

APPEAL NO. 990459

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 29, 1999. The issue at the CCH was whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. The hearing officer concluded that the claimant was not entitled to these benefits finding that the claimant did not make efforts to look for work during the filing period commensurate with his ability to work and that he failed to meet his burden to show that his unemployment was a direct result of his impairment. The claimant appeals arguing that the hearing officer erred in admitting certain evidence; that the hearing officer did not give proper weight to the medical evidence showing the claimant had no ability to work; that the hearing officer erred in questioning the claimant about an earlier compensable injury; and that the hearing officer exhibited bias as shown by cutting off the claimant's attorney from redirect. The respondent (carrier herein) replies that the Appeals Panel should not consider documents attached to the claimant's appeal which were not admitted into evidence at the CCH; that the hearing officer should have admitted the surveillance video offered by the carrier; and that the hearing officer's finding that the claimant had some ability to work during the filing period for the eighth compensable quarter was sufficiently supported by the evidence.

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.

We first note that the carrier's response to the claimant's request for review was not timely to itself constitute a request for review. Section 410.202 provides that a party shall file a request for review with the Appeals Panel no later than 15 days after receiving the decision of the hearing officer. The appeal shows that the carrier received the hearing officer's decision on February 17, 1999, and filed its response to the claimant's request for review on March 12, 1999. Thus, the carrier failed to preserve error, if any, in the hearing officer's failure to admit the surveillance film, and we shall not address this matter further.

We note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Applying this test to the documents attached to the claimant's request for review, we do not find a basis to remand the case and we do not consider the attachments in reaching our decision in this case.

Many of the facts of this case were not in dispute. The parties stipulated that the claimant suffered a compensable injury on _____; that he reached maximum medical improvement on March 30, 1995, with a 32% impairment rating (IR); that the claimant had not commuted any of his impairment income benefits; and that the eighth compensable quarter for SIBS began on October 31, 1998, and ended on January 29, 1999. Neither party appealed the finding of the hearing officer that the filing period for the eighth compensable quarter began on August 1, 1998, and ended on October 30, 1998, and this finding has become final pursuant to Section 410.169. It was undisputed that the claimant did not seek employment during this filing period and that the claimant did not return to any type of employment. The claimant testified that he was unable to work at all during the filing period and did not seek employment on the advice of his treating doctors. There is medical evidence from the claimant's treating doctor that he is unable to work. There was also in evidence a functional capacity evaluation (FCE) performed on September 3, 1997, stating that the claimant was able to perform light-duty work

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [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 average weekly wage 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. 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).

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 Commission Appeal No. 951204, September 6, 1995; Pool v. Ford Motor Co., *supra*; Cain v. Bain, *supra*.

In the present case, there was conflicting evidence concerning the claimant's ability to work. The fact that the evidence was merely conflicting is not a basis for us to reverse given our standard of review. This is so even though another fact finder 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.). We have also on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, New Jersey, *supra*; Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992.

We understand that the claimant contends that the hearing officer erred by admitting the evidence from the FCE. The fact that the FCE may have been criticized in an earlier decision by the Appeals Panel or that a decision concerning a prior quarter of SIBS in which the FCE was in evidence was overturned during judicial review does not constitute a basis for necessarily excluding the FCE as a matter of law. Nor do we find that the mere questioning of the claimant by the hearing officer concerning his prior injury constituted reversible error. We note that the hearing officer has an obligation to develop the record and that the development of the context of a claimant's physical condition may be useful even when the only issue in dispute is entitlement to SIBS. To obtain reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the ruling was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The claimant argues that the hearing officer's bias was shown by the fact that the hearing officer did not allow his attorney to ask redirect questions after the hearing officer examined the claimant. We note that when the attorney indicated the desire to redirect, the hearing officer questioned the need for it and indicated the attorney had no right to conduct a redirect examination. After an extended discussion on the record, the hearing officer offered the attorney an opportunity to present further evidence and this offer was declined. Under these particular circumstances, we find no error was preserved regarding redirect examination.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge