APPEAL NO. 991712

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 July 16, 1999. The issue at the CCH was whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter. The hearing officer found that during the qualifying period for this compensable quarter the claimant had some ability to work and failed to make a good faith effort to seek employment. The hearing officer also found there was insufficient evidence to determine that the claimant's unemployment was a direct result of his impairment. Based on these findings, the hearing officer concluded that the claimant was not entitled to SIBS for the 11th compensable quarter. The claimant appeals, contending the evidence established that during the qualifying period he had no ability to work and that his unemployment was a direct result of his impairment. The respondent (self-insured herein) replies that the hearing officer's findings and decision were supported by the evidence.

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 on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on January 11, 1996, with an impairment rating (IR) of 15% or greater; that the claimant has not commuted any portion of his impairment income benefits (IIBS); that the qualifying period for the 11th compensable quarter was February 6, 1999, through May 7, 1999; and that during the qualifying period for the 11th compensable quarter the claimant was unemployed and did not seek employment. The claimant testified that he was unable to work during the filing period. The claimant submitted medical evidence from Dr. T indicating he was unable to work due to his injury. A functional capacity evaluation (FCE) conducted on February 19, 1999, indicated that the claimant was unable to work on any physical demand level.

The hearing officer found that the claimant did have an ability to work during the qualifying period. He pointed to what he believed were inconsistencies in Dr. T's report and the FCE. The hearing officer indicated that the FCE did not include a validation report and that the results of tests in the FCE indicated demand capability for pushing, pulling, and material handling. The hearing officer, in his decision, pointed to testimony from the claimant that he lived alone and was able to take care of his personal needs as well as the claimant's presentation at the hearing as being contradictory of the medical evidence concerning the claimant's limitations.

Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

An employee is entitled to [SIBS] if on the expiration of the [IIBS] period computed under Section 408.121(a)(1) the employee:

(1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;

(2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;

(3) has not elected to commute a portion of the [IIBS] under Section 408.128; and

(4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

The fact that the claimant met the first and third of these requirements was established by stipulation. This case revolved around whether the claimant met the second and fourth of these requirements. We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was a direct result of his impairment are questions 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, *supra*; Cain, *supra*.

Applying this standard, we do not find a basis to set aside the hearing officer's determination that the claimant was able to work during the filing period. 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.). Nor do we find reversible error in the hearing officer's finding as to direct result.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge