

APPEAL NO. 991468

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 18, 1999, a contested case hearing was held. With regard to the issue before her the hearing officer determined that the appellant (claimant herein) was not entitled to supplemental income benefits (SIBS) for the 12th compensable quarter of February 25, 1999, through May 26, 1999. The claimant appeals, arguing the evidence established that she was unable to work during the filing period for the 12th compensable quarter, entitling her to SIBS benefits. The respondent (carrier herein) replies that there was sufficient evidence to support the decision of the hearing officer, including her finding that the claimant had some ability to work during the filing period of the 12th compensable quarter.

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 _____; that the claimant reached maximum medical improvement on July 6, 1995, with an impairment rating of 17%; that the claimant did not commute any portion of her impairment income benefits; that the 12th compensable quarter for SIBS began on February 25, 1999, and ended on May 26, 1999; and that the filing period for the 12th compensable quarter ran from November 26, 1998, through February 24, 1999. It was undisputed that the claimant did not seek employment during the filing period for the 12th compensable quarter; she contended that she was unable to work during this period. There was medical evidence from Dr. H, the claimant's treating doctor, that she could not work; there was also contrary medical evidence from Dr. P, the carrier's medical examination order doctor. There were two functional capacity evaluations (FCE) in evidence. The first of these, performed on May 7, 1998, indicated that the claimant could function at a sedentary level, but the claimant would be most likely be unable to function at such a job because of motor movement deficits of the bilateral upper extremities and the inability to tolerate constant sitting. The second FCE, performed on May 7, 1999, indicated that the claimant could function at a sedentary level. The claimant testified that she suffered from lumbar and cervical back problems as well as carpal tunnel syndrome. The claimant testified that she was unable to work during the filing period as her injury resulted in pain, headaches, weakness and sleep deprivation to such a degree that on some days she was unable to get out of bed.

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." The hearing officer found that the claimant's unemployment during the filing period for the 12th compensable quarter was a result of her impairment and neither party has appealed this finding. 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 contested case 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 v. Ford Motor Co., *supra*; Cain v. Bain, *supra*.

In the present case, the hearing officer found that the claimant had an ability to work during the filing period for the 12th compensable quarter. While there is conflicting evidence on this issue, it was the province of the hearing officer to resolve that conflict. We will not substitute our judgment for that of the hearing officer in this regard. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Since the hearing officer found the claimant had some ability to work and it was undisputed that the claimant did not seek work, we find no error in the hearing officer's finding that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work. This finding is sufficient to support the hearing officer's decision that the claimant was not entitled to SIBS for the 12th compensable quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge