APPEAL NO. 991104

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 22, 1999, a contested case hearing was held. With regard to the issue before her, the hearing officer concluded that the appellant (claimant herein) was not entitled to supplemental income benefits (SIBS) for the second compensable quarter. The claimant appeals this determination, arguing that the evidence established that the claimant had no ability to work during the filing period for the second compensable quarter and was entitled to SIBS. The respondent (carrier herein) replies that the decision of the hearing officer is sufficiently supported by the evidence.

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 reached maximum medical improvement on April 3, 1997, with an impairment rating of 27%; that the claimant did not commute any portion of his impairment income benefits; that the second compensable quarter for SIBS began on January 22, 1999, and ended on April 22, 1999; and that the filing period for the second compensable quarter was from October 23, 1998, through January 22, 1999. The claimant testified that he was injured working as an electrician's helper when he received an electrical shock and fell eight feet to the ground. Medical records indicate that the claimant had neck surgery in March 1996. Dr. P, D.C., performed a functional capacity evaluation (FCE) in January 1999 which indicated that the claimant was capable of light/sedentary work. Dr. P later amended this FCE to state that the claimant was not capable of returning to work in any capacity. The claimant testified that he sought employment with seven employers during the filing period. Dr. P testified at the hearing explaining the reason for the amendment of the FCE. The carrier put into evidence a surveillance film of the claimant showing him, among other things, loading groceries into the back of a pickup truck.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS] for any quarter claimed." The hearing officer's determination that the claimant's unemployment during the filing period was a direct result of his impairment from the compensable injury was not appealed by either party. 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 replace 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*.

In the present case, we do not find that the hearing officer's determination that the claimant had an ability to work during the filing period and that he failed to look for work commensurate with his ability to work to be contrary to the overwhelming evidence. While the evidence was conflicting, we find sufficient evidence in the record to support the findings of the hearing officer.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____

Thomas A. Knapp
Appeals Judge