APPEAL NO. 990984

This appeal arises 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 1, 1999. The issues concerned whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his sixth, seventh, eighth, and ninth compensable quarters.

The hearing officer held that the claimant was not entitled to SIBS for any of the quarters in issue because he failed to make a good faith search for employment commensurate with his ability to work for any of the quarters in issue, and that his unemployment was not the direct result of his impairment.

The claimant appeals and argues that he was unable to work, and that state law requires that one have a doctor's release to work. There is no response from the respondent (carrier).

DECISION

Affirmed.

The claimant was employed by the (employer) when he was injured on _____. He was an officer at a corrections institution, and hurt his lower back while pulling open the hood of an 18-wheeler truck. The quarters in issue ran from January 16, 1997, through January 14, 1998, with the filing periods running in the preceding quarters to each SIBS quarter.

The claimant had more than one back surgery. His first surgeon was Dr. T, who referred him to Dr. H. Dr. H performed the claimant's most recent back surgery on August 26, 1996 (fusion L5-S1, with instrumentation). The claimant said that this surgery would require seven to nine months of healing. The claimant said he was still under Dr. H's care during the filing period for the sixth quarter, and being treated through a pain clinic and with pain medication. The claimant testified that this was true also during the seventh, eighth, and ninth quarters. The claimant said he was released according to his functional capacity evaluation (FCE) in November 1998. He had not searched for employment because he was not released by Dr. H. He said he was hurting every day, with low back and left leg pain.

An FCE was conducted on December 17, 1996. The claimant was 42 years old when this was conducted. The claimant, according to the FCE report, stated that he had minimal low back discomfort although his symptoms would increase if he had to stand or ride in a car for long periods of time, or do heavy lifting. His vocational plans were reported as wishing to get as well as possible before returning to his prior occupation with the employer. The FCE results show that the claimant could perform a variety of activities, but had some limitations. For example, it was found that he could lift six to seven pounds

constantly, up to 18 pounds frequently, and up to 35 pounds occasionally. If there was a "bottom line" conclusion reached from this report, it is not included in evidence. In evidence are several short "off work" slips in which Dr. H stated that the claimant was "unable to work since 8/26/96."

A second FCE for November 30, 1998, reported that the claimant could work at the sedentary level. His lifting ability was shown as much less than his 1996 FCE. On January 30, 1997, Dr. H noted that the claimant's leg symptoms had resolved and the fusion was solid, and that the claimant had stopped his work hardening. Dr. H saw him at three-month intervals. In November 1997, the claimant complained primarily of neck and shoulder pain.

There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80% of the employee's average weekly wage as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work.

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, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. We have held that the burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. Whether or not a claimant is "released" is not the sole inquiry that must be made, because a search is only required to be commensurate with the ability to work.

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 of 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). It is the hearing officer that has the best opportunity to observe the demeanor of testifying witnesses and can assess credibility. Thus, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, we affirm the decision and order.

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Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge