

APPEAL NO. 991304

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 20, 1999. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth compensable quarter from October 31, 1998, to January 29, 1999. The hearing officer concluded that the claimant was entitled to these benefits. The appellant (carrier) files a request for review, contending that the hearing officer abused her discretion in admitting certain of the claimant's exhibits, in finding the claimant had a 17% impairment rating (IR) and in both finding the claimant made a good faith job search and his unemployment was a direct result of his impairment. The claimant responds that the hearing officer did not err in admitting his exhibits and that the carrier failed to establish harm even if it was error. The claimant argues that the hearing officer's findings were sufficiently supported by the evidence and that her decision should be affirmed.

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 on _____, the claimant suffered a compensable injury to his low back; that the claimant reached maximum medical improvement on February 7, 1997; that the claimant did not elect to commute any portion of his impairment income benefits; that the filing period for the fourth compensable quarter began on August 1, 1998, and ended on October 30, 1998; and that the fourth compensable quarter began on October 30, 1998, and ended on January 29, 1999. The hearing officer took official notice of a prior decision and order in which it was determined that the claimant had a 17% IR. The carrier represented that this decision had been appealed to district court where it was pending trial.

The claimant testified that during the filing period for the fourth compensable quarter he was attending cosmetology school under the auspices of the Texas Rehabilitation Commission and also seeking jobs from a number of employers in the areas of sales, cosmetology, welding and as a general helper. The claimant had the persons he contacted about employment sign his Statement of Employment Status (TWCC-52). The carrier employed a service which confirmed some of the claimant's job contacts and applications. The claimant's attorney provided letters confirming other job contacts. The carrier objected to the admission of some of these letters into evidence on the basis that they were not timely exchanged after the benefit review conference (BRC). There was an extended discussion on the record concerning the exchange of these documents, after which the hearing officer admitted them, finding good cause for untimely exchange and that the claimant exercised due diligence in obtaining these documents.

We first address the carrier's argument that the hearing officer erred in admitting the claimant's exhibits confirming some of his job contacts. We note that there were other exhibits concerning the issue of confirming job contacts that were admitted into evidence without objection and that it was Claimant's Exhibit Nos. 7 through 11 about which the carrier complains on appeal. These consisted of letters signed by an individual whom the claimant had contacted about employment during the filing period, confirming the contact. The claimant's attorney represented that he had earlier obtained some letters from the claimant's job contacts which he had exchanged and which were admitted into evidence. He further represented that since not all of the job contacts had responded to his letter, he printed out additional letters after the BRC and gave them to the claimant so the claimant could have the job contacts sign the letters. The attorney stated that he received these letters back from the claimant in a week and mailed them to the carrier. They were returned to the attorney because of insufficient postage and then remailed to the carrier. The chronological sequence of events was that the BRC was held on March 18, 1999; the attorney represented that he first mailed the exhibits to the carrier on April 7, 1999; and the attorney represented he remailed the exhibits to the carrier on April 15, 1999. The carrier had no objection to this being the sequence of events.

Under these circumstances, we do not find the hearing officer abused her discretion by admitting the exhibits. She found good cause for an untimely exchange in that the documents were not in existence until after the BRC and the claimant exchanged them after he obtained them. She found that the claimant used due diligence in obtaining the documents. We do not find an abuse of discretion in the hearing officer so finding. Finally, we note that there was other evidence concerning the confirmation of other job contacts from both the claimant and the carrier. Nor do we find that under the facts of this case the carrier has established that any harm or reversible error resulted from the admission of these documents. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

We next consider the carrier's argument that the hearing officer erred in finding the claimant has a 17% IR because the issue of IR is still being litigated in the courts. The hearing officer relied upon a decision and order from a previous CCH at which it was determined the claimant had a 17% IR. The Appeals Panel affirmed that hearing officer's decision in an unpublished decision authored by Judge Rhodes-Texas Workers' Compensation Commission Appeal No. 982196, decided October 30, 1998. The fact that this decision has been appealed to the district court does not affect the validity of the IR determination made by the Texas Workers' Compensation Commission unless and until there is a contrary judgment by the district court. Section 410.125(b) provides that a decision of the Appeals Panel is binding during the pendency of an appeal for judicial review. We therefore find no error in the hearing officer finding that the claimant's IR is 17%.

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 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).

Applying this standard of review, there is certainly evidence to support the hearing officer's finding of a good faith job search. The claimant testified that he looked for jobs at a number of places during the qualifying period and the hearing officer accepted this testimony. The carrier argues that many of the claimant's job contacts were cold calls and did not involve the claimant actually completing an application. We have repeatedly rejected the argument that cold calls are not job contacts. See Texas Workers' Compensation Commission Appeal No. 982222, decided October 22, 1998; Texas Workers' Compensation Commission Appeal No. 982468, decided November 23, 1998. While the carrier argued at the hearing and on appeal that the claimant applied for jobs inconsistent with his restrictions the hearing officer explicitly stated in her decision, the carrier failed to prove this and we defer to her in this regard as the finder of fact.

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. We find sufficient evidence in the record of this case to support the hearing officer's finding that the claimant's unemployment during the filing period was the direct result of his impairment.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge