APPEAL NO. 991432

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 June 11, 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 fifth and sixth quarters. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant had no ability to work in the filing period for the fifth and sixth SIBS quarters, that her unemployment was a direct result of her impairment, and that she is entitled to SIBS for the fifth and sixth quarters are against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, and that she has received benefits from the carrier, including prior quarters of SIBS. The claimant testified that she injured her low back in the course and scope of her employment as a licensed vocational nurse, when she caught and held a patient to keep the patient from falling. The fifth quarter of SIBS was identified as the period from January 30 to April 30, 1999, with a corresponding filing period of October 31, 1998, to January 29, 1999, and the sixth quarter of SIBS was identified as the period from May 1 to July 29, 1999, with a corresponding filing period of January 30 to April 30, 1999.

The claimant testified that she contacted five employers in the filing period for the fifth quarter at the urging of Mr. C, the vocational rehabilitation consultant retained by the carrier. She stated that she did not contact any employers in the filing period for the sixth quarter. The claimant maintained that, although she contacted some employers in the fifth quarter filing period, she does not believe that she was capable of performing any work in either filing period. She testified that she can sit for 20-30 minutes at a time, that she can stand still for no more than 10 minutes, and that she can walk for about 20 minutes at a time. The claimant had spinal surgery in 1995 and was fused from L4 to S1, with the insertion of hardware. That surgery failed. The claimant testified that the hardware in her spine moves and causes excruciating pain. She stated that she takes six different medications each day and uses a TENS unit to help control the pain.

In a letter of July 2, 1998, Dr. S, the claimant's current treating doctor, noted that the claimant's fusion is not complete and that "there apparently is 3mm. motion on flexion/extension . . . ." In another letter of the same date, Dr. S noted that the claimant has complaints of marked low back pain, which is mechanical and nonradicular in nature and relates to her unstable fusion.

On December 2, 1998, the claimant underwent a functional capacity evaluation (FCE). The FCE report states that the claimant "demonstrated a physical demand level of sedentary." That report further provides:

> Based on current performance level, any job being considered should include frequent changes of position. Limit standing to a few minutes, 30 minutes of sitting and avoidance of twisting or bending at the waist. Repetitive back, arm, trunk, and leg movements should be avoided. Frequent microbreaks (5-10 seconds) are encouraged. A weight lifting limit should be less than 10 pounds occasionally. Carrying limits should be 0 pounds. Pushing limits should be 0.

The therapists who performed the FCE, wrote an addendum report which states:

> [Claimant] was evaluated on 12/2/1998. Due to the way the report was worded [claimant] is being told she must start applying for a job. This was not the intent of the evaluating therapists. This person is not physically, or psychologically ready to return to a job. Work hardening and work conditioning were not recommended because it was not felt she would tolerate even a two hour program.

The addendum report concluded that if the claimant were to receive psychological evaluation and treatment, individual occupational therapy, vocational exploration, and work hardening/conditioning based on the vocational exploration, "she may be able to progress to a sedentary job."

In a letter of January 26, 1999, Dr. S stated that the "work capacity evaluation report speaks for itself. I would rely heavily on the recommendations with regards to any suggestions for her returning to work of any kind." Dr. S also noted that he thought individual occupational therapy and psychological evaluation and treatment would be appropriate for the claimant.

In a "To Whom it May Concern" letter of April 14, 1998, Dr. O, an orthopedic surgeon who is also treating the claimant, stated:

> This is to certify that [claimant] is a patient of mine. Please be advised that it has become medically necessary for [claimant] to remain out of work. I have referred her to [Dr. JS]. The following restrictions are necessary:
>
> 1. The patient cannot sit for more than twenty minutes at a time.
>
> 2. The patient cannot stand for more than twenty minutes at a time.
>
> 3. The patient cannot bend or twist at any time.

In an undated letter, Dr. B, whose role in this case is not apparent from the record, stated:

> I do not feel [claimant] is capable of traveling to and from work, being at work, and performing appropriate tasks and duties on a reliable basis. I feel the chances of her returning back to any gainful employment status is essentially nil without completing a multi-disciplinary pain management program.

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 her burden of proving that she had no ability to work in the filing periods for the fifth and sixth quarters. There was conflicting evidence on that question. 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. To that end, the hearing officer stated:

> I have read all of the medical records presented . . . and I do not see that the Claimant is capable of working, despite the fact that a total inability to work arises only in extremely rare and unusual circumstances. She has not been released to return to work by her doctors, and the [FCE], as amended, does not indicate that the Claimant's physical condition would permit her to work. She has tried to retrain but was unable to complete the course work. Her ability is less than sedentary. It does not appear from the evidence presented that the Claimant is a malingerer. At least one doctor has recommended further surgery to attempt to repair her failed fusion.

The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence in finding that the claimant had no ability to work in the filing periods for the fifth and sixth quarters. Our review of the record does not demonstrate that that determination 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 the determination 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's challenge to the hearing officer's direct result determination is dependent upon the success of its argument that the claimant did not satisfy the good faith requirement in this instance. Given our affirmance of the good faith determination, we likewise affirm the hearing officer's determinations that the claimant's unemployment in the filing periods was a direct result of her impairment and that the claimant is entitled to SIBS for the fifth and sixth quarters.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge