APPEAL NO. 990498

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 11, 1999, a hearing was held. He (hearing officer) determined that respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the 10th and 11th compensable quarters, but was entitled to SIBS for the 12th compensable quarter. Appellant (self-insured) asserts that medical evidence prior to the filing period of the 12th quarter, together with Dr. S comments during the filing period in question, greatly outweigh the comment of Dr. M and show that claimant can work but did not attempt to find work. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked in (employer). The parties stipulated that the self-insured "accepted liability for the _____, injury to claimant," that claimant has an impairment rating of 15% or more, that no benefits were commuted, that the 10th quarter began on May 21, 1998, that the 11th quarter began on August 20, 1998, and that the 12th quarter began on November 19, 1998. (The filing period for the 12th quarter–the only time period in question in this appeal–began on August 20, 1998, and ended on November 18, 1998.)

Claimant testified that she has not worked during the filing period in question and that she did not look for work during the filing period in question because she cannot work at all.

Claimant's current treating doctor is Dr. M. The hearing officer assigned significant weight to his opinion of October 26, 1998, in which he said that claimant is unable to "perform any gainful activity" because of her lumbar radiculopathy and other lumbar problems which cause her to be unable to bend, or to lift, push or pull anything over five pounds "without worsening of her severe condition." He said she must be able to switch positions at her choosing, including to "lying down." He added that she is on "powerful narcotics." He then said that for all these reasons, claimant cannot "perform any gainful activity."

While this writer has pointed out in Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998, that "gainful employment" is not a standard set forth in the 1989 Act relative to whether a claimant cannot do any work of any kind at all, medical evidence stating such a conclusion, such as "cannot do any gainful employment" may be considered when the context in which it is written shows that it, in effect, states no work of any kind can be done based on medical factors. Dr. M's opinion reflects only medical reasons and therefore may be interpreted as stating that claimant cannot work at all.

The self-insured argues, and the evidence suggests, that claimant could do some work during the filing period in question. While medical evidence prior to the filing period in question showed that claimant could work, Dr. S, during the filing period in question, also provides a reasoned opinion indicating work is possible. She evaluated claimant on November 11, 1998. She stated that even at the outset of the injury, claimant's studies showed "chronic degenerative disc disease," which Dr. S states is "natural" to progress with exacerbations and remissions; and Dr. S notes that claimant would possibly have had the "same problems" she now has whether there had been an injury or not. Dr. S states that there is evidence contradictory to Dr. M's statement that claimant cannot work. She cites a normal EMG, positive Waddell signs, and no physical explanation for the pain. She added that claimant gave "poor effort" at the functional capacity evaluation (which showed sedentary work could be done) and states that in her opinion claimant can do light work.

The hearing officer is the sole judge of the weight and credibility of the evidence, *see* Section 410.165. While another fact finder may have weighed the medical evidence differently, that is not a basis for overturning the fact finder's determination. The hearing officer weighs medical evidence, and, while he generally should give deference to medical opinion that explains itself in other than conclusory form, he may choose to give more weight to an opinion that is not as reasoned or specific in reaching its conclusion. *See* Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. The Appeals Panel is not the fact finder.

The opinion of Dr. M provides some medical evidence of inability to work during the filing period in question; therefore, the question of whether or not there was medical evidence to support a determination that the claimant cannot work at all is a factual one for the hearing officer to make. It will only be overturned if against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996. The determination that claimant could not work at all in the filing period of the 12th quarter is not against the great weight and preponderance of the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge