APPEAL NO. 990885

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 5, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter of December 23, 1998, through March 23, 1999, and whether the appellant (carrier) waived its right to contest the claimant's entitlement to SIBS. The hearing officer determined that the carrier had not waived its right to contest the claimant's entitlement to SIBS for the eighth compensable quarter, but that the claimant was entitled to these benefits. The carrier appeals challenging the findings of the hearing officer that during the filing period for the eighth compensable quarter the claimant attempted in good faith to obtain employment commensurate with her ability to work and that the claimant did not return to work as a direct result of impairment from her compensable injury. There is no response from the claimant to the carrier's request for review in the appeal file. Neither party appealed the determination of the hearing officer that the carrier did not waive its right to contest the claimant's entitlement to SIBS for the eighth compensable quarter and this determination has become final pursuant to Section 410.169.

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 hearing officer summarized the evidence in his decision and we adopt his rendition of the evidence. We will only briefly touch on the evidence germane to the appeal. This includes stipulations by the parties that the claimant sustained a compensable injury to her back and left upper extremity on _____; that this injury resulted in a 21% impairment rating (IR); that the Texas Workers' Compensation Commission determined the claimant was entitled to SIBS for the first compensable quarter; and that the filing period for the eighth compensable quarter began on September 23, 1998. The claimant's treating doctor, in a number of medical reports, stated that the claimant was totally and permanently disabled attributing this circumstance to "unpredictable acute pain episodes which prevent her from performing any type of occupation." The carrier requested an examination by Dr. W. Dr. W stated as follows in a narrative dated July 9, 1998:

> I feel that [the claimant] could possibly return to light duty work, possibly four hours a day. Any job she performs would have to consist of sedentary activities only. She cannot do any type of repetitive work whatsoever. She also cannot do any type of work which would involve reaching over her head or anything involving prolonged walking, stooping, bending or kneeling. I do not feel she will ever be able to return to regular duty work.

The claimant's position at the CCH was that she was totally unable to work. The claimant testified that she did seek employment during the filing period for the eighth

compensable quarter. Her job contacts are described in her Statement of Employment Status (TWCC-52) which was admitted into evidence. The claimant was questioned extensively about these contacts during the CCH.

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 average weekly wage 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 of these requirements was established by stipulation. It was undisputed that the claimant met the third requirement. This case revolved around whether the claimant met the second and fourth of these requirements. We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his impairment are questions 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 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).

Applying this standard of review there is certainly evidence to support the hearing officer's finding of good faith job search. The claimant testified that she looked for a number of jobs during the qualifying period and the hearing officer accepted this testimony. The hearing officer may well have considered that the claimant's job search was limited by her own physical limitations, which according to the medical evidence, are considerable. The carrier argues that the claimant did not establish that her unemployment was a direct result of her impairment because she testified she would have been hired by one of the businesses at which she applied if she knew how to operate a cash register. This is not an accurate statement of the evidence. The claimant testified that she did know whether or not she would have been hired if she could have run a cash register. Even were it the case, it would not preclude the hearing officer from finding direct result. As we have previously noted, given the constraints of the Americans With Disabilities Act, one would not expect a prospective employer to state that the reason for not hiring was related to physical impairment. *See* Texas Workers' Compensation Commission Appeal No. 951730, decided November 30, 1995. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. There is evidence of this in both the claimant's testimony and the medical records.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge