

APPEAL NO. 990675

This appeal arises 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 5, 1999. With respect to the issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 10th quarter. In her appeal, the claimant challenges the determinations that she had some ability to work in the filing period, that she did not make a good faith search for employment commensurate with her ability to work, and that she is not entitled to SIBS for the 10th quarter. In its response, the respondent (self-insured) urges affirmance. The self-insured did not appeal the hearing officer's determination that the claimant's unemployment in the filing period was a direct result of her impairment.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on September 19, 1995, with an impairment rating of 17%; that she did not commute her impairment income benefits; and that the 10th quarter of SIBS ran from December 8, 1998, to March 8, 1999, with a corresponding filing period of September 8 to December 7, 1998. The claimant testified that she injured her low back on _____, when she tripped over a telephone cord and fell to the floor, landing on her left hip. The claimant underwent a spinal surgery at L3-4 on January 14, 1994, as treatment for her compensable injury. The claimant acknowledged that she had four back surgeries at L5-S1 prior to her compensable injury. She testified that she had no ability to work in the filing period and that she did not look for any work. She stated that she attended a vocational evaluation requested by the Texas Rehabilitation Commission (TRC) and that she understood from that testing that she cannot work in any capacity. She also stated that Dr. G, her treating doctor, has told her that she is unable to work.

In a letter of January 27, 1999, Dr. G stated that the claimant "was unable to work in any capacity between 9/8/98 and 12/7/98," noting that her "continued pain and nerve root compression of the lumbar spine make her an unsuitable candidate for work." Dr. G noted that the functional capacity evaluation (FCE) testing the claimant has undergone indicates that she is able to perform sedentary work; however, he stated such work was "not medically advisable due to patient's diagnoses." In a "To Whom it May Concern" letter of November 19, 1998, Dr. G stated that the claimant is "unable to sit or stand for prolonged periods of time due to her spinal problems. Since she is unable to sit at a desk, she has been advised she will be unable to return to work."

On September 21-23, 1998, the claimant underwent a vocational assessment at the request of the TRC. The report from that evaluation concludes that "[d]ue to high levels of pain, inability to complete task and not able to work over 2 ½ hours at a time, [claimant] is

not recommended for gainful employment at this time." On November 25, 1998, the TRC sent a letter to the claimant stating that her file had been closed. That document states that "Ct and I evaluated her ability to work and agreed she is not suitable for employment right now. She will remember to contact me in the future should her circumstances change."

The claimant underwent FCE testing on May 7, 1998, at the request of the self-insured. The May 7th FCE report states that the claimant can work in a sedentary capacity. The report stated that she had decreased ability to bend, stoop, squat, twist and kneel; decreased ability to perform lifting tasks; decreased ability to tolerate standing (can tolerate only five minutes longest duration); poor activity tolerance secondary to reported pain complaints; and decreased ability to tolerate sitting required by job (can tolerate 15 minutes). The report concluded that she could return to work with the recommendations that she be allowed to frequently change position during the work day (every 10-15 minutes), allowed to take "mini" breaks during the day (of less than five minutes duration), and limited to lifting 15 pounds occasionally and eight pounds frequently.

On July 7, 1998, Dr. E examined the claimant at the request of the self-insured. In a report of July 10, 1998, Dr. E opined that the claimant could return to work in accordance with the restrictions outlined in the May 7th FCE, namely frequent change of positions (every 10 to 15 minutes), "mini" breaks during the day, and limited lifting (15 pounds occasionally and eight pounds frequently). Dr. E concluded that the claimant was capable of performing sedentary work. On December 23, 1998, the claimant underwent additional FCE testing. The report from that examination provides that the claimant could perform sedentary to light work.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, 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. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, states that an assertion of inability to work must be judged against employment generally, not just the job where the injury occurred. In addition, we have noted that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. 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 decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the testimony and evidence. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result.

National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain her burden of proving that she had no ability to work in the filing period at issue. As noted above, there was conflicting evidence on the question of the claimant's ability to work in the filing period.

Dr. G opined that the claimant was unable to work in any capacity. Similarly, the report from the vocational evaluation conducted at the request of the TRC concluded that the claimant was "not recommended for gainful employment." However, the FCE testing, conducted at the request of the self-insured, concluded that the claimant could return to sedentary work with restrictions and Dr. E opined that the claimant could work in accordance with the restrictions outlined by the FCE. It was the hearing officer's responsibility as the fact finder to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. He did so by giving more weight to the opinion of Dr. E and the FCEs of May 7 and December 23, 1998, than to the opinion of Dr. G and the vocational assessment ordered by the TRC. In this case, the hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that she was totally unable to work in the filing period. He was acting within his province as the sole judge of the weight and credibility of the evidence in so finding. Our review of the record does not demonstrate that the hearing officer's determination that the claimant had some ability to work in the filing period is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The claimant acknowledged that she did not engage in a job search in the filing period; accordingly, the hearing officer properly determined that she did not satisfy the good faith requirement and that she is not entitled to SIBS for the 10th quarter.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge