

APPEAL NO. 990660

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 February 22, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the ninth quarter for supplemental income benefits (SIBS) began on December 20, 1998, and would end on March 20, 1999. The hearing officer determined that during the filing period for the ninth quarter for SIBS the claimant made 64 job contacts and attempted in good faith to seek employment commensurate with her ability to work. Those determinations have not been appealed and have become final under the provisions of Section 410.169. He also made the following finding of fact:

FINDING OF FACT

15. Claimant's unemployment during the filing period is not a direct result of her impairment. Claimant's unemployment is a direct result of a combination of her age, voluntary retirement, other health problems unrelated to the compensable injury, and her decision to move to a small town where jobs are limited.

The hearing officer concluded that the claimant is not entitled to SIBS for the ninth quarter. The claimant appealed. She said that she retired when she could no longer use her hands to do her work, that she moved to a small town because the living expenses there were less than in a large town, that there is no work commensurate with her ability to work in the town in which she lives, that she has applied for work and is willing to try anything, and that her injury was caused by her work. She requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the ninth quarter. A response from the self-insured has not been received.

DECISION

We affirm.

The claimant sustained repetitive trauma injuries to both hands while working for the self-insured in (City 1), Texas. She testified that she had surgery on one hand twice, that she had surgery on the other hand once, that she needs a second surgery on that hand, and that she will see a hand doctor soon. She said that she returned to work operating a microfilm camera after she had carpal tunnel surgery on her hands; that she retired in March 1996 because of the pain in her hands; that she is 65 years old; that she would still be working if she did not have the problems with her hands; that she moved to (City 2), Texas, where she lives with her daughter and son-in-law; that the population of City 2 is about 18,000 or 19,000; that some of the places where she applied had job openings and others did not; that she looked for any type of job because she needed the money; that she has difficulty using her hands; that she did not know if she could have performed the work involved in each job that she applied for; and that she would have tried to do the work if she

had been offered a job. She said that she did not know why she had not been offered a job and that it might be because of her age. She testified that her driving was limited because of a seizure that was not related to her compensable repetitive trauma injury.

Medical reports indicate that the claimant had been treated for high blood pressure, cancer, and thyroid disease; that she had a carpal tunnel release of the left wrist and arthroscopic surgery on the right knee in 1987; that she had carpal tunnel surgery on the right wrist; and that she again had surgery on the left wrist and thumb in August 1995. A functional capacity evaluation dated January 7, 1997, states that the claimant may not lift over 15 pounds; that she should not lift over her head with the left arm; that, due to carpal tunnel syndrome, repetitive handling should be limited or placed in a controlled environment; that climbing, bending, stooping, and squatting should be restricted because of discomfort in the knees; and that she does have the capabilities of taking care of her blind daughter and son-in-law and functioning within the house.

The burden is on the claimant to prove by a preponderance of the evidence that her unemployment is a direct result of her impairment from the compensable injury and that she is entitled to SIBS. The fact that a person has retired may be considered in determining entitlement to SIBS. A person may voluntarily retire, form an intent to reenter the job market, and meet the direct result criteria. Texas Workers' Compensation Commission Appeal No. 982897, decided January 20, 1999. In Texas Workers' Compensation Commission Appeal No. 981878, decided September 18, 1998, the Appeals Panel wrote:

While the Appeals Panel has stated that there was evidence sufficient to uphold a hearing officer's implicit determination on direct result where the evidence shows the "claimant suffered a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of injury" (Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993), we have not held that an inability to return to a "preinjury occupation," per force, proves the direct result requirement. See Texas Workers' Compensation Commission Appeal No. 960165, decided March 7, 1996, for a discussion of cases concerning direct result. While the inability to return to a "preinjury occupation" may well be a significant factor in a given case in determining direct result, standing alone it does not prove direct result to the exclusion of any other evidence on the issue.

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 because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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). An appeals level body is not a fact finder, and it 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). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determinations that the claimant's unemployment during the filing period was not the direct result of her impairment from the compensable injury and that she is not entitled to SIBS for the ninth quarter 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, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge