimant can lift limited weight, and says that claimant is "totally disabled . . . despite the fact he can lift small amounts of weight" and goes on to say that because claimant takes six Vicodin a day he would not be safe in the workplace; he concludes by saying that when claimant is able to use less medication he should be able to do light work.

However, a May report of Dr. M indicates that a TENS unit has decreased claimant's pain by "50%." An April 1997 entry by Dr. M also indicates that claimant was taking four Vicodin a day, that such amount was "effective," and that claimant's medications had no side effects.

The ARCON test, which was also referred to by Dr. V as having been done in September 1997, was said to show that claimant could constantly lift 11 pounds with occasional lifts of 38 pounds and said he could even lift 69 pounds to the waist.

While medical opinions in the filing period must be considered, the fact finder may also consider medical evidence from outside the filing period particularly when it is near in time and the claimant's condition is not shown to be significantly different from that during the filing period. (In Appeal No. 961483, *supra*, the Appeals Panel rejected evidence of ability to work that was provided prior to that claimant's last operation.) In the case under review, not only may the results of the test showing claimant's ability to lift be considered by the hearing officer, she could also consider the reasons given by Dr. V for saying that claimant could do no work (effect of a drug and pendency of a program) and compare those opinions to Dr. M's opinion as to the effect of such drug and to the length of time passed without completion of the program. The determination that claimant had some

ability to do some type of work during the filing period is sufficiently supported by the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge