

APPEAL NO. 991402

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 18, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the filing period for the second quarter for supplemental income benefits (SIBS) began on November 10, 1998, and ended on February 8, 1999, and that the filing period for the third quarter began on February 9, 1999, and ended on May 10, 1999.¹ The hearing officer determined that during those filing periods the claimant did not seek employment and that her unemployment was a direct result of her impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer also determined that during those filing periods the claimant had some ability to work and did not in good faith seek employment with her ability to work and that she is not entitled to SIBS for the second and third quarters. The claimant appealed those determinations, urging that they are so against the great weight and preponderance of the evidence as to be manifestly unjust. The carrier responded, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We affirm.

Dr. M, the designated doctor, certified that the claimant reached maximum medical improvement on December 29, 1997. A functional capacity evaluation (FCE) was performed on August 7, 1998. In a letter dated August 10, 1998, Dr. M stated that he reviewed the medical records; that the report of the FCE indicated that the claimant gave submaximal effort; that she could occasionally lift 15 pounds, could frequently lift 10 pounds, and should avoid heavy lifting, bending, or stooping; that she could work in a sedentary to light-duty job; and that he would send her for additional testing. In a letter dated August 27, 1998, Dr. M increased her occasional lifting to 20 pounds and said that she could return to light-duty work. In a letter dated October 19, 1998, Dr. K stated that he examined the claimant, reviewed her medical records, and recommended additional tests and physical therapy. On October 26, 1998, Dr. K wrote a letter stating that it was brought to his attention that in his October 19, 1998, letter he did not address work restrictions for the claimant; that it was his opinion that she should remain completely off work until the recommendations in that letter are carried out; and that she needs to be aggressively treated with a comprehensive pain program as previously recommended by Dr. B, a chiropractor.

¹If the qualifying period for the third quarter was moved back 14 days, as provided in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(1)(D)(4) (Rule 130.101(1)(D)(4)), the SIBS rules effective January 31, 1999, do not apply. Even if they did, applying the provisions of Rule 130.102(d)(3) concerning ability to work would not change the results reached in this decision.

A videotape made in May 1998 shows the claimant descending outside stairs from the second story of what appears to be an apartment building; carrying a large purse, a medium-sized bag with a strap, and another object; entering a vehicle; and carrying a small child.

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 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated that the claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. Medical evidence is required to support findings of no ability to work, but medical evidence is not required to support a determination that the claimant had some ability to work. Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. The hearing officer did not err in considering the video of the claimant.

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 may believe all, part, or none of any witness's testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the question of the ability of the claimant to work during the filing periods the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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 hearing officer's determinations that the claimant had some ability to work during the filing periods, that during the filing periods she did not in good faith seek employment commensurate with her ability to work, and that she is not entitled to SIBS for the second and third quarters are not so against the great weight and preponderance of the

evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the appealed determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge