

APPEAL NO. 990095

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 17, 1998. The issues at the CCH were whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the 12th compensable quarter of June 16 through September 14, 1998, and for the 13th compensable quarter of September 15 through December 14, 1998. The hearing officer determined that the claimant was not entitled to these benefits. The claimant appeals certain findings of the hearing officer and argues that she was unable to work during the filing period for the compensable quarters in question. The respondent (carrier herein) replies that there is sufficient evidence to support the hearing officer's finding that the claimant had an ability to work during the relevant filing periods and objects to the claimant attaching material not in evidence to her request for review.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The carrier argues that we should not consider the article that the claimant attaches to her request for review concerning fibromyalgia. The claimant states she is attaching this because the carrier has disputed the relationship of her rheumatology problem to her injury.

First, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The carrier argues that the claimant has not shown that the material she attaches to her appeal was not available at the time of the CCH. We agree, and therefore, will not consider this evidence offered for the first time on appeal.

The parties stipulated that the claimant sustained a compensable injury to her hands, arms, shoulders, and neck, which later resulted in a 19% impairment rating (IR). The parties also stipulated that the carrier had contested the compensability of the rheumatology problems in those body parts; that the claimant received SIBS for the first 11 compensable quarters and that the filing period for the 12th compensable quarter began on March 17, 1998.

The claimant testified that she had returned to work part time from July 1997 through February 1998, but that due to increased pain she became unable to work. The claimant testified that after she stopped working in February 1998, she did not look for further

employment. Medical evidence indicated that Dr. G, the claimant's treating doctor, stated in a medical report dated November 11, 1997, that the claimant was capable of light duty. Dr. G restated this opinion in medical reports dated April 14 and June 30, 1998, although in the June 30th report Dr. G referenced a functional capacity evaluation that showed a "capability of sedentary to light level work."

The claimant testified that Dr. G referred her to Dr. H. Dr. H stated as follows in a note dated September 10, 1998:

[The claimant] is off work for therapy of her neck. She is unable to work due to severe neck pain. She will be seen & evaluated in 1 week for return to work.

Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

An employee is entitled to [SIBS] if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

- (1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the impairment income benefit under Section 408.128; and
- (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The fact that the claimant met the first and third of these requirements was established by stipulation. The hearing officer found that the claimant met the second requirement, and since this finding was not appealed by either party, it has become final pursuant to Section 410.169. This appeal revolves around whether the hearing officer erred by finding that the claimant did not meet the fourth requirement. We have previously held that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight

and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, 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." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool v. Ford Motor Co., *supra*; Cain v. Bain, *supra*.

In the present case, the hearing officer's finding that the claimant had an ability to work during the filing period in question is not contrary to the overwhelming evidence. It was the duty of the hearing officer to resolve conflicts in the evidence and to determine what weight to give the evidence.

The decision and order of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge