APPEAL NO. 990853

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 25, 1999. The appellant (carrier) and the respondent (claimant) stipulated that on _____, the claimant sustained a compensable injury to his cervical, thoracic, and lumbar spine; that he reached maximum medical improvement on January 29, 1996, with a 15% impairment rating; and that the filing period for the fifth quarter for supplemental income benefits (SIBS) began on September 9, 1998, and ended on December 9, 1998. The hearing officer determined that during the filing period for the fifth quarter for SIBS the claimant was unemployed as a direct result of his impairment from the compensable injury, that during that filing period the claimant was unable to work, and that he is entitled to SIBS for the fifth quarter. The hearing officer also determined that the carrier made an overpayment on a prior SIBS payment due to miscalculation in the amount of interest due to the claimant, that the overpayment by the carrier was made by its own fault, and that the carrier is not entitled to reduce or offset SIBS to recoup the overpayment of interest. The carrier appealed those determinations; urged that the determinations that the claimant had no ability to work during the filing period and is entitled to SIBS for the fifth quarter is not supported by sufficient evidence; contended that Appeals Panel determinations concerning reducing or offsetting future SIBS do not apply because the overpayment was for interest, and not income benefits; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the fifth quarter and that it is entitled to reduce or offset future SIBS because of the overpayment of interest. The claimant responded, urged that the evidence is sufficient to support the determination that the claimant is entitled to SIBS for the fifth quarter, argued that there is no meaningful distinction between interest and income benefits, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

In a letter dated August 31, 1998, Dr. M, the claimant's treating doctor, wrote:

> In my opinion, [claimant] is completely and totally disabled. Due to financial needs, [claimant] has asked me to allow him to work. He is allowed to look for a job where he could work no more than 2 hours per day and with the following restrictions. He shouldn't lift over 20lbs, not able to stand or sit for longer than an hour, avoid repetitive bending, stooping, pulling and pushing at the waist level. He should also avoid lifting objects above the shoulder and he is not able to work on heights.
>
> His condition has gradually deteriorated, he had severe neck pain a few days ago. He went to the emergency room on August 20, 1998 due to his neck pain associated with coughing.

In letters dated October 14, 1998, and December 16, 1998, Dr. M wrote:

> This letter is to certify that [claimant] is under my care. In my opinion, he is not able to do any kind of work. He is totally disabled because he has a compressive fracture at T12 and L1. He is in severe pain and he is not able to seat [sic] or stand for longer than 10 to 15 minutes at a time. He is not able to do any lifting, carry or pull things.
>
> In view of all this [sic] findings, it is my opinion that he is completely and totally disabled.

In a letter dated February 9, 1999, Dr. M said that the claimant requested a letter in October and December 1998, and that since the claimant's condition had not changed, he and the claimant agreed that the same letter would suffice. In that letter, Dr. M also stated that the claimant's status concerning disability had not changed and that in his opinion the claimant was unable to do any kind of work. In a letter dated January 5, 1999, Dr. M wrote:

> Since the last office visit, [claimant] has further deteriorated. He has developed more intense pain to his neck and lower back as well as pain and swelling on his left knee. He limps when he walks and he needs use of a crutch for ambulation. He is not able to do any lifting and pushing at the waist level. He is not able to perform any work above the shoulder level. He needs a referral to physical therapy.

The evidence concerning the overpayment is limited. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 11, 1998, the carrier states that amounts of benefits were recalculated based on an October 29, 1998, benefit review conference agreement and that on December 16, 1997, it overpaid the claimant $831.06 when it recalculated benefits after a contested case hearing decision concerning the claimant's average weekly wage. The claimant testified that the carrier intentionally overpaid him.

We first address the determinations that during the filing period for the fifth quarter for SIBS the claimant had no ability to work and that he is entitled to SIBS for that quarter. 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. In

addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. In Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997, the Appeals Panel cited earlier decisions and stated that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information concerning the claimant's physical limitations and restrictions and that "bald statements" of an inability to work are of limited use in assessing whether a claimant can work during the filing period because of a lack of any discussion of the nature of and the reasons for the claimant's inability to work. In Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996, the Appeals Panel stated that its comments about medical evidence being more than conclusionary did not establish a new or different standard of appellate review and that a finding of no ability to work is a factual determination which is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. While it is preferable that medical evidence concerning a claimant's ability to work be as close in time to the filing period as possible, medical evidence falling outside the filing period can be relevant to determine ability to work and entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941649, decided January 26, 1995.

The burden is on the claimant to prove by a preponderance of the evidence that he is entitled to SIBS. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 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 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). The hearing officer did not err in considering letters from Dr. M that were written soon after the close of the filing period. The hearing officer made a finding of fact that the claimant had no ability to work during the filing period. The carrier complained that the hearing officer did not make a determination that during the filing period the claimant in good faith sought employment commensurate with his ability to work. While it would have been preferable for the hearing officer to have made a finding of fact on that criterion for entitlement to SIBS, such a determination may be inferred or implied. The hearing officer's determinations concerning entitlement to SIBS for the fifth 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). We affirm them.

We next address the determination that the carrier is not entitled to reduce or offset SIBS payments to recoup an overpayment made on prior benefit calculations. The carrier contends that Appeals Panel decisions concerning not reducing SIBS payments do not apply because the overpayment was an overpayment of interest on benefits due. The hearing officer states that the overpayment was made due to a miscalculation of interest. The issue is stated using "miscalculation in the amount of interest," but the record does not indicate the reason for the overpayment. A review of Appeals Panel decisions concerning recoupment from SIBS payments indicates that the rationale was not to reduce the amount of an income benefit replacing lost wages when the overpayment was based on a mistake of the carrier and not on fraud of the claimant. The fact that the overpayment may have been made because of a miscalculation of interest, rather than an overpayment of income benefits, is not important. The concept is that SIBS payments are made because of lost or reduced income because of the compensable injury and those SIBS payments will not be reduced because of a mistake by the carrier. We affirm the determinations that the carrier is not entitled to reduce or offset SIBS payments to recoup an overpayment.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge