APPEAL NO. 990914

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 April 14, 1999. The Texas Workers' Compensation Commission adopted the 15% impairment rating (IR) assigned to the appellant/cross-respondent (claimant) by the designated doctor. The respondent/cross-appellant (carrier) sought judicial review of the IR and that issue is presently in a district court for resolution. The claimant and the carrier stipulated that the filing period for the second quarter for supplemental income benefits (SIBS) began on June 24 and ended on September 22, 1998; that the third quarter for SIBS began on September 23 and ended on December 22, 1998; and that the fourth quarter for SIBS began on December 23, 1998, and ended on March 23, 1999; and that the claimant earned no wages during the filing periods for those three quarters. The hearing officer determined that during the filing periods for the second and third quarters the claimant had no ability to work, that during those filing periods her unemployment was a direct result of her impairment from the compensable injury, and that she is entitled to SIBS for the second and third quarters. From those determinations, it may be inferred or implied that the claimant in good faith sought employment commensurate with her ability to work. The carrier appealed those determinations of the hearing officer, contending that the evidence is not sufficient to support the determinations that the claimant had no ability to work during the filing periods for the second and third quarters and requesting that the Appeals Panel reverse the decision of the hearing officer pertaining to the second and third quarters and render a decision that she is not entitled to SIBS for those quarters. A response from the claimant has not been received.

The hearing officer also determined that during the filing period for the fourth quarter the claimant had some ability to work, that she made 10 job contacts during nine days, that she had no interviews or job offers, that she did not in good faith seek employment commensurate with her ability to work, and that her unemployment was a direct result of her impairment from the compensable injury. She also determined that the claimant is not entitled to SIBS for the fourth quarter. The determination that during the filing period her unemployment was the direct result of her impairment from the compensable injury has not been appealed and has become final under the provisions of Section 410.169. The claimant appealed each determination adverse to her, urging that she "proved beyond a preponderance of the medical evidence that she made a good faith effort to seek employment commensurate with her ability to work" and requesting that the Appeals Panel reverse parts of the hearing officer's decision that are adverse to her and render a decision that she is entitled to SIBS for the fourth quarter. The carrier responded, urged that the evidence is sufficient to support determinations that during the filing period the claimant had some ability to work and did not in good faith seek employment commensurate with her ability to work, and requested that the hearing officer's determinations concerning the fourth quarter be affirmed.

DECISION

We affirm.

An interpreter was used to translate for the claimant, and the claimant had difficulty understanding some of the questions. She testified that she fell; injured her right arm, both legs, and her lower back; and had two surgeries on her right knee. She said that during the filing periods in question, she had pain in her right arm, both legs, and lower back; that she talked with Dr. RA, her treating doctor, about the problems that she had; that Dr. RA told her not to work; that in November 1998 she looked for work because she was told that she should; that she tried to find something that she could do; that she could not perform the work involved in some of the jobs that she applied for, but she hoped that the places where she applied may have had some work that she could perform; that she could perform the work of a cashier; and that a functional capacity evaluation was performed in January 1999. A Statement of Employment Status (TWCC-52) for the fourth quarter indicates that the claimant sought employment on five days in November 1998 with five employers and on four days in December 1998 with five employers.

Dr. A performed arthroscopic surgery on the claimant's right knee on August 27, 1996. Dr. RA began treating the claimant in October 1996. He performed a second arthroscopic surgery on the claimant's right knee on January 22, 1997, and later placed the claimant in physical therapy. In a Specific and Subsequent Medical Report (TWCC-64) dated March 16, 1998, Dr. RA described the claimant's left knee, right knee, and back conditions; said that the carrier had initially not accepted the injury to the claimant's back; and stated that she would be unable to work for two months. In a TWCC-64 dated May 24, 1998, Dr. RA again described the claimant's condition, and said that the low back was accepted as part of the injury and that the claimant was unable to work for three months. In a TWCC-64 dated July 28, 1998, Dr. RA described the injuries to both knees and diagnosed lumbosacral injury with right lower extremity radiculitis established by a positive EMG. In a report of an IR dated August 6, 1998, Dr. RA gave a history of the claimant's condition and treatment; stated that she had an impairment of eight percent for the lumbar spine, 13% impairment for the right lower extremity, and two percent impairment for the left lower extremity; that she was on medication and used a TENS unit and walking cane; and that she was unable to work in her present condition. In a TWCC-64 dated November 12, 1998, Dr. RA said that the claimant was unable to work. In a work slip dated December 10, 1998, Dr. RA stated that the claimant continued to be unable to return to work.

In a Report of Medical Evaluation (TWCC-69) dated October 22, 1998, the designated doctor assigned a 15% IR, invalidated lumbar range of motion tests, and in an attached letter explained that the claimant's movements during testing were inconsistent with her movements when her movements were not being measured. A report of a functional capacity assessment performed on January 6, 1999, states that all testing was inconsistent and invalid; that the results only indicate the highest level at which the claimant is willing to function and may not indicate her actual capabilities; and that based on the results, she is unlikely to return to gainful employment in the foreseeable future. In a letter dated January 15, 1999, Dr. H, who examined the claimant at the request of the carrier several times, stated that he continued to believe that there was symptom magnification and suggested a psychological assessment.

We first address the determinations that the claimant had no ability to work during the filing periods for the second and third quarters and had some ability to work during the filing period for the fourth 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 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 rendered during the filing period, medical evidence falling outside the filing period, especially if given close in time to the filing period, may be relevant to determine ability to work and entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941649, decided January 26, 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's determinations that the claimant had no ability to work during the filing periods for the second and third quarters and had some ability to work during the filing

period for the fourth 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). Since we find the evidence sufficient to support the determinations of the hearing officer concerning the ability of the claimant to work during the filing periods in question, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next address the determinations that the claimant did not in good faith seek employment commensurate with her ability to work during the filing period for the fourth quarter and that she is not entitled to SIBS for that quarter. Whether good faith was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications showed good faith and stated the following about good faith:

> In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.

And in Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the trier of fact, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. In Texas Workers' Compensation Commission Appeal No. 950592, decided May 25, 1995, the Appeals Panel affirmed the determination of the hearing officer that the claimant did not make a good faith effort to seek employment where he sought employment for jobs that he did not think he was capable of performing with his restrictions rather than seeking employment with jobs that were within his restrictions. In her Decision and Order, the hearing officer noted that the claimant only looked for work on nine days during the filing period for the fourth quarter. Her determinations that during the filing period for the fourth quarter the claimant did not in good faith seek employment commensurate with her ability to work and that she is not entitled to SIBS for the fourth quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

We affirm the appealed determinations of the hearing officer and her decision and order.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Alan C. Ernst
Appeals Judge