APPEAL NO. 991444

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 10, 1999. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth compensable quarter. The hearing officer found that the claimant was entitled to these benefits. The appellant (self-insured) files a request for review, arguing that the hearing officer erred in finding that the claimant acted in good faith when he did not seek employment because he had no ability to be gainfully employed. The claimant responds that there was sufficient evidence to support the hearing officer's finding that the claimant was unable to work.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that injury took place when he fell and sustained an injury to his right leg at work. The claimant testified that after being in the U.S. Navy for 30 years, he had worked for the self-insured for 17 years at the time of his injury. The claimant testified that as a result of the injury he underwent three surgeries, including a total replacement of his right knee. The parties stipulated that the claimant had a 17% impairment rating and that he had not commuted any portion of his impairment income benefits. The parties also stipulated that the fourth compensable quarter was from March 19 through June 17, 1999, and the filing period for this quarter began on December 18, 1998, and continued through March 18, 1999.

It was undisputed that the claimant did not seek employment during the filing period of the fourth compensable quarter. The claimant testified that he did not seek employment because he was unable to work and his doctors told him he could not work. The claimant testified that due to his injury he can only walk a very short distance, is unable to drive and is homebound. Dr. B, M.D., who, the claimant testified, was his treating doctor throughout the filing period, stated as follows in a letter dated April 19, 1999:

> [The claimant] has rather severe and debilitating pain and problems with his right leg, and this affects his whole person and affects his ability at mobility, as well as activities of daily living skills. Certainly since I have followed him from the above date, he has been unable to work, and in fact I have previously filled out a work restriction form wherein I stated that he specifically is considered to be off duty work. He has not had any ability to work as well from December 19, 1998 through March 19, 1999. This gentleman has very limited functional abilities, and in fact he can only sit for short periods of time, and he can only walk for extremely limited distance of perhaps 15-25 feet with a cane, and then at that point he has terrible right leg

> pain and fatigue and has to stop. He is unable to do any type of carrying or lifting of objects, as he has to utilize one arm for balance with a cane. He is unable to squat or bend down, and certainly totally unable to crawl or climb given his physical condition. This gentleman has difficulty just making it in to my appointments, and has to have a friend or neighbor transport him and essentially is homebound. He has quite a significant generalized immobility, and in fact since he has been seeing me, and because in part, lack of treatment, he has had serious loss of range of motion in that right knee, which is now manifesting in a knee flexion contracture, even though he has had a total knee replacement. He is unable to climb stairs and has to take an elevator, and also is 68 years of age and is overweight. He is on medicines, and specifically he is on Neurontin and Clonazepam medicines to try and alleviate some of the chronic pain in that right leg, and the side effects of these medicines affect to some degree his cognitive abilities, and do have a mild, groggy side effect to mental processing speed. Due to all of the above factors, it is my medical opinion that this gentleman is unable to work, and indeed has serious limitations even looking for work.

Dr. G, M.D., stated as follows in a medical report dated September 23, 1998:

> It does appear at this time the patient is not employable. His pain, basically consumes his entire day. It appears he is not able to concentrate or be mobile in any aspect that would make him employable.

Much of the medical evidence revolves around recommendations by Dr. B, Dr. G, and Dr. H, M.D., that the claimant be admitted into a pain management program and controversies concerning obtaining authorization for the self-insured for such treatment.

Dr. T, M.D., states as follows in a medical report dated August 13, 1998:

> We have also talked about his wishes and wants and what he needs to do for the long term. I think he has been approached by the [self-insured's] comp division about seeking other employment. I think this would be a good idea. Based upon his training and experience, he has a lot to offer somebody; finding that special situation which will tolerate his physical demands. I am sure he will never be fully employable.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the

employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS] for any quarter claimed."

This case revolved around whether the claimant met the requirement of making a good faith attempt to find employment commensurate with his ability to work. We have previously held that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the 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" 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." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*.

While the medical evidence concerning ability to work is arguably conflicting, it was up to the hearing officer to resolve any conflict. The hearing officer's finding that the claimant was unable to work during the filing period is amply supported by the evidence, including all the medical evidence during the filing period itself. Nor do we find any merit whatever in the self-insured's argument that the hearing officer considered improper factors in determining the claimant was unable to work.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Thomas A. Knapp
Appeals Judge