APPEAL NO. 991985

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 16, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the filing period for the third quarter for supplemental income benefits (SIBS) began on February 4, 1999, and ended on May 5, 1999. The claimant did not seek employment during the filing period and contended that she had no ability to work during the filing period. The hearing officer determined that during the filing period the claimant's unemployment was a direct result of her impairment from the compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer found that during the filing period the claimant had some ability to work and that she did not in good faith seek employment commensurate with her ability to work and concluded that she is not entitled to SIBS for the third quarter. The claimant appealed, contended that the evidence established that during the filing period she had no ability to work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the third quarter. The self-insured responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. The claimant testified that her condition had become worse since her last functional capacity evaluation (FCE) conducted in November 1998 and that she was unable to work during the filing period because of her condition. A report of an FCE dated November 13, 1998, appears on Dr. S letterhead; contains data concerning 14 tests that were conducted; but does not contain an opinion on whether the claimant could work and, if she could work, at what level. In a letter dated April 26, 1999, Dr. S wrote:

> At this point in time I do not feel that [claimant] can work. This is based on multiple office visits, observations and on a recent [FCE]. She has an extreme amount of limitation of sitting and standing. She is not being able to sit for longer than thirty-five minutes or stand for longer than fifteen minutes. Also, her weight lifting is significantly limited. It is recommended that she not lift more than about fifteen pounds of weight occasionally throughout the day and continuously not more than three pounds. I feel that these strict limitations need to be followed to minimize her pain and probably would exclude her from work activity.

On May 28, 1999, Dr. S wrote that it was clear to him that the claimant cannot work and should be considered eligible for SIBS. In a letter dated June 22, 1999, Dr. S said that the claimant cannot do any type work; that this is based on careful review of the FCE; and that

it is not known when she will be able to return to full-work activity. In his statement of the evidence, the hearing officer noted that the claimant was able to sit in the hearing for at least one and one-half hours.

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 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. Medical evidence is required to support a finding of no ability to work, but medical evidence is not required to support a determination that the claimant had some ability to work. Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. In addition, in Appeal No. 941382, *supra*, the Appeals Panel stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. In Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997, the Appeals Panel cited earlier decisions and stated that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information concerning the claimant's physical limitations and restrictions and that "bald statements" of an inability to work are of limited use in assessing whether a claimant can work during the filing period because of a lack of any discussion of the nature of and the reasons for the claimant's inability to work. In Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996, the Appeals Panel stated that its comments about medical evidence being more than conclusionary did not establish a new or different standard of appellate review and that a finding of no ability to work is a factual determination which is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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 may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The

hearing officer's findings that during the filing period for the third quarter for SIBS the claimant had some ability to work and that she did not in good faith seek employment commensurate with her ability to work and his conclusion that the claimant is not entitled to SIBS for the third quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge