APPEAL NO. 990556

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 18, 1999. The issue at the CCH was whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the fifth compensable quarter of December 5, 1998, through March 5, 1999. The hearing officer determined that the claimant was not entitled to these benefits. The claimant appeals this determination specifically challenging the hearing officer's finding that he did not attempt in good faith to obtain employment commensurate with his ability to work. The respondent (carrier herein) replies that the hearing officer's determination is 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.

The parties stipulated that the claimant sustained a compensable injury to his low back, neck, and nose which later resulted in a 21% impairment rating (IR); that the claimant was entitled to SIBS for the first and second compensable quarters; and that the filing period for the fifth compensable quarter began on September 5, 1998. The claimant presented medical evidence from Dr. K, D.C. In letters of February 19, 1998, and May 28, 1998, Dr. K stated that the claimant had "a total restriction from work." In a letter of January 20, 1999, Dr. K indicated that the claimant was under lifting, standing, walking, sitting and driving restrictions. The carrier put into evidence a February 19, 1998, medical report from Dr. T, M.D., in which Dr. T stated he saw no reason why the claimant could not return to gainful employment.

The claimant presented evidence that he applied for 13 jobs during the filing period for the fifth compensable quarter. The claimant testified that he also looked for other jobs during the filing period.

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 of these requirements was established by stipulation. It was not disputed that the claimant met the third requirement. 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.

The hearing officer found that the claimant did not return to work as a direct result of his impairment from the compensable injury. The carrier does not appeal this finding. The claimant purports to appeal it, but since this finding is favorable to the claimant, the claimant is not aggrieved by this finding and has no basis to appeal it.

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). Applying the standard of review above, there is sufficient evidence to support the hearing officer's finding of no good faith job search.

The claimant in his appeal points to evidence from Dr. K that he was unable to work at all. 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, decided September 6, 1995; Pool v. Ford Motor Co., *supra*; Cain v. Bain, *supra*. The hearing officer in his discussion specifically indicates that he did not consider Dr. K's report specific enough to accept it as being true. We cannot say this was error as a matter of law. We also note there was conflicting medical evidence from Dr. T.

The claimant also points to his testimony that he looked for more jobs during the filing period than the 13 he had documented. The hearing officer indicates that he found the claimant's testimony in this regard vague and apparently gave it little or no weight. What weight to give this testimony was the province of the hearing officer.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Alan C. Ernst
Appeals Judge