APPEAL NO. 990099

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 17, 1998. The appellant (claimant) and the respondent (carrier) stipulated that the filing period for supplemental income benefits (SIBS) for the seventh quarter began on February 5, 1998, and ended on May 6, 1998, and that during that filing period the claimant did not seek employment and did not earn wages. Whether the claimant is entitled to SIBS for the seventh quarter depended on whether during the filing period the claimant had some ability to work. The hearing officer found that during the filing period the claimant had some ability to work with limitations and concluded that the claimant is not entitled to SIBS for the seventh quarter. The claimant appealed, contending that the evidence established that he had no ability to work during the filing period and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the seventh quarter. The claimant did not serve a copy of his appeal on the carrier at its proper address; the Texas Workers' Compensation Commission sent a copy of the claimant's appeal to the carrier; and it timely responded to the claimant's request for review, urging that the evidence is sufficient to support the decision of the hearing officer and requesting that it be affirmed.

DECISION

We affirm.

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 that the claimant's inability to do any work must be supported by medical evidence

The medical evidence on the ability of the claimant to work during the filing period is in conflict. A report on an MRI of the cervical spine dated September 18, 1995, states:

> Prominent broad-based bulge seen at C4-C5 with abutment to the cord. This flattens the cord somewhat. Findings are compatible with broad-based herniation. No significant encroachment upon the lateral recess or neural foramen are seen at this level.

> At the C3-C4 level there is a small central protursion present. This is thought to represent annular bulge but small central herniation cannot completely be excluded. Again, no lateralizing component or foraminal encroachment is identified. Remaining levels are unremarkable.
>
> No element of spinal stenosisis or mass within the neural canal is seen. Cord signal is normal without syrinx or tonsillar herniation.

The claimant testified that he has not had surgery and that his condition continues to become worse. In a note dated November 26, 1997, Dr. B, the claimant's treating doctor, stated that the claimant has acute lumbar/sacral and cervical strain and is unemployable and unable to work. In a letter to the carrier dated December 11, 1997, Dr. B said that a functional capacity evaluation (FCE) was performed on December 4, 1997, that his arm lift is approximately 17 pounds, that his physical demand characteristics are limited to light at 1-10 pounds, and that he has limited lumbar and cervical range of motion (ROM); referred to the report of the MRI of the cervical spine quoted from earlier in this decision; and stated that the claimant definitely cannot work in any capacity because of those abnormalities which have been demonstrated radiographically and physiologically. In a note dated March 2, 1998, Dr. B wrote that the claimant has limited ROM due to degenerative changes, that he cannot lift over 10 pounds, and that he cannot work. In follow-up visit notes in the spring and summer of 1998, Dr. B recorded that the claimant complained of severe headaches and pain in the cervical and lumbar areas and in his right leg. In a letter to a Texas Workers' Compensation Commission ombudsman dated August 21, 1998, Dr. B answered questions by stating that he had not released the claimant to any type of employment with restrictions, that the claimant is not capable of employment, and that he never expects the claimant to return to the workforce.

Dr. S examined the claimant at the request of the carrier in September 1995 and reported that the claimant had reached maximum medical improvement with a zero percent impairment rating. In a letter dated March 14, 1997, Dr. S said that an FCE was performed on that day; commented on the claimant's heart rate not increasing during tests in which it would be expected that it would; and wrote:

> As far as work capabilities, this examinee demonstrates today, the ability to perform work in the Dictionary of Occupational Titles Categories of Sedentary and Light. I also feel he could perform work in the DOT Category of Medium, which would allow for frequent lifts of up to 25 pounds and occasional lifts of up to 50 pounds. He does not demonstrate the ability to lift that heavy on testing today, but I have reason to believe that he is not giving a good effort on testing, and certainly is not being honest in his report of his condition. Overall, this examinee demonstrates poor validity on testing.

In a letter to the carrier dated December 13, 1997, Dr. G said that he reviewed the December 1997 FCE that Dr. B had performed; that he does not think that the figures in the report of the FCE reflect someone who is totally disabled or cannot work in any capacity;

and that in his experience, the injuries of the claimant would not normally cause someone to be totally disabled from any type of work. In a letter to the carrier dated August 7, 1998, Dr. B stated that the claimant's FCE results were better than they were approximately one year ago; that his aerobic average is not consistent with a sedentary lifestyle the claimant said that he had; that the claimant did not give maximum effort on testing; that he can definitely work in the medium category; and that he should return to work with lifting restrictions immediately.

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. 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). In a case such as the one before us where both parties presented evidence on the ability of the claimant to work during the filing period, the hearing officer must look at all of the relevant evidence to make a factual determination and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determination of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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's determinations that during the filing period for the seventh quarter the claimant had some ability to work and that he is not entitled to SIBS for that quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 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 judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Elaine M. Chaney
Appeals Judge