APPEAL NO. 980201
FILED MARCH 9, 1998

This appeal is brought 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 29, 1997, with hearing officer. The appellant (claimant) and the respondent (carrier) stipulated that the filing period for the sixth quarter for supplemental income benefits (SIBS) began on April 13, 1997, and ended on July 12, 1997; that the filing period for the seventh quarter for SIBS began on July 13, 1997, and ended on October 11, 1997; and that during the filing periods for those two quarters the claimant did not work. The hearing officer determined that during the filing periods for the sixth and seventh quarters the claimant had some ability to work, that during those filing periods he did not make any job searches, that during the filing periods for the sixth and seventh quarters the claimant did not make a good faith effort to seek employment commensurate with his ability to work, that during those filing periods his unemployment was not a direct result of his impairment, and that the claimant is not entitled to SIBS for the sixth and seventh quarters. The claimant appealed, urging that the evidence established that he was unable to work during the filing periods for the sixth and seventh quarters and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for those quarters. The carrier responded, urging that the evidence is sufficient to support the decision of the hearing officer and requesting that it be affirmed.

DECISION

We affirm.

The claimant injured his low back on _____, and had surgery in March and September 1993. In February 1994 (Dr. JG) performed a discectomy and fusion at L4-5 and on June 6, 1994, Dr. JG indicated that claimant was not to work until further notice. In January 1995 the hardware was removed. Notes from Dr. JG state that as of June 25, 1996; September 23, 1996; March 21, 1997; and June 20, 1997, the claimant had chronic back problems and was unable to return to work. In another note, Dr. JG wrote "[a]s of July 15, 1997 patient is totally impaired due to his back pain. He has had four surgeries. No work at this time." The attorney representing the claimant sent eight questions with places to indicate "yes" or "no" to Dr. JG. The doctor indicated that the claimant had been unable to work from 1993 when he began treating the claimant to the present, that it was his intention that the claimant be totally off work because of chronic pain and disability, and that this was because of the injury he sustained on _____. One question asked "[i]s it correct that the restrictions on these off work slips were for no work whatsoever due to the four surgeries to [claimant's] back, the non-union and the resultant chronic pain." Dr. JG lined through the words after the comma, and checked yes. In a Specific and Subsequent Medical Report (TWCC-64) dated November 28, 1994, Dr. JG said that the fusion appeared to be fusing solidly throughout its length and in a TWCC-64 dated April 1, 1995,

stated that the claimant's fusion in the lumbar region remained solid. The doctor was also asked:

> Is it correct that you signed a document from Cascade Rehabilitation Counseling, Inc. [Rehabilitation Counseling], entitled "*Injured Worker's Employment Potential and Abilities*" on both January 29, 1997 and April 18, 1997, as these were things that [claimant] might be able to potentially do in the future after vocational rehabilitation services and his medical recovery, as the form suggests?

Dr. JG wrote "I do not recall this document."

(Ms. S), a case manager for Rehabilitation Services, testified that she met with Dr. JG on January 29, 1996; that the doctor said he did not believe in functional capacity evaluations and the claimant had work restrictions; and that Dr. JG completed a Rehabilitation Services form stating that claimant could not return to his previous occupation, that he could work light duty with a 40-pound lifting limit and no repetitive bending, and that claimant could benefit from vocational rehabilitation services. Ms. S testified that she again met with Dr. JG on April 18, 1997, and he again signed the same form and dated it that day. Two forms containing the information and dates are in evidence.

In a note dated September 10, 1997, (Dr. HG) said that the claimant was off work indefinitely and was permanently disabled. In a report dated September 18, 1997, Dr. HG stated that his impression was muscle spasm, radicular back pain on the left, and myalgia; that he prescribed Ultram, Lodine, and Lortrab; and that claimant would have a physical therapy evaluation and return in one week.

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 Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated "claimant's inability to do any work must be supported by medical evidence or must be so obvious as to be irrefutable (the employee is completely bedridden)." In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally.

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 resolves conflicts and inconsistencies in the testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations that during the filing periods for the sixth and seventh quarters the claimant had some ability to work and that he is not entitled to SIBS for those quarters, that he did not in good faith seek employment commensurate with his ability to work, and that his unemployment is not a direct result of his impairment are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. 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). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Christopher L. Rhodes
Appeals Judge