APPEAL NO. 990144

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 29, 1998. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13th compensable quarter. The hearing officer found that the claimant was entitled to these benefits. The appellant (carrier) files a request for review, arguing that there was insufficient evidence to support some of the findings of the hearing officer, including findings by the hearing officer that the claimant was unable to work and searched in good faith for work commensurate with his ability to work during the filing period for the 13th compensable quarter. The claimant responds that the findings and the decision of the hearing officer are supported by the evidence.

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 parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on November 15, 1994, with a 16% impairment rating (IR); that the claimant did not commute any portion of his impairment income benefits; that the 13th compensable quarter started on October 15, 1998, and would end on January 13, 1999; and that the filing period for the 13th compensable quarter started on July 16 and ended on October 14, 1998.

The hearing officer summarizes and extensively quotes from the medical evidence in his decision. We will not repeat all of that here, but do adopt the hearing officer's statement of the evidence for purposes of this decision. This evidence showed that the claimant underwent a C6-7 anterior cervical fusion on May 10, 1994. It also shows that the claimant has continued to have symptoms; that an additional surgery has been recommended; and the spinal surgery process had been invoked to determine whether the carrier would be liable to pay for a second surgery.

The claimant underwent a functional capacity evaluation (FCE) on June 25, 1998, which concluded that the claimant was capable of modified light work. The claimant was released to work by Dr. B, the carrier's doctor, based on this FCE. Dr. G, the claimant's surgeon, stated in letters of October 23, 1998, and December 11, 1998, that the claimant was totally unable to work and had been totally unable to work since _____, detailing the reasons for this opinion. Ms. B, the occupational therapist who performed the FCE, stated as follows in a letter to the carrier dated November 13, 1998:

> Per the client's demonstrated capabilities, he is not a candidate for gainful employment. Because of the client's limited capabilities and continued complaints of pain, I am in agreement with [Dr. G's] assessment that [the

claimant] is permanently and totally disable from pursuing gainful employment based on his continued significant medical problems, complaints of pain and functional limitations.

The hearing officer summarized the evidence concerning the claimant's job search as follows:

> After learning that he had been released to work, the Claimant made some efforts to obtain employment. Admittedly, the efforts were focused in the latter part of the filing period. According to Claimant's Exhibit 5, the Claimant contacted approximately six potential employer's during the filing period. (See Claimant's Ex. 5) The Claimant also pursued various opportunities to work in his own home. (See Claimant's Ex. 4) Additionally, the Claimant contacted the Texas Workforce Commission [TWC]. According to the [TWC], the Claimant reviewed many job opportunities on several occasions. (See Claimant's Ex. 7) One reasonable interpretation of the evidence suggests that the Claimant worked diligently with the TWC in an effort to obtain employment. The record also indicates that the Claimant has worked with the Texas Rehabilitation Commission in an effort to obtain suitable retraining and/or employment. (See Claimant's Ex. 8)

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

2. The Claimant experienced significant lasting effects from the injury and is unable to return to his former employment.

3. The Claimant was unemployed during the filing period.

4. The Claimant's unemployment was a direct result of the impairment from his compensable injury.

5. The Claimant was "totally unable to work" during the filing period and therefore was not required to seek employment.

6. In the alternative, the Claimant had some limited ability to work and looked for employment commensurate with that ability.

7. The Claimant made a good faith effort to obtain employment, commensurate with his ability.

CONCLUSION OF LAW

1. The Claimant is entitled to [SIBS] for the thirteenth quarter.

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. This case revolved around whether the claimant met the second and fourth of these requirements. We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his impairment are questions 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 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 Appeal No. 951204, September 6, 1995; Pool, *supra*; Cain, *supra*.

The carrier contends that the hearing officer's Findings of Fact Nos. 4, 5, 6, and 7, quoted above, were not supported by the evidence. As to Finding of Fact No. 5, the carrier argues that all the medical evidence during the filing period indicated that the claimant could work and that all evidence of inability to work was outside the filing period. We note that we have never said that the hearing officer may not look to medical evidence outside the filing period. Further, in this case, the medical evidence cited by the hearing officer from Dr. G and Ms. B, while consisting of documents written outside the filing period, expresses opinions that relate to the claimant's ability to work during the filing period. Finally, we think the hearing officer quite properly considered Ms. B's clarification of her opinion. To have merely considered the FCE report prepared during the filing period and to not consider evidence clarifying that same report just because the clarification was prepared outside the filing period would have reduced what should be a serious search for truth to a mere game.

Nor do we find the carrier's argument that there is an inconsistency between Findings of Fact Nos. 5 and 6 persuasive. We note that Finding of Fact No. 6, quoted above, in its terms, is stated as an alternative finding. Just as parties may take alternative positions in pleading and argument, we see nothing to preclude a hearing officer from making alternative findings. In fact, such findings, in this particular case, merely reflect a serious consideration of some of the conflicting evidence in the case.

We find that the evidence from Dr. G and Ms. B supports the hearing officer's finding that the claimant was unable to work during the filing period. This alone is sufficient to support a finding that the claimant made a good faith effort to seek employment. Even were this not the case, we would find no error in the hearing officer's determination that the claimant made a good faith effort to obtain employment commensurate with his ability. While the carrier points to the number of job searches and the timing of these job searches,

we repeatedly stated, as the carrier recognizes in its appeal, that there is no minimum number of job searches required to meet the good faith criterion. Also, while the timing of the job search is a factor the hearing officer may consider, it would be impossible for there to be an exact requirement as to the timing of the job searches without a corresponding minimum number of searches required. *See* Texas Workers' Compensation Commission Appeal No. 972482, decided January 15, 1998.

While the carrier states that it is challenging Finding of Fact No. 4, it does not present any arguments dealing specifically with how the hearing officer erred in finding that the claimant's unemployment during the filing period was not a direct result of his impairment. Nor does the carrier challenge Finding of Fact No 2, quoted above, which, based on our prior holdings,[1] would provide a sufficient factual basis for Finding of Fact No. 4.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur because of Dr. G's December 1998 statement that said claimant has not been capable of working since his injury, which may be credited by a fact finder even though it is very broad. I do not agree to affirm based on Ms. B's recitations about "gainful employment," whatever that is. Similarly, I do not affirm based on Dr. G's October 1998 statement which said claimant cannot do "meaningful work" (which also is not set forth in the 1989 Act), in part because of his age.

_____
Joe Sebesta
Appeals Judge

[1] We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995.