APPEAL NO. 991793

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 21, 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 second quarter; that the claimant timely filed her Statement of Employment Status (TWCC-52) for the second quarter, thus, the respondent (self-insured) is not relieved of liability for SIBS on that basis; and that the claimant is not entitled to SIBS for the third quarter. In her appeal, the claimant essentially argues that the hearing officer's determinations that she is not entitled to SIBS in the second and third quarters are against the great weight of the evidence. In its response to the claimant's appeal, the self-insured urges affirmance. The self-insured did not appeal the hearing officer's determination that it is not relieved of liability for SIBS for the second quarter because of the claimant's late filing of her TWCC-52.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____; that she reached maximum medical improvement on December 8, 1997, with an impairment rating of 17%; that she did not commute her impairment income benefits; that the second quarter of SIBS ran from March 2 to May 31, 1999, with a corresponding filing period of December 1, 1998, to March 1, 1999; and that the third quarter of SIBS ran from June 1 to August 30, 1999, with a qualifying period of February 17 to May 17, 1999. The parties also agreed at the hearing that the "old" SIBS rules applied to the second quarter and the "new" SIBS rules applied to the third. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (new SIBS rules apply if quarter starts on or after May 15, 1999).

The claimant testified that she did not look for work in the filing period for the second quarter and maintained that she had no ability to work. The claimant's treating doctor is Dr. Z, an orthopedic surgeon. In a report of September 14, 1998, Dr. Z states that the claimant "has a certain degree of chronic residual pain from her chronic back problem. She has a great deal of trouble sitting and also stooping and bending. I think she would have difficulty rehabilitating herself into any type of day-to-day employment." In a Physical Capacities Assessment Form of November 9, 1998, Dr. Z states that the claimant can occasionally lift zero to 10 pounds, never lift over 11 pounds, and cannot frequently or continuously lift any weight. In addition, he stated that she could not carry or push/pull any weight; that she could never bend, stoop or twist; and that she could occasionally squat, kneel and reach. Dr. Z concluded that the claimant was "unable to work because of medications and lumbar multiple surgeries." However, on another part of the form, he stated that "[i]f she could work, would be sedentary." A November 12, 1998, letter, from Dr. Z provides:

> I believe the patient is not employable. I do not think that she has enough physical capacity to be employable on a day-to-day basis and is taking opiate-type pain medications. I have not been able to control her symptoms with any other type of regimen. She certainly will have restrictions as far as driving to work and attentiveness during the work day.

Dr. Z's March 1, 1999, report states "I have advised the patient that in as much as she continues to take opiate medications regularly and she has well-established chronic pain problems I do not think that she is employable in any type of work." Finally, in a "To Whom it May Concern" letter of May 5, 1999, Dr. Z states:

> [Claimant] is unable to work because of chronic pain and multiple back surgeries. The patient has restrictions on sitting, standing, walking and driving.
>
> She cannot carry objects, push or pull, bend or stoop. She is permanently and totally disabled from day-to-day employment.

Dr. O performed a functional capacity evaluation (FCE) on the claimant at the request of the self-insured. In a report of October 27, 1998, Dr. O stated that the claimant was noncompliant with the FCE and opined that, nonetheless, she "would qualify for sedentary and light work based on the *Dictionary of Occupational Titles*." In addition, Dr. O stated that "[t]his may be an underestimation of what she actually can do; but with her previous surgery and the fusion, I think she will be limited to no more than sedentary to light work anyway."

The claimant testified that although she believed that she was unable to work in the qualifying period for the third quarter, she nonetheless sought employment. Her TWCC-52 documents that she contacted approximately 16 potential employers in the qualifying period. The TWCC-52 does not document contacts in approximately seven weeks of the qualifying period. The claimant testified that she made employment contacts in each of those weeks, primarily making telephone calls to employers listed in the newspaper and by attempting to obtain referrals from the Texas Workforce Commission. In addition, the claimant testified that her condition had remained basically the same from December 1998 to the date of the hearing, with some increased pain depending upon her activities. The claimant acknowledged that she obtained employment on July 4, 1999, with a private nursing home. She testified that her employer is working with her gradually increasing her hours up to full time. She stated that initially she worked a split shift: four hours at work, four hours off and four hours at work, and then the employer assigned her to work in the evening when most of the residents are asleep. She maintained that she has not yet worked a 40-hour week.

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 her burden of proving that she had no ability to work in either the filing period for the second quarter or the qualifying period for the third quarter. There was conflicting evidence on the question of the claimant's ability to work in those periods. Dr. Z opined that the claimant was unable to work, while Dr. O opined that the claimant could work in a sedentary or light job. It was the hearing officer's responsibility 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 she had no ability to work in either the filing period for the second quarter or the qualifying period for the third quarter. The hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that she 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 period for the second quarter and the qualifying period for the third quarter 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. 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 claimant acknowledged that she did not engage in a job search in the filing period for the second quarter; accordingly, the hearing officer properly determined that she did not satisfy the good faith requirement and that she is not entitled to SIBS for that quarter.

The claimant pursued an alternative theory that she made a good faith job search in the qualifying period for the third quarter. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides in relevant part that "an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." In this case, as noted above, the claimant's

TWCC-52 does not document employment contacts in approximately seven weeks of the qualifying period. The claimant testified that she had made job search efforts in each of those weeks, but the hearing officer did not credit that testimony. In his discussion, he stated "[t]he Claimant urged that there were many employment efforts that were not documented; however, this raises a significant credibility issue." In addition, the hearing officer noted that the claimant's testimony was "contradictory and unpersuasive." The hearing officer was free to discount the claimant's testimony that she made some effort to look for work in each week of the qualifying period, instead believing that she only made contacts in the weeks where her efforts were documented. His determination in that regard is not so contrary to the great weight of the evidence as to compel its reversal. Pool, *supra*; Cain, *supra*. Thus, under Rule 130.102(e), he properly determined that the claimant did not make a good faith effort to look for work commensurate with her ability to work in the qualifying period for the third quarter because he found that she did not look for work in each week of the period as she was required to do.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge