APPEAL NO. 990377

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 January 26, 1999. The respondent (claimant) did not earn any wages and did not attempt to obtain employment during the filing period for supplemental income benefits (SIBS) for the 13th quarter, from July 14, 1998, through October 14, 1998. Whether the claimant is entitled to SIBS for the 13th quarter depended on whether he had some ability to work during the filing period. The hearing officer determined that during the filing period the claimant "was disqualified from employment generally" and is entitled to SIBS for the 13th quarter. The appellant (carrier) requested review, contended that the medical evidence established that the claimant had an ability to work during the filing period, urged that the hearing officer erred in determining that the claimant had no ability to work during the filing period, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the 13th quarter. The claimant responded, urged that the medical evidence is sufficient to establish that the claimant had no ability to work during the filing period, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

Dr. L performed a right hip replacement in 1993. In a Specific and Subsequent Medical Report (TWCC-64) dated October 2, 1998, Dr. L stated that the claimant reported pain and instability in the hip and walked with a cane, diagnosed intermittent subluxation, recommended a trial of physical therapy before considering revision surgery, and opined that the claimant was totally disabled. Dr. E performed a decompression discectomy and fusion with instrumentation at L4-5 and L5-S1 on February 18, 1997. In a letter to the third party administrator handling the claim dated October 6, 1998, Dr. E stated that the claimant was seen on October 1, 1998; that his back and leg pain was increasing; that examination showed increased pain with straight leg raising on the left side; that the claimant's nerve root tension signs were more pronounced than they had been in the past; that he continued to have disabling pain in his back and left buttock; that he has difficulty standing and walking and can carry zero pounds; that that does not put him in the DOT sedentary work category; that the claimant is totally disabled and cannot perform any type of job; that the current level of pain and documented structural abnormalities also impede the claimant's ability to work; that he continues to require medication; that he, Dr. E, makes another request for pre-authorization for an MRI; and that he does not want the claimant to try any type of work pending further evaluation and possible revision surgery. In a letter dated December 21, 1998, Dr. E said that the claimant had marked limitation in range of motion in his spine; that he recommended that the claimant not bend, twist, or lift more than 25 pounds; that it is possible that the claimant may require further surgery; that it is not reasonable for the man to return to the workforce; that the claimant was totally disabled and could not do any work; and that this condition existed from August 1998 to the present.

Dr. F examined the claimant at the request of the carrier. In a report dated February 17, 1998, Dr. F stated that the claimant is worse than he was before he had the back surgery; that the claimant is probably limited to sedentary duty; and that the situation is tragic with little hope for any improvement. In a letter dated April 13, 1998, Dr. F stated that he reviewed a job listing that was submitted to him and that he thought that the claimant could perform five of the eight jobs. A report of a functional capacity evaluation (FCE) dated July 22, 1998, states that the claimant had a total hip replacement on the right and a two-level lumbar fusion with hardware and that he was unable or unwilling to perform or complete a number of tests such as squatting, kneeling, crawling, and bicycle riding because of pain. In a letter to Dr. N forwarding the report of the FCE, the two physical therapists stated the following impression:

> Due to the multiple complaints expressed throughout testing, it is difficult to determine an accurate work level at this time. Based on his performance during the [FCE], [claimant] demonstrated the ability to lift up to 10 lbs. occasionally, 5 lbs. frequently, 2lbs. constantly and carry 00 lbs. According to the DOT, this places him at the sedentary level work category; exerting force up to 10 lbs. on an occasional basis.
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> [Claimant's] ability to function throughout testing was significantly limited secondary to lumbar pain.

In a letter to the carrier dated July 23, 1998, Dr. N stated that the claimant had a total hip replacement; that the cup is probably loose; that he had a very, very scanty fusion with probable pseudoarthrosis; and that the facet joints at L4-5 and L5-S1 were still open. Dr. N also included the quotation from the letter of the physical therapists set forth earlier in this 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 Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. In Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997, the Appeals Panel cited earlier decisions and stated that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information

concerning the claimant's physical limitations and restrictions and that "bald statements" of an inability to work are of limited use in assessing whether a claimant can work during the filing period because of a lack of any discussion of the nature of and the reasons for the claimant's inability to work. In Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996, the Appeals Panel stated that its comments about medical evidence being more than conclusionary did not establish a new or different standard of appellate review and that a finding of no ability to work is a factual determination which is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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 disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are 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 the claimant was disqualified from employment generally and that he is entitled to SIBS for the 13th 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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Philip F. O'Neill
Appeals Judge

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Elaine M. Chaney
Appeals Judge