APPEAL NO. 991918

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 August 16, 1999. The issue at the CCH was whether or not the respondent (claimant herein) was entitled to supplemental income benefits (SIBS) for the 16th and 17th compensable quarters. The hearing officer concluded that the claimant was entitled to SIBS for the 16th compensable quarter but not for the 17th compensable quarter. The appellant (carrier herein) files a request for review, arguing that there was insufficient evidence to support that the claimant was unable to work during the filing period for the 16th compensable quarter and that there was medical evidence the claimant was able to work. The claimant responds that there is medical evidence supporting the claimant's inability to work during the filing period for the 16th compensable quarter and no contrary medical evidence during this period.

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 _____, resulting in an impairment rating of 15%; that the claimant has not commuted any portion of his impairment income benefits; that the 16th compensable quarter was from March 18, 1999, through June 16, 1999; and that the claimant earned no wages during the qualifying period for the 16th compensable quarter. The claimant testified he suffered an injury when he lifted a bucket and injured his knees. The claimant has had multiple knee surgeries, the most recent on October 19, 1998.

The claimant testified through a translator that during the qualifying period for the 16th compensable quarter he did not seek employment because he was unable to work. The claimant testified that he is in severe pain and taking a variety of medications which make him sleepy and that he is limited in both walking and sitting. The claimant also testified that his doctors have told him that he will need to have both knees replaced but is too young to undergo this procedure (the claimant is 42 years old). The claimant further testified that his doctors have suggested another surgery but that he has not yet undergone it because there is no guarantee it will improve the condition of his knees.

In evidence were off-work slips from Dr. W, the claimant's treating doctor, stating the claimant was unable to work from September 30, 1998, to January 1, 1999, and from January 1, 1999, through May 1, 1999. In an April 4, 1999, report Dr. W stated that the claimant was unable to work due to pain and mobility limitations. In a June 2, 1999, report Dr. W outlined the claimant's physical limitations and stated that the claimant was unable to work due to severe physical limitations and medication side effects. Dr. W also testified live during the CCH and opined that the claimant was unable to work, although under cross-

examination he conceded that under the best of conditions it might be possible for the claimant to perform some sedentary work.

Dr. S states in a July 16, 1999, report that the claimant is totally disabled due to the injury to his knees and is unable to work due to ongoing constant pain. Dr. Sw, the carrier's medical examination order doctor, stated in a May 13, 1999, report that, based upon his examination, he believed the claimant was capable of light-duty work. The claimant underwent a functional capacity evaluation (FCE) on May 12, 1999, which indicated that the claimant could perform light-duty work. The claimant was referred by the Texas Workers' Compensation Commission to Dr. D, who stated as follows in a June 8, 1999, report:

In regard to your question as to [the claimant's] current work ability, I do not think that he could perform any type of activity that would require prolonged standing, walking or other postural activities. He has ongoing arthritic pain in the bilateral knees with progressive degenerative changes that limit his functional independence. In spite of his performance on the recent [FCE], I think this was only for a limited time frame. I do not think that he could tolerate working at a light-duty category for any prolonged period of time due to his inability to stand, sit, bend, twist or stoop. I do think that he could return back to some type of gainful employment but this would have be at a sedentary level. He would need to be able to sit in a chair and work at this level. He could perform very short time frames of standing primarily to transfer from sitting position but I would not recommend any work activities that requires him to walk long distances, bend, stoop or stand in place. I realize that this significantly limits him in many duties but I do not think that he is completely 100% disabled. As noted above, he could work in a sitting position for the majority of his work shift. There are jobs out in the community that he could handle with these restrictions. These recommendations apply to the time frame of 12/17/98 to the present and continuing on from the present time.

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."[1]

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[1]We note that while the hearing officer and the parties appear to be under the impression that the SIBS rules that went into effect on January 31, 1999, control in the present case, this is not true for the 16th compensable quarter, although it was for the 17th. *See* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). The hearing officer's determination that the claimant

The hearing officer found that the claimant was unemployed as a direct result of his impairment during the qualifying period for the 16th compensable quarter and this finding, having not been appealed, has become final pursuant to Section 410.169. The present appeal revolves around whether the claimant met the requirement that he seek employment in good faith commensurate with his ability to work during the filing period.

The carrier argues that the evidence is insufficient to establish that the claimant was unable to work during the qualifying period for the 16th compensable quarter, pointing to Dr. W's testimony. 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). While Dr. W did testify that under ideal conditions the claimant could possibly do some form of sedentary work, the crux of his testimony was that the claimant could not work at all and the hearing officer was certainly able to reach that conclusion from Dr. W's testimony and reports.

The carrier argues that we must look to other reports, particularly Dr. D's concerning the claimant's inability to work. The carrier points out that while Dr. D's report was after the end of the filing period for the 16th compensable quarter, he expressed the opinion that claimant could have performed some form of sedentary work starting on December 17, 1998, and that the carrier was delayed by the claimant in obtaining a report contrary to that of Dr. W. Dr. D's report certainly conflicted with Dr. W's opinion as to the claimant's ability to work, but it was the province of the hearing officer to resolve this conflict. The carrier's assertion that it was delayed by the claimant in obtaining a report contrary to Dr. W's does not find support in the evidence. Also, as the claimant points out in response, the claimant was injured in 1992 and the carrier had a right to seek a medical examination order to have

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is not entitled to SIBS for the 17th compensable quarter has not been appealed and has become final under Section 410.169, so we need not discuss entitlement for this quarter further.

the claimant examined by a doctor of its choice earlier than it did. More importantly, in light of the fact that the SIBS rules that went into effect on January 31, 1999, do not apply in the present case, the carrier's argument concerning the timing of Dr. D's report is not particularly relevant and means that the carrier has not shown any harm from the delay it asserts was caused by the claimant.

Applying the proper standard of review described above, we perceive no error in the hearing officer's decision. The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge