APPEAL NO. 990632

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 March 3, 1999. The appellant (carrier) and the respondent (claimant) stipulated that the claimant sustained a compensable injury on _____; that his impairment rating is 18%; that the fourth quarter for supplemental income benefits (SIBS) began on December 15, 1998, and ended on March 15, 1999; that the respondent's average weekly wage is $466.47 (incorrectly stated as $466.57 in Finding of Fact No. 1.H, which is reformed at the request of the carrier to state $466.47); and that during the filing period for the fourth quarter the claimant earned less than 80% of his average weekly wage. In August 1998 the claimant began working part-time, light-duty maintenance work as an independent contractor and continued to do that type of work during the filing period. The hearing officer determined that the claimant is entitled to SIBS for the fourth quarter. The carrier appealed, urged that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust, 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 fourth quarter or, in the alternative, that the Appeals Panel reverse the decision of the hearing officer and remand the case to the hearing officer. The claimant filed an untimely response in which he urged that the evidence is sufficient to support the decision of the hearing officer and requested that it be affirmed.

DECISION

We affirm.

The claimant, who is now 65 years old, slipped and injured his low back and neck _____. He testified that prior to the injury he performed custodial duties, general maintenance, and took care of about a one-acre lawn; that he still has pain in his low back and neck; and that now he could not perform that job because of his injury. The claimant underwent a functional capacity evaluation (FCE) on August 12, 1998. The report indicates that his prior job was a heavy-level job. The report states that during an eight-hour day the claimant could stand for three hours; sit for two hours; walk for three hours; bend, stoop, or squat for from one to two and one-half hours; lift 10 pounds for from two and one-half hours to five and one-half hours, lift 20 pounds for from one to two and one-half hours; push, pull, and reach above shoulder level for from two and one-half hours to five and one-half hours; perform simple grasping and fine manipulation for from five and one-half hours to eight hours; and that he cannot climb, kneel, crouch, or crawl. In a letter dated August 27, 1998, Dr. W, a chiropractor and the claimant's treating doctor, stated that he had reviewed the report of the latest FCE, that he concurred with the findings, that the claimant should not try to work full-time at that time, and that it was very important that he gradually work up to 40 hours per week. On November 25, 1998, Dr. W wrote that the claimant has permanent disability and will be unable to do physical work like he did before his injury. In a letter dated January 19, 1999, Dr. W said that the claimant had a permanent, irreversible injury that will need ongoing care; that at best, he is capable of doing very light physical labor;

and that he must proceed at his own pace. On February 1, 1999, Dr. W repeated the comments in his January 19th letter; he said that he recommended no more than 15-20 hours per week and that the claimant was aware of his condition and realized his limitations and capabilities.

The claimant testified that in August 1998 he was called by Mr. B, the person he was working for when he was injured, and Mr. B asked if he could stand in for the person who had replaced him. He said that he told Mr. B that he could not, but that he told Mr. B that he could do light work. The claimant stated that soon after that he began doing light work as an independent contractor; that Mr. B let him work at his own pace; that he started working about 10 hours a week; that during the filing period he worked 12 to 15 hours a week; and that he now works 18 to 20 hours a week. He testified that he reported that he earned $940.00 during the filing period, that he filed his Statement of Employment Status (TWCC-52) forms before the end of the filing period so that his benefits would not stop, and that one of the invoices submitted to Mr. B for labor should have been reported for the third quarter rather than the fourth quarter. The claimant said that during the filing period he did not attempt to obtain more work because he had all of the work that he could do and that sometimes he had to delay work because he could not do it at the time. He agreed that his experience was not limited to maintenance and that he had sold insurance for about eight years and worked in food service management, which he considered to be very hard work, for about 15 years. He said that two agencies had provided him job leads, that some of the leads were for full-time jobs and some were for part-time jobs, that he did not think he could perform the full-time jobs, that he sent resumes to some of the leads, that one of the job leads was with the (employer), that there had been a delay in the start of the (employer) jobs for political reasons, that after the end of the filing period he contacted the (employer), that he had been advised that he will have a job with the (employer), that he will start training for that job in a few weeks, that he will give priority to the (employer) job, and that he hoped to also be able to continue to do some work for Mr. B.

Mr. M, a case manager, testified that when he first began working with the claimant, he was not able to work; that after the FCE, Dr. W requested that the claimant start working part time; that about every three weeks he provided leads to the claimant; that some of the leads were for part-time work and some were for full-time work; that he contacted employers; and that as of December 15, 1998, none of them indicated that the claimant had applied for a job with them. Mr. M said that about the end of October 1998 the claimant advised him that he was doing part-time contract work.

Whether the claimant made a good faith effort to obtain employment commensurate with his ability to work and whether his unemployment or underemployment was a direct result of his impairment are generally questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. In the case before us, the claimant contended that during the filing period he could only work part time and that he worked the number of hours that he could work. The carrier contended that the claimant could have obtained more work in his self-employment job and that he could have worked more hours in another type of employment for which he was

qualified. A claimant may satisfy both the good faith and direct result criteria by working part-time as a self-employed person; however, the lack of work in the business chosen by the claimant or the lack of effort to obtain work at the level of the ability of the claimant to work may result in a determination that the claimant is not entitled to SIBS. Texas Workers' Compensation Commission Appeal No. 950814, decided July 3, 1995; Texas Workers' Compensation Commission Appeal No. 940918, decided August 26, 1994. The hearing officer simply made findings of fact that the claimant's underemployment was a direct result of his impairment from the compensable injury and that he in good faith attempted in good faith to obtain employment commensurate with his ability to work. It would have been better had she made underlying findings of fact on which to base those findings of fact, which are more in the nature of conclusions of law. In the discussion section in her Decision and Order the hearing officer wrote that the claimant made a good faith effort because he found work and worked a part-time position that accommodated his physical restrictions. It can be inferred or implied that she determined that the claimant's part-time work during the filing period was in accordance with his ability to work. 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 and the implied and inferred determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or 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).

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge