APPEAL NO. 991326

This appeal arises 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 20, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first, second, third, fourth, and fifth quarters. In his appeal, the claimant challenges the determinations that he had some ability to work in the relevant filing periods, that he did not make a good faith search for employment commensurate with his ability to work in those periods, and that he is not entitled to SIBS for the quarters at issue. In its response, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the claimant's unemployment in the filing periods was a direct result of his impairment.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on May 13, 1997, with an impairment rating of 15%; that he did not commute his impairment income benefits; that the first quarter of SIBS ran from March 25 to June 23, 1998, with a corresponding filing period of December 25, 1997, to March 24, 1998; that the second quarter of SIBS ran from June 24 to September 22, 1998, with a corresponding filing period of March 25 to June 23, 1998; that the third quarter of SIBS ran from September 23 to December 22, 1998, with a corresponding filing period of June 24 to September 22, 1998; that the fourth quarter of SIBS ran from December 23, 1998, to March 23, 1999, with a corresponding filing period of September 23 to December 22, 1998; and that the fifth quarter of SIBS ran from March 24 to June 22, 1999, with a corresponding filing period of December 23, 1998, to March 23, 1999. The claimant testified that he injured his back in the course and scope of his job as a machinist, when he lifted a steel rod that weighed about 200 pounds and felt a "pop" in his low back. In a report of September 29, 1997, Dr. P, a neurosurgeon noted that the claimant had complaints of low back pain, bilateral leg pain, and numbness in the toes of his right foot. Dr. P diagnosed herniated discs at L4-5 and L5-S1, with right L5 nerve root compression and spondylosis. Dr. P opined that "[t]he patient remains a surgical candidate with continuing complaints and confirmatory evidence on myelogram/CT scan of nerve root compression." Apparently, Dr. P retired and the claimant submitted a request to change treating doctors to Dr. C, a chiropractor. The Texas Workers' Compensation Commission apparently lost the paperwork relating to that request and the approval of the change of treating doctors was, therefore, delayed. The claimant began treating with Dr. C in October 1998. In a February 10, 1999, "To Whom it May Concern" letter, Dr. C states:

> [Claimant] is still under my care at this time. [Claimant] has made some improvement but it has been sporadic in nature. He has never been able to

> bend, twist, or lift anything since the injury and it is estimated he may never be able to bend, twist, or lift anything. He is therefore unable to return to his former job and would have great difficulty performing work of any type. I cannot comment on his condition before 10-14-98, his first visit to this office, but his records indicate that his status remained the same as it is currently. It stands to reason, therefore, that he has been unable to work from the date of the injury 5-2-95 [sic] up [remaining portion of sentence illegible].

In a second letter of March 30, 1999, Dr. C stated that the claimant "is unable to return to work in any capacity at this time as he still has difficulty with many activities of daily living."

On October 14, 1997, the claimant underwent a functional capacity evaluation (FCE). The FCE report provides that the claimant qualifies for light to medium category work under the Dictionary of Occupational Titles. However, the report also provides that "it would be unsafe for him to return to full duty and he would be at a high risk of being re-injured on the job." The report concluded that if the claimant were to be allowed to return to work, lifting restrictions should be strictly implemented.

On March 22, 1999, a second FCE was performed on the claimant by Dr. B, a chiropractor, who examined the claimant at the request of the carrier. The report from that evaluation states that the claimant is "qualified to lift safely in the Sedentary to Light PDL Category as defined by the Dictionary of Occupational Titles." In a report of March 26, 1999, Dr. B stated that the claimant "may be fit to work at a sedentary to light physical demand level, which would include answering the phone, working as clerk, filing, [and] working in a warehouse without excessive lifting, standing or walking."

In a "To Whom it May Concern" letter of April 21, 1999, Dr. C stated that he concurred with the findings of the March 22, 1999, FCE. In addition, Dr. C stated:

> [Claimant] has been unable to work since his injury on _____. It is my opinion that he will never be able to return to his former job due to the nature of heavy lifting, bending, twisting, etc. involved. It is also my opinion, however, that he would benefit from a referral to the Texas Rehabilitation Commission for vocational assessment and re-training in a new field of employment. Although he is unable to return to his former job, he could and should work in a less demanding environment. In addition, [claimant] is receiving a referral from this office to seek another surgical consult. He will be referred to [Dr. M], a neurosurgeon.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all in a 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. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18,

1994, states that an assertion of inability to work must be judged against employment generally, not just the job where the injury occurred. In addition, we have noted that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. 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 decides the weight to assign to the evidence before her and resolves conflicts and inconsistencies in the testimony and evidence. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the filing periods for the first through fifth quarters. As noted above, there was conflicting evidence on the question of the claimant's ability to work in those periods. Dr. C opined that the claimant was unable to work in any capacity. However, the 1997 and 1999 FCEs indicate that the claimant was capable of working in the light to medium and sedentary to light categories, respectively. Dr. B opined that the claimant could work in accordance with the restrictions outlined by the 1999 FCE. It was the hearing officer's responsibility as the fact finder to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. She did so by giving more weight to the opinion of Dr. B and the FCEs, than to the opinion of Dr. C. In this case, the hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that he was totally unable to work in the filing periods for the first, second, third, fourth and fifth quarters. She was acting within her province as the sole judge of the weight and credibility of the evidence in so finding. Our review of the record does not demonstrate that the hearing officer's determinations that the claimant had some ability to work in the relevant filing periods are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The claimant acknowledged that he did not engage in a job search in the filing periods; accordingly, the hearing officer properly determined that he did not satisfy the good faith requirement and that he is not entitled to SIBS for the first, second, third, fourth, and fifth quarters.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge