APPEAL NO. 990416

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 February 1, 1999. The issues at the CCH were impairment rating (IR), average weekly wage (AWW), and entitlement to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer concluded that the appellant/cross-respondent (claimant herein) had a 15% IR based upon the report of a designated doctor selected by the Texas Workers' Compensation Commission (Commission); that the claimant had an AWW of $455.36 based upon a wage statement; and that the claimant was not entitled to SIBS for the first compensable quarter because she failed to establish that during the filing period for this quarter that she made good faith efforts to seek employment commensurate with her ability to work. The claimant appeals the hearing officer's determinations as to AWW and entitlement to SIBS, contending that the wage statement did not accurately reflect her wages and her doctors stated she was unable to work during the filing period for the first compensable quarter. The respondent/cross-appellant (carrier herein) responds, contending that there is sufficient evidence to support the hearing officer's AWW and SIBS determinations. The carrier also files an appeal of the hearing officer's IR determination, contending that the designated doctor assessed impairment for the claimant's thoracic spine which was not part of the claimant's compensable injury. There is no response to the carrier's appeal from the claimant in the appeal file.

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.

Neither party disagreed with the following statement of the evidence in the hearing officer's decision which we adopt:

> [The claimant] said she conducted telephone surveys for Employer. She said how she was paid depended on the job. On some jobs they were paid as they went, and on others only when the job was completed. [The claimant] said the rate of pay varied by the job. Jobs paid $13.00 to $19.00 an hour. [The claimant] aid [sic] she tripped over a telephone cord at work on _____ and injured her hip, shoulder, legs, back, and neck. She said she saw [Dr. K] once on referral, and treats with [Dr. D] and [Dr. A]. She said those doctors have not let her go back to work, and she cannot work. [The claimant] said she is limited in standing and sitting. [The claimant] said she presently was unable to work, and did not look for any work and did not earn any wages. [The claimant] said she worked some after the injury and provided that wage information to the carrier and the carrier used it to calculate benefits--a figure more than the wage statement provided by the Employer. [The claimant] said Dr. B [sic, should be B] [Dr. B] examined her once, and assigned a 15% whole body [IR]. [The claimant] said she agreed with that rating.

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

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   a. On November 1, 1995 the Claimant was the employee of (employer).

   b. On November 1, 1995 Employer had workers' compensation insurance with [the carrier].

   c. Venue is proper in the (city 1 Field Office) of the [Commission].

   d. Carrier accepted liability for the _____ injury to the Claimant.

   e. [Dr. B] served as a commission designated doctor.

   f. Claimant did not elect to commute any portion of Impairment Income Benefits.

   g. The first compensable quarter is from September 21, 1998 through December 20, 1998.

2. On _____ Claimant slipped and fell while working for Employer. Before _____ Claimant worked as a telephone surveyor for Employer, Claimant's job duties required her to use a phone and prepare reports. Claimant had no surgery from the _____ injury.

3. Claimant worked for at least thirteen consecutive weeks of 30 hours a week or more for Employer before _____.

4. On October 6, 1996 the Employer filed a wage statement with the commission that showed Claimant earned total wages of $5919.70 and worked 397.25 hours in the 13 weeks before November 1, 1995, for an arithmetic average of $455.36 per week.

5. Claimant worked after _____ and, at times, earned more than $455.36 a week.

6. [Dr. B] examined Claimant on June 22, 1998. At the time of the examination [Dr. B] had appropriate medical records before her and was not aligned with either the Clamant [sic] or the Carrier. [Dr. B]

assigned an impairment rating of 15%. [Dr. B] found no localized neurological deficits and assigned no impairment for neurological loss. [Dr. B] disallowed any impairment for loss of range of motion in the lumbar, and cervical areas of the spine based on her clinical observation that Claimant's functional movement did not correlate with her measured motions. [Dr. B] assigned impairments of 6%, 2%, and 7% for specific disorders in the cervical, thoracic, and lumbar spine. [Dr. B] suggested an impairment rating under DSM-IIIR might also be appropriate.

7. [Dr. Ag] reviewed [Dr. B's] report and opined that 0% impairment for loss of motion was appropriate. [Dr. Ag's] opinion was that impairments for specific disorders in the lumbar and cervical spine should be evaluated under category II-B rather than II-C, and that those should be 4% and 5% respectively. [Dr. Ag] stated, the 2% impairment for the thoracic spine was appropriate if it is compensable. [Dr. Ag] stated that the appropriate apportionment would be to deduct the 11% from the 15%, for contribution for what he perceived to be a preexisting condition.

8. The commission requested [Dr. B] to review the report of [Dr. Ag].

9. On October 30, 1998 [Dr. B] responded that, in her medical judgment, category II-C in the cervical and lumbar area was appropriate, and that the impairment rating was 15%.

10. [Dr. B's] determination that Claimant's impairment is 15% is not against the great weight of other medical evidence.

11. [Dr. D] and [Dr. A] treat Claimant for symptoms from her_____ injury. Claimant is under a pain treatment regime by [Dr. A]. On November 30, 1998 [Dr. A] wrote claimant has significant headache, paraspinal spasm, and back tenderness. [Dr. A] noted that Claimant is unable to sit, stand, lay, or walk for periods of time longer than 5-10 minutes, and did not believe that she could return to work until those matters were controlled. A functional capacity evaluation in January 1997 showed that Claimant had some ability to work at a sedentary capacity, although the number of hours per day was not stated. Claimant's doctor's reports do not disqualify Claimant from employment generally, but indicate she may only work on a limited part time basis in a sedentary capacity.

12. The first compensable quarter is from September 21, 1998 through December 20, 1998. The filing period for the first compensable quarter is the thirteen weeks before September 21, 1998, or from

about June 20, 1998 through September 20, 1998. During the filing period for the first compensable quarter Claimant did not work earning any wages. Claimant had an injury that prevented her from returning to her pre-injury occupation working the same hours as she had before _____. Claimant did not earn any wages during the filing period for the first compensable quarter. Claimant's unemployment was a direct result of impairment.

13. During the filing period for the first compensable quarter Claimant did not seek any employment of any kind. Claimant's doctors had not released Claimant to work, but their reports do not disqualify Claimant from employment generally. Claimant was capable of some sedentary employment at least on a part time basis. Claimant did not make good faith efforts to seek employment commensurate with her ability to work during the filing period for the first compensable quarter.

CONCLUSIONS OF LAW

1. The [Commission] has jurisdiction to hear this case.

2. Venue was proper in the (city 1 Field Office).

3. Under the stipulated facts, Carrier accepted liability for the _____ injury to Claimant.

4. Because [Dr. B] served as a commission designated doctor who determined that Claimant has a 15% impairment rating from the _____ injury, and [Dr. B's] report is not against the great weight of other medical evidence, [Dr. B's] report is presumed to be correct, and therefore Claimant has a 15% whole body impairment rating from the _____ injury.

5. Because the wage statement shows Claimant's wages in the 13 weeks before _____, Claimant's average weekly wage is $455.36 in accordance with the wage statement.

6. Claimant has an impairment rating of 15% or greater, did not elect to commute any portion of the impairment income benefits, and was unemployed as a direct result of impairment during the filing period for the first compensable quarter, but because Claimant has not shown by a preponderance of the evidence that she made good faith efforts to seek employment commensurate with her ability to work during the filing period for the first compensable quarter, she is not entitled to [SIBS] for the first compensable quarter.

The claimant challenges the hearing officer's determination of AWW, contending that she presented evidence supporting a higher AWW. Section 408.041(a) provides as follows:

> Except as otherwise provided by this subtitle, the [AWW] of an employee who has worked for the employer for at least 13 weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13.

This is exactly the method the hearing officer used and this was proper. The claimant presented some evidence of wages different from the wage statement, but this presented the hearing officer with a question of fact. 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).

The claimant argues that she was entitled to SIBS. 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. The hearing officer's finding that the claimant met the second requirement has not been appealed by either party and has become final pursuant to Section 410.169. This case revolved 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.

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, decided September 6, 1995; Pool v. Ford Motor Co., *supra*; Cain v. Bain, *supra*. We do not find that to be the case here. The hearing officer summarized the medical evidence concerning the claimant's ability to work in Finding of Fact No. 11 quoted above. The claimant in her appeal expresses disagreement with the hearing officer's reading of the medical evidence. As the hearing officer indicates, there was conflicting medical evidence concerning the claimant's ability to work.

The carrier contends that the designated doctor rated the thoracic spine. The carrier's peer review doctor, Dr. Ag stated that this was not proper because there had been no studies to the thoracic spine and that the medical records indicated only injuries to the claimant's lumbar and cervical spine. The designated doctor was asked for clarification and maintained that the claimant's IR was 15% including a two percent impairment assessed for the claimant's thoracic spine.

Section 408.125(e) provides:

> If the designated doctor is chosen by the commission, the report of the designated doctor shall have presumptive weight, and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the impairment rating contained in the report of the designated doctor chosen by the commission, the commission shall adopt the impairment rating of one of the other doctors.

We have previously discussed the meaning of "the great weight of the other medical evidence" in numerous cases. We have held that it is not just equally balancing the evidence or a preponderance of the evidence that can overcome the presumptive weight given to the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. We have also held that no other doctor's report, including the report of the treating doctor, is accorded the special, presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 93825, decided October 15, 1993.

Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor is basically a factual determination. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. Applying the standard of review described above for factual determinations, we do not find error.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge