APPEAL NO. 991371

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 18, 1999. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the third quarter and that he is entitled to SIBS for the fourth quarter. In his appeal, the claimant challenges the determinations that he had some ability to work in the filing period for the third quarter, that he did not make a good faith search for employment commensurate with his ability to work, and that he is not entitled to SIBS for the third quarter. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. In its cross-appeal, the carrier argues that the hearing officer's determinations that the claimant had no ability to work in the filing period for the fourth quarter and that he, thus, made a good faith effort to look for work and is entitled to fourth quarter SIBS are against the great weight of the evidence. The carrier did not appeal the determinations that the claimant's unemployment in the filing periods for the third and fourth quarters are a direct result of his impairment.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____. The parties stipulated that the claimant's impairment rating for his compensable injury is 16%; that he did not commute his impairment income benefits; that the third quarter of SIBS ran from January 13 to April 13, 1999; and that the fourth quarter of SIBS ran from April 14 to July 13, 1999. The filing periods were identified as having run from October 14, 1998, to January 12, 1999, and from January 13 to April 13, 1999, respectively. The claimant testified that he was employed as an electrician's apprentice at the time of his injury and that he injured his low back lifting a bucket of paint that he mistakenly thought was empty.

The claimant testified that he had fusion surgery as a result of his compensable injury in 1996. The claimant's treating doctor is Dr. L. In a letter dated November 2, 1998, Dr. L noted that MRI testing of the claimant's lumbar spine "did not show any stenosis or herniated disk." In addition, Dr. L stated that the claimant had been examined by Dr. S, who opined that despite his depression, the claimant was a good candidate for a trial spinal cord stimulator. Dr. L concluded that he would proceed with the stimulator. In a December 28, 1998, letter, Dr. L noted that the claimant has "severe chronic mechanical low back pain and bilateral hip and leg pain, secondary to lumbar disk disease, with previous surgery but no evidence that he needs any further direct procedures on his lumbar spine." Dr. L again stated that the claimant needed a spinal cord stimulator and that he would attempt to get it approved. On January 19, 1999, Dr. L referred the claimant for a spinal cord stimulator trial. In a report of January 25, 1999, Dr. B, who implanted the stimulator, noted that the claimant had excellent pain relief for three days

following placement of the stimulator. In his January 25th report, Dr. L also noted that the claimant had excellent results from the temporary spinal cord stimulator and that he would attempt to get authorization for a permanent stimulator. In a "To Whom it May Concern" letter of February 2, 1999, Dr. L stated:

> [Claimant] is completely disabled for any type of employment because of a chronic mechanical low back disorder secondary to lumbar disk disease and the amount and strength of medication he takes to control the pain. He has had previous surgery. He has had all forms of conservative measures. He is being considered for a spinal cord stimulator. There is no way that this man can work. He is unable to do any lifting, carrying or bending and is unable to [sit], stand or walk for any [period] of time.

The claimant testified that on May 7, 1999, a permanent spinal cord stimulator was implanted in his lumbar spine.

The carrier introduced a functional capacity evaluation (FCE) report of March 26, 1997, which states that the claimant is able to work at a medium physical demand level for an eight-hour day. In addition, the carrier introduced a July 17, 1997, report of Dr. P, who examined the claimant at the request of the carrier. In his report, Dr. P noted that the claimant tested in a light physical demand level job classification. Dr. P reexamined the claimant on July 23, 1998, noted that he found "no essential change in his medical condition from when I examined him in July 1997," and opined that the claimant would continue to have recurring muscle spasms and "a waxing and waning of the intensity of his complaints."

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 during the filing period in question, 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 him 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 period for the third quarter but that he did sustain his burden of proof with respect to the filing period for the fourth quarter. There was conflicting evidence on the question of the claimant's ability to work in the filing periods. The March 1997 FCE concluded that the claimant could work at a medium physical demand level. In addition, Dr. P opined in his July 1997 report that the claimant could work at a light physical demand level and noted that the claimant's condition had not changed significantly between the July 1997 and July 1998 examinations. However, in his February 2, 1999, letter, Dr. L opined that the claimant is "completely disabled for any type of employment because of a chronic mechanical low back disorder secondary to lumbar disk disease and the amount and strength of medication he takes to control the pain." 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. He did so by finding that the claimant had not established that he had no ability to work until Dr. L provided his opinion that the claimant was unable to work in February 1999, during the filing period for the fourth quarter. 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 period for the third quarter but was so persuaded with respect to the filing period for the fourth quarter. He was acting within his 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 filing period for the third quarter and no ability to work in the filing period for the fourth quarter 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 third quarter but that he did so for the fourth quarter.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge