APPEAL NO. 990737

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 1, 1999, a contested case hearing was held. The issues were whether appellant (claimant herein) had disability as a result of the compensable injury from December 16, 1993, through October 5, 1994, and whether claimant was entitled to supplemental income benefits (SIBS) for the third through the eighth compensable quarters. The hearing officer found that the claimant did have disability for the period in question and, as no party has appealed this determination, it has become final pursuant to Section 410.169. The hearing officer found that the claimant was not entitled to SIBS for the third through the eighth compensable quarters. The claimant appeals the hearing officer's resolution of the SIBS issue. The claimant argues that the medical evidence, including the report of the designated doctor selected by the Texas Workers' Compensation Commission (Commission), showed he was unable to work at all; that he has been determined to be disabled by other agencies; that medical evidence indicating he could work is untrue; and that the hearing officer did not allow facts to be presented because he was pressed for time. The claimant also questions whether he was paid the proper amount of interest on back benefits he received as a result of the hearing officer's ruling regarding disability. The respondent (carrier herein) replies that there is sufficient evidence to support the findings and the decision of the hearing officer and specifically points to evidence that it believes supports the hearing officer's resolution of the issues. The claimant files a reply to the carrier's response. There being no provision for a reply to a response for a request for review and the claimant's pleading not being timely to be considered a request for review itself, we do not consider it. *See* Sections 410.202 and 410.203(a).

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 injury on _____; that the claimant did not commute any impairment income benefits; that the claimant's impairment rating (IR) is 15 percent or more; that dates for the third through the eighth compensable quarters are, respectively, September 10, 1997, to December 9, 1997; December 10, 1997, to March 10, 1998; March 11, 1998, to June 9, 1998; June 10, 1998, to September 8, 1998; September 9, 1998, to December 8, 1998; and December 9, 1998, to March 9, 1999. It was undisputed that the claimant did not seek work during the filing period[1] for any of these compensable quarters. The claimant's position was that he was totally disabled during the filing periods for each of the quarters in question. He presented medical evidence from Dr. RH, his treating doctor, and Dr. CH, the designated doctor selected by the Commission, supporting this position. The carrier presented evidence from Dr. S and Dr. B showing the claimant did have some ability to work.

[1]The filing period being the 90-day period preceding each compensable quarter.

The hearing officer's findings of fact and conclusion of law include the following:

FINDINGS OF FACT

2. During the filing periods for the 3rd through 8th SIB's quarters, Claimant's inability to earn 80% of his average weekly wage [AWW] is a direct result of his impairment from the compensable injury.

3. During the filing periods for the 3rd through 8th SIB's quarters, Claimant did not make a good faith attempt to obtain employment commensurate with his ability to work.

4. During the filing period for the 3rd through 8th SIB's quarters, Claimant had some ability to perform some types of work.

CONCLUSION OF LAW

4. The Claimant is not entitled to [SIBS] for the 3rd through 8th compensable quarters, 9-10-97 to 3-9-99.

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. The hearing officer's finding that the claimant met the second requirement has not been appealed by either party and has become final pursuant to Section 410.169. This case revolved around whether the claimant met the fourth of these requirements. We have previously held that the question of whether the claimant made a good faith job search is a question 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).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, 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." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to satisfy the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool v. Ford Motor Co., *supra*; Cain v. Bain, *supra*.

It was the province of the hearing officer to determine what weight to give the conflicting medical evidence. While the opinion of a designated doctor selected by the Commission is entitled to presumptive weight on the issue of maximum medical improvement and IR pursuant to Sections 408.122(c) and 408.125(e) respectively, there is no provision that gives the opinion of the designated doctor any special weight as to the issue of ability to work. While the claimant argues that the hearing officer should have given more weight to the opinions of Drs. RH and CH than to Drs. S and B, we cannot say

that the hearing officer erred as matter of law in failing to do so. Nor was the hearing officer bound to find the claimant unable to work because he has been declared disabled by federal and state agencies and his group disability carrier. We do not find that the hearing officer failed to allow adequate development of the record. The issue of the amount of interest, as opposed to the claimant's entitlement to interest on the back payment, was not before the hearing officer and is not before us. Should the claimant desire to pursue this issue he should contact the (City 1) field office.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge