APPEAL NO. 990657

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 March 2, 1999. The issues at the CCH were whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the third compensable quarter and what was the claimant's average weekly earnings during the filing period. The hearing officer determined that the claimant was not entitled to SIBS for the third quarter and had an average weekly earning of $96.69 during the filing period. The claimant appeals the determination that he was not entitled to SIBS, arguing the hearing officer erred in finding that his underemployment during the filing period was not a direct result of his compensable injury and that he failed to seek employment in good faith commensurate with his ability to work. The respondent (carrier herein) argues that these findings were sufficiently supported by the evidence. Neither party has appealed the hearing officer's resolution of the issue of the claimant's average weekly earnings during the filing period and this has become final pursuant to Section 410.169.

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 lower back injury on _____; that the claimant reached maximum medical improvement on February 20, 1997, with a 22% impairment rating (IR); that the claimant did not commute any portion of his impairment income benefits; that the third quarter started on November 27, 1998, and ended on February 25, 1999; that the filing period for the third quarter started August 28, 1998, and ended on November 26, 1998; and that the claimant's preinjury average weekly wage (AWW) was $506.30. The claimant testified that during the filing period he was self-employed in two capacities--as a musician with a bluegrass band and as a handyman. The claimant testified that he contacted 16 potential employers during the filing period. The claimant testified that he was unable due to his injury to return to his preinjury employment as a result of his injury and presented medical evidence supporting this.

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. 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).

Applying this standard of review we cannot say the hearing officer erred in finding a no good faith job search. The hearing officer stated in his findings that the claimant did not spend sufficient time or energy seeking employment. The hearing officer had before him the evidence concerning the claimant's efforts to seek employment. We cannot say that the overwhelming evidence was contrary to the hearing officer's determination. This is so even though, were we fact finders, we 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.).

The claimant argues that the hearing officer's failure to take into account that the claimant lived in a rural area when determining whether or not he made a good faith good job search was contrary to the liberal construction of the workers' compensation law

recently reiterated by the Texas Supreme Court. In Texas Workers' Compensation Commission Appeal No. 990401, decided April 14, 1999, we recognized that Texas appellate courts, including the Texas Supreme Court, had applied the doctrine of liberal construction to the 1989 Act. However, it does not appear to us that in the present case the hearing officer failed to apply this doctrine.

We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. There was such evidence in the record in this claim. However, such evidence does not mandate a finding of direct result. It is still up to the hearing officer to determine what weight to give this evidence. Again, we will not substitute our judgement for his in this regard.

The claimant argues that the hearing officer erred because he did not find direct result based upon the fact that the claimant was not under active medical care during the filing period for the third compensable quarter. To make active medical treatment during a filing period a requirement for eligibility for SIBS would add a requirement for eligibility not found in the 1989 Act or the rules of the Texas Workers' Compensation Commission. However, we do not think it is inappropriate for the hearing officer to weigh evidence of the claimant's current medical condition treatment in considering whether the claimant continued to suffer from lasting effects from an injury. This does not mean that lack of treatment during the filing period is determinative of the issue of direct result, merely that it is one factor that the hearing officer *may* consider.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge