APPEAL NO. 990276

This appeal arises 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 30, 1998. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 14th quarter; that the claimant's compensable injury, a repetitive trauma injury to the ulnar and median nerves of both upper extremities, is a producing cause of the claimant's left carpal tunnel syndrome (CTS) and left ulnar nerve entrapment; and that the claimant's compensable injury is not a producing cause of bilateral epicondylitis, bilateral tenosynovitis, cervical sprain, cervical outlet syndrome, reflex sympathetic dystrophy, and allergies, as a result of taking anti-inflammatory medications. In her appeal, the claimant argues that the hearing officer's determinations that she had some ability to work in the relevant filing period, that she did not make a good faith job search commensurate with her ability to work, and that she is not entitled to SIBS for the 14th quarter are against the great weight and preponderance of the evidence. In its response, the respondent (carrier) urges affirmance. The claimant did not appeal the hearing officer's determinations that her compensable injury was not a producing cause of bilateral epicondylitis, bilateral tenosynovitis, cervical sprain, cervical outlet syndrome, reflex sympathetic dystrophy and allergies relating to her use of anti-inflammatory medications.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to her right and left wrists on _____; that she was assigned an impairment rating of 15%; that she did not commute her impairment income benefits; and that the 14th quarter ran from September 1 to November 30, 1998. The claimant testified that she has extensive problems with pain, weakness and swelling in her hands, wrists, elbows, upper arms and shoulders. She stated that she has difficulty grasping fine things with her hands, writing with a pen, and lifting/holding things that are large or heavy. She stated that she did not look for work in the filing period because the function she has remaining in her upper extremities has to be used to feed herself and attend to the activities of daily living. She explained that she "can't use her hands effectively, predictably or productively even in the pursuit of private interests" and that she worked with the Texas Rehabilitation Commission (TRC) until a consensus decision was reached that her limitations were so severe that she could not be "placed in the work world."

In a Specific and Subsequent Medical Report (TWCC-64) dated December 24, 1997, Dr. A, the claimant's treating doctor, stated:

> [Claimant] still has significant difficulties with her day to day activities. She is unable to open doors without significant pain; unable to drive; unable to do paperwork; unable to do personal hygiene without suffering severe pain and incapacitation. In her current condition, I feel that she is unemployable on a regular basis. Based upon her FCE [functional capacity evaluation] she is able to lift 0 lbs. from floor to knuckle, to shoulder level, to overhead. She is

> unable to carry, push or pull anything with limits of zero. She is able to sit and stand constantly. She is able to occasionally bend, squat, kneel, climb, reach and drive. She is unable to use arm controls. She is able to use foot controls on a light basis. She is able to only occasionally grasp, fine manipulation or push/pull with her hands. She is only able to work at a sedentary level.

In a letter of July 15, 1998, Dr. A stated that the claimant suffers from chronic CTS such that "any simple activities of daily living will incapacitate her to the point that she is not able to do personal hygiene, dress herself, drive her car, or even open doors." Dr. A concluded that it was "medically necessary that she be provided with household services to assist her in her activities of daily living, as well as the care of her home." Finally, in a "To Whom it May Concern" letter of December 23, 1998, Dr. A noted that the claimant's cumulative trauma injury has "affected the biomechanical function of her upper extremity which has resulted in physical limitations at her elbow and shoulder that continue to affect her day-to-day activities even at home."

Dr. H examined the claimant at the request of the carrier. In his report of December 21, 1997, Dr. H opined that the claimant could work in a "highly sedentary position with minimal lifting and no repetitive tests [sic] and no vibrating machinery, as the best case scenario." An October 7, 1996, FCE indicated that the claimant is able to work at the sedentary physical demand level. The FCE report noted that the claimant "display[ed] significant limitations which are based on both objective physical findings and her own perceived limitations." The carrier also introduced a letter from the claimant's counselor at the TRC which states that her vocational rehabilitation case was closed due to "refused services." That letter also noted that the claimant's "condition has increased her limitations to a degree that she has requested her case be closed until she is able to participate in employment program." The claimant denied that she had refused the services of the TRC, insisting that the decision to close her file had been a "consensus decision."

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 addition, we have stated that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. 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 decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the testimony and evidence. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its

judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain her burden of proving that she had no ability to work in the filing period at issue. It was the hearing officer's responsibility as the fact finder to consider the conflicting evidence before him, concerning the claimant's work status, and to determine whether that evidence was sufficient to demonstrate inability to work. The hearing officer made a specific finding that the claimant had the ability to do "sedentary type work with further restrictions of limited repetitive use of the hands and forearms." He was acting within his province as the sole judge of the weight and credibility of the evidence in so finding. The claimant acknowledged that she made no job search efforts in the filing period. Our review of the record does not demonstrate that the hearing officer's determinations that the claimant had some ability to work in the filing periods, that she did not make a good faith job search commensurate with that ability, and, therefore, that she is not entitled to SIBS for the 14th quarter are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge