APPEAL NO. 991741

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 July 7, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the sixth, seventh, eighth and ninth quarters. In his appeal, the claimant challenges the determinations that he had some ability to work in the relevant filing periods, that he did not make a good faith search for employment commensurate with his ability to work, and that he is not entitled to SIBS for the sixth, seventh, eighth, and ninth quarters. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for a _____, compensable injury; that the claimant's impairment rating for his compensable injury is 15% or greater; that he did not commute his impairment income benefits; that the sixth quarter of SIBS ran from January 13 to April 13, 1998; that the seventh quarter of SIBS ran from April 14 to July 13, 1998; that the eighth quarter of SIBS ran from July 14 to October 12, 1998; and that the ninth quarter of SIBS ran from October 13, 1998, to January 11, 1999. The filing periods for the four quarter were identified as having run from October 14, 1997, to October 12, 1998.

The claimant testified that he was employed as a stone worker on _____, and that he injured his low back lifting a piece of marble. He stated that he had low back surgery performed by Dr. B; that another surgery has been recommended but he does not want to have another surgery; that his current treating doctor is Dr. P; that Dr. P has told him that he cannot work; and that despite Dr. P's not having released him to work, he looked for work at many places in the relevant filing periods. He acknowledged that he did not have any documentation supporting his job search efforts, explaining that none of the employers that he contacted would give him a document to prove he had been there and that it was "very frustrating."

At the hearing and on appeal, the claimant advances a no-ability-to-work theory in support of his claim for SIBS; therefore, the focus of this decision will be on that theory of recovery. On August 7, 1995, Dr. FP examined the claimant at the request of Dr. B, his then treating doctor and noted that "[s]ymptom magnification is a strong component of his presentation." In an August 18, 1995, letter, Dr. B stated that he was "quite frustrated with the care of [claimant]. I have had him seen by two other physicians who have confirmed what I suspect and I do believe this gentleman is engaging in symptom magnification." Dr. B concluded:

> Motivation in [claimant] is an extremely difficult problem. I don't feel that counseling will help him. Likewise I don't believe that any medication will afford him any insight and/or motivation. In short, the care of [claimant] at this point is at a standstill. He needs to resolve his conflict internally,

> however, I don't think he has enough insight to do that. I have suggested he try to return to work but he is adamant against it.

In an October 4, 1995, report, Dr. L, to whom the claimant was referred by Dr. P, opined that the claimant "will not be able to return to his former occupation working with marble. I feel that he should get into a light-type of occupation. It may be that he opts to just choose to live with his infirmities and try to find some type of work that is tolerable to him in spite of the fact he will have some discomfort."

On September 9, 1998, a Texas Workers' Compensation Commission benefit review officer sent a letter of Dr. P asking him about the claimant's ability to work in the period from October 14, 1997, to July 13, 1998, the filing periods for the sixth, seventh, and eighth quarters. On September 14, 1998, Dr. P responded that during that period the claimant "could not perform any type of work, even with restrictions." Dr. P explained why the claimant could not work at all, as follows:

> I am basing my opinion on the fact that, during the period stated above, the patient was in a state of constant low back pain which was worsened by walking, bending and sitting. Constant pressure on his low back exacerbated radicular symptoms into his right lower extremity. Any type of work that would have involved either prolonged standing, sitting (which doubles the axial load of standing on the lumbar spine), or walking would have caused increased low back pain and radiating pain/tingling in the right leg. It is hard to imagine any type of work that would not have involved at least one of these three requirements. The patient may have been able to withstand the effects of periodic walking, standing or sitting but this is to be differentiated from a day-in and day-out employment situation where such demands would have been continuous.

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 him 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 did not sustain his burden of proving that he had no ability to work in the filing periods for the sixth, seventh, eighth, and ninth quarters. There was conflicting evidence on the question of the claimant's ability to work in the filing periods. Dr. P opined that the claimant was totally unable to work; however, Dr. B and Dr. FP opined that the claimant engaged in symptom magnification. In addition, Dr. FP noted that he had advised the claimant to return to work and the claimant had refused to do so. Likewise, Dr. L opined that although the claimant could not return to his former occupation, he could work in a light-duty position. 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. He did so by finding that the claimant had not established that he had no ability to work during the relevant filing periods. The hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that he was totally unable to work. He was acting within his province as the sole judge of the weight and credibility of the evidence in so finding. Our review of the record does not demonstrate that the hearing officer's determinations that the claimant had some ability to work in the filing periods for the sixth, seventh, eighth, and ninth quarters are 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 those determinations on appeal, or the determinations that the claimant did not satisfy the good faith requirement in this instance and is not entitled to SIBS for the quarters at issue. 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 hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Gary L. Kilgore
Appeals Judge