APPEAL NO. 991209

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 30, 1999, a contested case hearing was held. With respect to the issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the third compensable quarter. The claimant files a request for review, arguing that he has no ability to work. There is no response to the claimant's request for review by the respondent (carrier) in the appeal file.

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.

We adopt the following statement of evidence from the hearing officer's decision:

> Claimant testified that he worked as a truck driver for the Employer and he injured his neck, low back, and left knee in a one vehicle accident on _____. Claimant has had limited treatment for his low back and neck. He has had two surgeries on his left knee and continues to experience pain in the left knee. In addition, Claimant has other health problems to include ankle and foot problems, lung disease, bilateral leg pain, headaches, right knee pain, and depression.
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> Claimant received an impairment rating of 34% for the compensable injury to the neck, low back, and left knee. Claimant's present treating doctor is [Dr. T] who issued a recent report stating that the Claimant was disabled. Claimant contends that he is unable to work at any job and therefore, he does not need to make a good faith effort to find employment. Claimant believes that he is entitled to [SIBS] for the 3rd quarter.
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> Carrier contends that Claimant has some ability to work and therefore must make a good faith effort to find employment commensurate with his ability to work. Carrier relies on a Functional Capacity Evaluation [FCE] and the reports of [Dr. R] and [Dr. E]. Both doctors note significant work restrictions, but both conclude Claimant could do sedentary type work if it were available. Carrier argues that Claimant has failed to establish that he has no ability to work.

We also note the parties stipulated that the third compensable quarter began on February 17, 1999, and would continue through May 18, 1999.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

6. [Dr. T], the Claimant's present treating doctor, issued a report on February 25, 1999 stating that [the claimant] is considered disabled.

* * * *

8. Claimant was evaluated by [Dr. R] in February of 1998 and [Dr. R] noted that Claimant's knees limit him to a sedentary type job.

9. In November of 1998, [Dr. R] issued a report indicating Claimant could do a sedentary desk job but noted the Claimant does not feel like he is able to work. Because of the disagreement over Claimant's ability to work, [Dr. R] ceased to provide medical care to the Claimant and provided the Claimant a list of three orthopedic surgeons for Claimant's consideration.

10. Claimant had a [FCE] performed on March 25, 1999 which resulted in an undetermined physical demand classification with a specific finding that the tests were invalid because Claimant was not exerting a minimum effort. The FCE further noted that Claimant was positive for three out of five tests regarding inappropriate illness behavior.

11. [Dr. E] evaluated the Claimant on April 5, 1999 and noted that Claimant is severely limited in what he can do and noted that Claimant's work restrictions are limited walking, no lifting over ten pounds, no squatting, kneeling, or bending and when sitting, Claimant must have frequent breaks.

12. During the filing period for the 3rd quarter, Claimant had the ability to perform sedentary type work.

13. During the filing period for the 3rd quarter, Claimant did not attempt in good faith to find employment commensurate with his ability to work.

CONCLUSION OF LAW

2. Claimant is not entitled to [SIBS] for the 3rd compensable quarter.

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." In the present case, the hearing officer found that the claimant's unemployment during the filing period was a direct result of his impairment and this has not been appealed by either party. The thrust of the claimant's appeal is his contention that he has been unable to work at all due to his compensable injury and the medications that it requires him to take.

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 Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Applying this standard, we find sufficient evidence to support the hearing officer's decision in the present case. Section 410.165(a) provides that the 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).

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge