APPEAL NO. 991372

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 24, 1999. With respect to the issues before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the eighth quarter and that the appellant (carrier) waived its right to contest the claimant's entitlement to eighth quarter SIBS by failing to timely file its Request for Benefit Review Conference (TWCC-45). In its appeal, the carrier asserts error in each of those determinations and asks that we reverse the hearing officer's decision and render a new decision in its favor. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he received an impairment rating (IR) of 15% or greater; that he did not commute his impairment income benefits; and that the filing period for the eighth quarter ran from November 20, 1998, to February 18, 1999. The eighth quarter of SIBS was identified as the period from February 19 to May 20, 1999.

There was no testimony at the hearing. Dr. C is the claimant's current treating doctor. In a progress note of November 25, 1998, Dr. C diagnosed failed back syndrome and chronic pain. In addition, Dr. C noted that the claimant had reached maximum medical improvement "statutorily" with a 29% IR; that he had been approved for the implantation of an intrathecal morphine pump; and that he "remains permanently off work." In a letter of December 16, 1998, Dr. C stated:

> [Claimant] has been under my care for treatment of his low back, due to work related injured [sic] that happened on _____. He is now permanently disable [sic], having had multiple surgeries on his back and groin area. He is suffering from failed back syndrome with chronic in contractible [sic] pain and is forced to ambulate with the assistance of a cane, walker or wheelchair as a result of the surgeries and failed back. A recent EMG/NCV . . . on 12-04-98 showed chronic radiculopathy of the lumbar paraspinal at L4-5. Since his ongoing disability precludes any form of work for the foreseeable future, I feel that he remains a candidate for SIBS.

In a progress note of December 30, 1998, Dr. C stated that the claimant's "overall prognosis is poor for recovery and he is permanently off work." In his February 17, 1999, report, Dr. C states that the claimant will be having a morphine pump implanted on February 24, 1999, noting that the pump "is necessary because of the amount of pain that he has to endure." Dr. C's April 21, 1999, treatment notes state that the morphine pump is

functioning well and that the claimant is "improved somewhat"; however, Dr. C further noted that "[h]is prognosis is still poor for a complete recovery. He is compliant with the treatment program and remains permanently off work."

In a letter of June 30, 1998, Dr. MM, a prior treating doctor, noted that the claimant "exhibits severe pain behavior" and that "the pain behavior has become the most important part of his problem, since the anatomy has been surgically corrected to the best of my understanding." Dr. MM concluded "I believe that he is permanently disabled from these problems and will continue to be so for the rest of his life." In a letter of November 4, 1997, Dr. MM stated that he did "not believe that this patient will be able to return to any type of gainful employment for the duration of his life." Dr. MM explained that "[t]his patient has too much impairmobility [sic] because of his pain from his injuries, and that is the reason for his inability to work."

On November 4, 1998, the claimant was admitted to the hospital and Dr. OC administered an "intrathecal morphine injection in a trial in preparation for intrathecal pump morphine implant." On March 24, 1999, Dr. OC implanted the intrathecal morphine pump as treatment for "chronic intractable pain syndrome." In a progress note of April 5, 1999, Dr. OC stated that the claimant's pain is "under control, however, he is complaining of the problem that the medication is making him sleepy."

The claimant apparently retained Dr. G, an orthopedic surgeon, to perform a peer review on the issue of the claimant's ability to work. In a letter to the claimant's attorney dated November 23, 1998, Dr. G stated "[i]t is my opinion that [claimant] cannot gain or maintain meaningful employment and should be considered permanently disabled." In addition, Dr. G opined that "the records clearly document conditions that require [claimant] to remain off work." Finally, Dr. G stated:

> Presently, I do not feel that [claimant] can function in any type of work environment taking into account his injury, his subsequent surgical procedures, his limitations, and medications he is taking. I also do not feel that he can function taking his present medications or any combination of medications. With [claimant's] prescribed medications I feel that it would present that [claimant] would be unstable and unable to adequately work without not only injuring himself but others.

The carrier introduced an April 22, 1998, functional capacity evaluation (FCE) by Dr. O. In his report, Dr. O concluded:

> There is no doubt that this patient has had significant problems with his low back. But unfortunately on his examination, he has so many bizarre findings that one cannot tell what actual objective findings are present. If he was as bad as he tested on functional testing, basically, he should not be able to get up out of bed or much less walk and yet he can walk and was noted to ambulate fine. Therefore, unfortunately, I simply cannot get a functional capacity that is valid for the degree of abnormality that this patient has.

The carrier has had Dr. LL examine the claimant on several occasions. In a report of June 16, 1995, Dr. LL stated:

> This man's emotional component of his complaints is quite striking. To me this man's behavior pattern represents a combination of functional overlay and significant underlying pathology. To me this man's prognosis is extremely poor based upon his emotionality and reactivity to pain and attempts at examination.
>
> The prognosis for this man's work return is poor no matter what is done to him in the future. (Emphasis in original.)

On March 17, 1999, the parties deposed Dr. LL. In his deposition, Dr. LL testified that the claimant had a "significant emotional component of his complaints" and that he had an "exaggerated pain response to all motions." In addition, Dr. LL opined that the claimant "should be able to do light work, office work, answer a phone, sedentary work, that type of activity." The carrier introduced a surveillance videotape of the claimant, which shows him exiting his car, retrieving a bag and a binder from the back seat, walking slowly to the trunk of the car, opening the trunk, getting out a wheelchair, opening the wheelchair, sitting down, and wheeling himself into his apartment. Dr. LL testified that the claimant's appearance on the tape "was substantially different than it was when he was here last in the office with the wheelchair." Dr. LL explained:

> Well, when he was here in the wheelchair it was like he couldn't even get out of the wheelchair without being lifted out of the wheelchair. And he would moan and groan and barely be able to move himself. On a short section of that tape it was apparent he's able to walk and put the wheelchair in the car and walk like a normal human.

The carrier introduced an FCE of April 12, 1999. That report states that the claimant did not give a good effort on testing and that he "demonstrated five positive Waddell's tests for non-organic signs." The report concluded:

> The patient either refused to attempt or demonstrated inconsistent effort throughout the functional assessment, i.e., invalid tests, invalid range of motion, inconsistent heart rate, activity and expressed pain level. Therefore, patient's level of function cannot be determined at this time.

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 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 sustained his burden of proving that he had no ability to work in the filing period for the eighth quarter. There was conflicting evidence on that question. The carrier argues that the hearing officer's determination that the claimant had no ability to work is against the great weight of the evidence. In so arguing, the carrier emphasizes that Dr. O's report and the FCE report both state that the claimant's functional abilities could not be accurately identified because of his symptom magnification, his pain behavior, and his lack of effort in the testing. The carrier also asserts that the hearing officer's omission of a reference to Dr. LL's deposition or the surveillance videotape "indicated that she did not even consider this in rendering her Decision." We cannot agree with this assertion. The hearing officer noted in the decision that the carrier presented conflicting evidence on the issue of the claimant's ability to work; however, she determined that the "credible medical evidence . . . overwhelmingly established that Claimant had a total inability to work." By commenting on the credibility of the claimant's evidence, the hearing officer indicated that she considered and weighed the evidence and made a credibility determination, as she was required to do. 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 opinions of Dr. C, Dr. MM, and Dr. G that the claimant had no ability to work than to the opinion of Dr. LL, the evidence from Dr. O, and the April 1999 FCE. 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 determination that the claimant had no ability to work in the filing period for the eighth quarter is 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 that determination, or the determination that the claimant is entitled to eighth quarter SIBS, 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 carrier also argues that the hearing officer erred in determining that it had waived its right to contest the claimant's entitlement to SIBS for the eighth quarter pursuant to Section 408.147 because it did not timely file its TWCC-45. The claimant's

Statement of Employment Status (TWCC-52) is date-stamped as having been received by the carrier on February 5, 1999. The carrier's TWCC-45 was filed in the (field office 1) field office of the Texas Workers' Compensation Commission (Commission) (field office 1) on February 16, 1999. The hearing officer took official notice that February 15, 1999, was President's Day and that the Commission was closed on that day. Thus, the 10-day period would extend to February 16th in this case under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.3(a)(3) (Rule 102.3(a)(3)). However, the hearing officer determined that the TWCC-45 was not timely filed because the (field office 2) field office (field office 2) is the field office that is managing this claim. We have previously determined that in order for a TWCC-45 to be timely it must not only be filed within the 10-day period but must also be filed in an appropriate location, namely either the central office of the Commission or the field office managing the claim. Texas Workers' Compensation Commission Appeal No. 962426, decided January 8, 1997; Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997; Texas Workers' Compensation Commission Appeal No. 980554, decided May 4, 1998. In this instance, the carrier satisfied only the requirement that the TWCC-45 be filed within 10 days. It filed the TWCC-45 in field office 1 and it was required to file it in either field office 2 or the central office. As such, the hearing officer properly determined that the carrier had waived its right to contest the claimant's entitlement to SIBS for the eighth quarter under Section 408.147.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge