APPEAL NO. 990731

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 18, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the third quarter for supplemental income benefits (SIBS) began on November 15, 1998, and ended on February 13, 1999. Over the objection of the claimant, the hearing officer admitted into evidence a medical report from Dr. S, who examined the claimant at the request of the carrier. The claimant contended that she was entitled to SIBS for the third quarter because she was unable to work during the filing period for that quarter. The hearing officer determined that during the filing period the claimant had some ability to work, did not seek employment, and did not in good faith seek employment commensurate with her ability to work and that she is not entitled to SIBS for the third quarter. The claimant appealed, contended that the hearing officer erred in admitting the report of Dr. S, urged that the determination that the claimant had some ability to work during the filing period is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the third quarter. The carrier responded; contended that the hearing officer did not err in admitting the report of Dr. S and that if the hearing officer erred in admitting the report of Dr. S, such error was not reversible; urged that the evidence is sufficient to support the determinations of the hearing officer; and requested that his decision be affirmed.

DECISION

We affirm.

We first address the claimant's contention that the hearing officer erred in admitting the report of Dr. S because it was not timely exchanged. A benefit review conference (BRC) was held on January 19, 1999. The report of that BRC has a place to indicate medical reports and states that medical reports of Dr. S dated August 20, 1998, and Dr. L dated September 22, 1998, were considered. In his recommendations and comments section, the benefit review officer mentions Dr. S three times and includes a quotation from a report of Dr. S. In Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992, the Appeals Panel commented on the disclosure requirements of the 1989 Act and stated that the intent was to assure full development of the facts prior to the hearing. In Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994, the Appeals Panel stated that exhibits exchanged at a BRC do not have to be reexchanged. The claimant was seen by Dr. S at the request of the carrier, was at the BRC, received a copy of the BRC report, and was aware that the carrier intended to use the report of Dr. S. Based on decisions of the Appeals Panel interpreting the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.13 (Rule 142.13), which are arguably subject to more than one interpretation, the hearing officer did not err in admitting the report of Dr. S.

We next consider the sufficiency of the evidence to support the determination of the hearing officer that the claimant had some ability to work during the filing period for the third quarter for SIBS. 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 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated claimant's inability to do any work must be supported by medical evidence. A hearing officer's determination that the claimant has not shown that she has no ability to work does not have to be based upon medical evidence. Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. In Texas Workers' Compensation Commission Appeal No. 970890, decided June 27, 1997, the Appeals Panel stated that it had never said that a claimant that had some limited ability to work was excused from seeking employment because a search for employment would be futile. The claimant must seek employment commensurate with the ability to work.

Dr. L testified that he has treated the claimant since he first saw her on April 7, 1995; that the claimant lives a considerable distance from where he practices medicine; that he hospitalized the claimant for one day in October 1998; that he provided her with intravenous albumin treatment; that during the filing period that began on August 16, 1998, and ended on November 14, 1998, he spoke with her on the telephone five or six times; that during the filing period she took numerous medications; and that during the filing period she was unable to work for three reasons, (1) her fatigue and infection symptoms were unpredictable, she may have two or three days when she is pretty much functional and could work for four to six hours, but another day she will be absolutely exhausted all day and cannot get out of bed, (2) her cognitive function is not good and patients with her condition have problems with numbers and math, and (3) that these type patients tend to get stressed if they work, it damages the immune system, and they are more vulnerable to cratering and having a really bad time. Dr. L said that women have a harder time with the illness than do men; that the claimant's depression, let alone her fatigue, would not let her go back to work; and that he disagreed with the report of Dr. S.

In the report dated August 20, 1998, Dr. S stated that a functional capacity evaluation was performed on August 4, 1998; that the claimant should be able to return to at least light-duty work; that her neurological examination was essentially unremarkable; that he was puzzled by her diffuse complaints since the chemical exposure; and that objective findings were not consistent with her subjective complaints. In a letter dated September 22, 1998, Dr. L states that Dr. S has no experience with environmental medicine, chronic fatigue, multiple chemical sensitivity, or fibromyalgia; that comments of Dr. S in his report dated August 20, 1998, indicate that he has no experience whatsoever

with multiple chemical sensitivity; that there are volumes written on multiple chemical sensitivity, fibromyalgia, and chronic fatigue immune dysfunction syndrome; and that in his mind the claimant is debilitated and will remain so for a prolonged period due to the exposure she had in the building.

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 judgment 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 burden was on the claimant to prove that during the filing period she had no ability to work. The hearing officer's determinations that the claimant had some ability to work during the filing period, that during that period she did not in good faith seek employment commensurate with her ability to work, and that she is not entitled to SIBS 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). Since we find the evidence sufficient to support the 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.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge