APPEAL NO. 991146

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 11, 1999. With regard to the issue before her, the hearing officer determined that the appellant (claimant herein) was not entitled to supplemental income benefits (SIBS) for the 16th compensable quarter, finding that the claimant had an ability to work and failed to seek employment commensurate with this ability to work. The hearing officer also found that the claimant failed to establish that her unemployment during the filing period for the 16th compensable quarter was a direct result of her impairment from her compensable injury. The claimant appeals, challenging a number of the hearing officer's factual findings and her legal conclusion that the claimant is not entitled to SIBS for the 16th compensable quarter. It is essentially the claimant's position that she was unable to work at all during the filing period for this quarter. The respondent (carrier herein) replies that the hearing officer's findings and decision was supported by sufficient 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 as reformed.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant has not elected to commute any portion of her impairment income benefits; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the filing period for the 16th[1] compensable quarter was October 28, 1998, through January 24, 1999; and that Dr. L was the required medical examination doctor selected by the Texas Workers' Compensation Commission. Dr. S, the claimant's treating doctor, stated in part as follows in a letter dated January 18, 1999:

> This patient cannot perform any activity which requires lifting, pushing, pulling stooping, bending, crawling, squatting or climbing. All of these activities severely aggravate her condition.
>
> This patient is a candidate to continue on [SIBS] as outlined under the Act as she has not been released to the work force. She may be undergoing further knee surgery and pain management during this quarter.

Dr. L, in a report dated October 27, 1998, stated that he believed that the claimant was able to work and, in fact, could return to her preinjury employment.

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[1]The hearing officer's decision mistakenly recites this stipulation as stating the *fifteenth* rather than the *sixteenth* compensable quarter. We reform the decision of the hearing officer to properly reflect the parties' stipulation.

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.

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 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*.

Applying this standard of review, there is certainly evidence to support the hearing officer's finding that the claimant had an ability to work during the filing period. Dr. S clearly was of the opinion that the claimant could not work. However, Dr. L took the opposite view, and it was the province of the hearing officer to resolve this conflict in the medical evidence. With sufficient evidence to support the hearing officer's finding that the claimant had an ability to work during the filing period and with it undisputed that the claimant did not seek employment during this period, we find sufficient evidence to support the hearing officer's determination that the claimant did not seek employment commensurate with her ability to work during the filing period for the 16th compensable quarter.

The hearing officer also found that the claimant's unemployment during the filing period for the 16th compensable quarter was not a direct result of her impairment from the compensable injury. 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. However, in the present case, the hearing officer believed, based upon Dr. L's report that the claimant could go back to the type of work she did prior to the injury and this finding is sufficiently supported by medical evidence.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge