

APPEAL NO. 991179

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 May 11, 1999. The appellant (self-insured) and the respondent (claimant) stipulated that the claimant has a 23% impairment rating; that the filing period for the seventh quarter for supplemental income benefits (SIBS) began on October 1, 1998, and ended on December 30, 1998; and that during that filing period the claimant did not earn wages that were at least 80% of her average weekly wage. The hearing officer determined that while working for the self-insured, the claimant was required to perform a great deal of stocking, lifting, and moving that she is now not able to do. He also found that during the filing period the claimant was able to work no more than 20 hours a week because of pain, numbness, and tingling in her neck, shoulders, and left arm; that she did not seek employment with an employer other than (Employer 2); that she worked part time, usually four hours a day five days a week, for two employers, (Employer 3) and Employer 2; that she in good faith sought employment commensurate with her ability to work; and that her underemployment was a direct result of her impairment from the compensable injury and he concluded that she is entitled to is entitled to SIBS for the seventh quarter. The self-insured appealed, contended that the claimant had the ability to work at a sedentary job 40 hours a week and had the obligation to look for such a job rather than to continue working in a light-duty position 20 hours a week, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the seventh quarter. The claimant responded, urged that the evidence is sufficient to support the determination that the claimant could work only 20 hours a week during the filing period, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The claimant testified that as the result of her compensable injury she had a fusion at C5-6 in November 1994; that her condition has become worse since the surgery; that she takes medication, receives injections, and administers hot and cold therapy at home; and that she is considering surgery at C4-5. She said that she began working part time at Employer 3 on September 4, 1997; that she worked in the jewelry department; that there were problems scheduling her for four hours of work five days a week; that she obtained a job with Employer 2 in the fine jewelry department and began working there on October 27, 1998; that she works four hours a day Monday through Friday; that the work is light duty and she works with pain; and that she is now working as much as she physically can. She said that her son lives with her, that he works full time, that he does some things for her, and that she does do some things for herself at home.

In a letter dated May 11, 1998, Dr. S, the claimant's treating doctor, stated that the claimant had minimal relief of pain from her surgery, continued to suffer on a daily basis, and was unable to perform duties above the sedentary level secondary to cervical and arm

pain. In a letter dated May 18, 1998, Dr. S said that the claimant could not perform a full 40-hour work week in the job she had at the time of her injury. In a letter dated June 29, 1998, Dr. S wrote that the claimant may work up to four hours per day no more than five days per week with restrictions of no bending or stooping, extended overhead reaching, and lifting over 10 pounds. On August 14, 1998, a Texas Workers' Compensation Commission benefit review officer ordered that the claimant be evaluated by Dr. D to determine if the "claimant is able to work more than 4 hours per day? If no [sic], how many? Based on Functional Capacity Evaluation exam." Dr. D provided a five-page report dated September 1, 1998, in which he wrote:

Based on my review of medical records, personal interview and physical examination on [claimant], I do not think she is cable [sic] of performing any more than 20 hours per week. She has evidence of ongoing multi-level degenerative disc disease with accompanying cervical stenosis. In addition there is evidence of bilateral shoulder impingement syndrome with rotator cuff tendinitis. I totally agree with the previous physicians that she is incapable of performing any type of overhead lifting or other type of activity. She has noticeable chronic neck pain with probable bilateral cervical radiculopathy and spinal stenosis from a combination of bony spondylosis and degenerative disc protrusions. I think she should be commended for return back to the work force to perform her current activity. She is obviously experiencing ongoing pain which is limiting her functional activities. I think a four-hour work day with 20 hours per week would be the upper limit that she could tolerate. This would be on a permanent basis.

At the request of the self-insured, Dr. O reviewed the records of the claimant and in a letter dated October 20, 1998, wrote:

She had a functional capacity evaluation on 8/25/98. [Claimant] did not demonstrate work efforts that could reflect her maximum work capabilities. [Claimant] demonstrated submaximal efforts and the following comments reflect the minimum that she can do. She invalidates the testing to the point that you cannot project her true ability. The only comment that you can make refer to her minimal ability because she was able to perform at that level at the time of testing. This in all probability represents an underestimation of what the patient could truly do. However you can only comment on the level that they were willing to perform.

With that being the case, I believe that [claimant] may work an eight hour day but with restrictions. She may occasionally lift less than 20 pounds, frequently lift less than 10 pounds, stand/walk less than six hours in a eight hour work day, and sit less than six hours on an eight hour work day. She will need frequent breaks and to frequently alternate her sitting, standing, and walking positions. If her employer can accommodate such restrictions, than I

see no reason why [claimant] is not able to work an eight hour day or full time.

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. 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). In a case such as the one before us where both parties presented evidence on the question of the ability of the claimant to work, the hearing officer must look at all of the relevant evidence to make a factual determination to resolve that disputed question and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determination of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. 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 could 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 determination that during the filing period for the seventh quarter for SIBS the claimant was able to work no more than 20 hours per week because of pain, numbness, and tingling in her neck, shoulders, and left arm is 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, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge