APPEAL NO. 990221

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 982468, decided November 23, 1998. We remanded the case so that the hearing officer could reconsider the evidence in the record in light of our decision in Texas Workers' Compensation Commission Appeal No. 982222, decided October 22, 1998. On remand the hearing officer issued a revised decision based on the evidence taken at the original contested case hearing (CCH) which was held on September 14, 1998. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. The hearing officer concluded that the claimant was not entitled to these benefits because he did not make a good faith effort to obtain employment commensurate with his ability to work during the filing period. The appellant files a request for review challenging certain findings of fact and the hearing officer's conclusion that the claimant was not entitled to SIBS for the fourth compensable quarter. The claimant also argues that even though the hearing officer had removed findings concerning the claimant's failure to speak, read and write English, the hearing officer's previous decisions regarding the claimant show that this is still the primary reason behind the hearing officer's decision that the claimant is not entitled to SIBS. The claimant also complains of the hearing officer's finding in regard to "cold calls" and contends that the hearing officer's findings regarding his physical limitations and his job search are contradictory. Finally, the claimant argues that testimony from the respondent's (carrier) witness, who is also the carrier's employee, that few of his job contacts could be confirmed ignored the evidence that these job contacts were made. The carrier responds, contending that the decision of the hearing officer should be affirmed.

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.

Since no additional evidence was taken we adopt the following summary of evidence from our decision in Appeal No. 982468, *supra*:

> It was undisputed that the claimant suffered a compensable injury on _____. The parties stipulated that the claimant reached maximum medical improvement on November 26, 1996, with a 16% impairment rating (IR); that the fourth compensable quarter began on July 29 and ended on October 27, 1998; and that the claimant had not returned to work earning at least 80% of his preinjury average weekly wage (AWW) during the filing period for the fourth compensable quarter. The claimant testified through a translator. The claimant described his job search and testified that he would take one of his children with him when searching so they could translate, as his English is not very good. The claimant testified that he sought employment at the 95 places of employment listed on his Statement of Employment Status (TWCC-

52). Mr. G, who was employed by the carrier to check on the claimant's job contacts, testified that he was unable to confirm a number of the employers the claimant listed as contacting and that a number of the employers listed on the claimant's TWCC-52 were employers that the claimant had listed in previous quarters. Both parties submitted medical evidence concerning the claimant's medical treatment and physical condition from the compensable injury.

The claimant argues that the following findings of fact and conclusion of law by the hearing officer are supported by insufficient evidence or are contrary to the great weight and preponderance of the evidence:

FINDINGS OF FACT

2. Claimant has always worked as a common laborer, generally in medium to heavy jobs.

3. Claimant listed sixty (60) cold call job contacts during the filing period for the fourth compensable quarter on his form TWCC-52.

* * * *

5. The employers contacted have medium to heavy manual labor similar to the labor Claimant previously performed.

6. Claimant has lifting restrictions as a result of the compensable injury, limiting him to medium labor, lifting no more than fifty pounds (50) on a repetitive basis.

* * * *

8. Claimant did not obtain employment during the three previous filing periods using a cold call job search.

9. Only a few of the job contacts were confirmable by Carrier.

10. Claimant contacted a number of employers he had contacted in previous filing periods which did not have light or medium duty and indicated they did not want to hire Claimant because of his injury.

11. Claimant was offered a job with Insulation, Inc. but did not complete the pre-employment screening and return to the company.

12. Claimant had forty-eight days when he listed only one employer contacted.

13. A number of the contacts listed by Claimant did not include correct phone numbers and a number were not at the address given by Claimant or were no longer in business at that address.

14. Claimant did not properly complete job applications at the employers who would accept applications.

15. Claimant's 3rd and 4th quarter Forms TWCC-52 had overlapping days and the employers contacted were not consistent between the two applications.

16. A preponderance of the evidence indicates Claimant did not make all the job contacts listed on his Form TWCC-52 for the 4th compensable quarter.

17. Claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the filing period for the fourth compensable quarter.

CONCLUSION OF LAW

3. Claimant is not entitled to [SIBS] for the fourth compensable quarter starting July 29, 1998 and ending October 27, 1998.

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 [IIBS] 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 [IIBS] 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 of these requirements was established by stipulation. We previously held in Appeal No. 982468, *supra*, that the hearing officer's

finding the claimant met the second requirement had become final pursuant to Section 410.169. It was undisputed that the claimant met the third requirement of Section 408.142(a). This case on appeal revolves around whether the claimant met 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). This is so even though another fact finders might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Applying this standard we find sufficient evidence to support the challenged findings of the hearing officer. While the claimant argues that the hearing officer made these findings for reasons other than the reasons stated in his decision, we will not presume that this is the case. Nor does the hearing officer anywhere state that he does not consider "cold calls" to be a valid form of job search. It appears from his finding that his decision turned on his belief that the claimant did not conduct as extensive a job search as he claimed and that the job search the hearing officer believed the claimant conducted was insufficient to constitute a good faith effort to find employment commensurate with his ability to work. This involved weighing the evidence and judging the credibility of witnesses. We will not reweigh the evidence. There is no basis to overturn the hearing officer's decision as a matter of law in light of the standard of review discussed above.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge