

APPEAL NO. 991640

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 8, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth, ninth and 10th compensable quarters. The claimant appeals, arguing that the great weight and preponderance of the evidence is contrary to the hearing officer's decision and that the medical evidence established that the claimant was unable to seek employment during the filing periods for the eighth and ninth compensable quarters. The respondent (self-insured) replies that the hearing officer's decision is sufficiently supported by the evidence, which showed the claimant had an ability to work during the filing periods for the eighth and ninth compensable quarters.

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.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on November 10, 1995, with a 20% impairment rating; that the claimant had not commuted any portion of her impairment income benefits; that the eighth compensable quarter began on October 4, 1998, and ended on January 2, 1999; that the ninth compensable quarter began on January 3, 1999, and ended on April 3, 1999; that the 10th compensable quarter began on April 4, 1999, and ended on July 3, 1999; and that during the filing periods of the eighth and ninth compensable quarters the claimant earned no wages and did not seek employment.

The hearing officer summarized the evidence and the rationale for her decision in the section of the decision entitled "Statement of the Evidence" in which she stated in part as follows:

On _____, Claimant was injured when she was the victim of a violent attack by a teenage student which resulted in the death of her husband. Claimant suffered gunshot wounds which healed, however, she still suffers the affects of the traumatic experience in the form of Post-Traumatic Stress Disorder and Generalized Anxiety Disorder. Claimant continues psychoanalysis psychotherapy with [Dr. M].

During the filing period for the eighth and ninth compensable quarters, Claimant did not earn any wages and did not seek employment claiming a total inability to work. Claimant was employed as a high-school teacher at the time of her injury. Claimant testified that she still considers herself a teacher but that she cannot return to that profession due to her psychological condition. Claimant testified that during these two filing periods, she was

unable to return to any type of work because she was suffering from sleeplessness, inability to concentrate and confusion. Claimant was continuing therapy with [Dr. M] who, on October 1, 1998, stated "She [Claimant] is unable to work and unable to look for appropriate work at this time." The facts of this case are similar, if not identical, to the facts in Appeal Panel Decisions (APD) 982480 [Texas Workers' Compensation Commission Appeal No. 982480, decided December 3, 1998] and 981908 [Texas Workers' Compensation Commission Appeal No. 981908, decided September 28, 1998 (Unpublished)] where it was found that the Claimant failed to prove a total inability to work and was therefore required to seek employment commensurate with her ability to work. The Claimant testified that her condition had not changed but her opinion and thoughts about returning to work had changed.

It is obvious that Claimant has severe psychological problems as a result of her traumatic experience. However, the burden of establishing no ability to work is firmly on the Claimant and an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. (APD 941334 [Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994]). It is doubtful that Claimant will ever be able to return to a teaching position, but the evidence is insufficient to support a finding of total inability to work during the eighth and ninth compensable quarter filing periods.

The hearing officer went on to describe the fact that the claimant found part-time employment as a tutor during the filing period for the 10th compensable quarter. The hearing officer stated that due to the claimant's limited ability to work, she did make a good faith effort to find employment during the filing period for the 10th compensable quarter. The hearing officer found that the claimant was not entitled to SIBS for the 10th compensable quarter; since the claimant had been previously found not to be entitled to SIBS for the sixth and seventh compensable quarters, the hearing officer's decision in the present case that the claimant was not entitled to SIBS for the eighth and ninth compensable quarters meant that the claimant had permanently lost entitlement to SIBS after the ninth compensable quarter.

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 periods for the eighth and ninth compensable quarters, as well as her underemployment during the filing period for the 10th compensable quarter, was a direct result of her impairment. Neither party has appealed these findings and they have become final pursuant to Section 410.169. The hearing officer found that the claimant failed to prove she was unable to perform any work during the filing periods for the eighth and ninth compensable quarter and that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work during these periods.

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 Appeal No. 941382, *supra*, we emphasized that the burden of establishing no ability to work is "firmly on the claimant" and in Appeal No. 941334, *supra*, 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.

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).

Applying this standard, we cannot say that the hearing officer's determination that the claimant had an ability to work during the filing periods for the eighth and ninth

compensable quarters is contrary to the overwhelming evidence. We do not believe the result reached by the hearing officer was dictated by Appeal No. 982480, *supra*, by Appeal No. 981908, *supra*, or by any other decision of the Appeals Panel. However, we find no legal basis to overturn the factual determination of the hearing officer.

In regard to the filing period for the 10th compensable quarter, the hearing officer found that the claimant did make a good faith effort to obtain employment commensurate with her ability to work. This finding is not appealed and has become final pursuant to Section 410.169. However, we find no error in the hearing officer's denial of SIBS benefits based upon Section 408.146(c) in light of our finding no reversible error in her determination that the claimant was not entitled to SIBS for the eighth and ninth compensable quarters.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge