APPEAL NO. 990203

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 January 6, 1999. The issue at the CCH was whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the 13th and 14th compensable quarters. The hearing officer determined that the claimant was not entitled to these benefits, finding that the claimant had an ability to work during the filing periods for these quarters, but did not attempt in good faith to obtain employment commensurate with that ability. The hearing officer also found that the claimant's unemployment was not a direct result of her impairment. The claimant appeals, contending that these determinations were contrary to the evidence. The claimant also contends that the hearing officer erred in considering evidence outside the filing period, in excluding a claimant exhibit and in not keeping the record open to allow admission of other evidence. The respondent (carrier herein) responds that the determinations of the hearing officer were supported by the evidence. The carrier also argues there was no error in the hearing officer's evidentiary ruling, and even were there error, such error was harmless error.

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 hearing officer summarizes the facts of this case in his decision and we adopt his rendition of the evidence. We also note that some of the evidence is similar, particularly that dealing with the background of the claimant's injury, to the evidence we considered in Texas Workers' Compensation Commission Appeal No. 982318, decided November 12, 1998 (Unpublished), in which we affirmed a finding by a hearing officer that this claimant was not entitled to SIBS for the 11th and 12th compensable quarters. Having adopted the hearing officer's rendition of the evidence, we will only briefly outline the evidence most germane to the present appeal. This includes the fact that the parties stipulated that the claimant reached maximum medical improvement on October 13, 1994, with a 15% whole body impairment rating (IR); that the claimant did not commute the impairment income benefits; that the filing period for the 13th compensable quarter was from May 22, 1998, through August 20, 1998, inclusive; that the 13th compensable quarter was from August 21, 1998, through November 19, 1998, inclusive; that the filing period for the 14th compensable quarter was from August 21, 1998, through November 19, 1998, inclusive; that the 14th compensable quarter was from November 20, 1998, through February 18, 1999, inclusive; and that during the filing periods for the 13th and 14th compensable quarters the claimant never earned wages, for at least 90 days, that were at least 80% of the claimant's average weekly wage (AWW).

The claimant testified that she was employed as an automobile salesperson on _____, when she slipped and fell on ice, injuring her back and legs. The claimant testified that during the filing periods for the 13th and 14th quarters she was only

able to work a few hours per day. The claimant testified that during the filing period for the 13th compensable quarter she sought employment on six occasions without receiving a job offer and during the filing period for the 14th compensable quarter she sought employment on eight occasions without success. The claimant testified that her ability to work is severely restricted by her injury and that she is unable to return to her preinjury work.

The claimant presented evidence from Dr. G, a psychiatrist, that she is totally disabled. Dr. Gu had released the claimant to return to work in 1996 and she did return to work for a period of time in 1996 at her preinjury job. Dr. P, a doctor who over the years had examined the claimant at the request of the carrier, testified that the claimant is capable of working and is capable of returning to her preinjury employment.

The carrier presented a surveillance film of the claimant engaged in various activities. Mr. R, the investigator who made the surveillance film testified that he observed the claimant for several days and observed her picking up large bags, shopping for up to six hours at a time, balancing on one foot while trying on shoes, bending down, loading bags on a cart, and climbing stairs. Mr. B, one of the prospective employers with whom the claimant testified she applied for employment during the filing period for the 13th compensable quarter, testified that claimant approached him and stated that she knew he would not hire her, but that she wanted to fill out an application. Mr. B testified that employment was available at the time the claimant applied but that the claimant's attitude indicated to him that the claimant was not really seeking employment.

The claimant sought to put into evidence medical records that were excluded by the hearing officer based on an objection that they were not timely exchanged and good cause was not shown for the failure to timely exchange them. The claimant also requested that the record be kept open to allow her to put a videotape into evidence that showed that the locations at which she was shown in the carrier's surveillance film were in close proximity to one another. The hearing officer denied this motion on several grounds including that this videotape would be cumulative to the claimant's testimony that the locations in question were in close proximity.

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 [AWW] 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 for the hearing officer to resolve. 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).

Applying this standard, we do not find the determinations by the hearing officer that the claimant did not attempt in good faith to find employment commensurate with her ability to work during the filing periods in question and that the claimant's unemployment during the filing periods was not a direct result of her impairment to be contrary to the overwhelming evidence. There was certainly conflicting evidence concerning these matters, but these were factual conflicts for the hearing officer to resolve. We find no basis to overturn them as a matter of law.

Nor do we find reversible error in the hearing officer's evidentiary rulings about which the claimant complains on appeal. Evidence that is not timely exchanged is subject to exclusion unless good cause is established. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.13(c). We find no legal basis for overturning the hearing officer's ruling. As far as the request to keep the record open to allow admission of the claimant's videotape, we note that the claimant testified extensively about the proximity of the locations at which she was videotaped in the surveillance film. As cumulative evidence, we find any error in

not holding the record open to allow its admission harmless. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Elaine M. Chaney
Appeals Judge