APPEAL NO. 000136

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 30, 1999, a contested case hearing was held. At issue was the entitlement of the appellant, who is the claimant, to his second, third, fourth, fifth, and sixth compensable quarters of supplemental income benefits (SIBS). Also at issue was whether he had timely filed his Statements of Employment Status (TWCC-52) for those quarters.

The hearing officer determined that all TWCC-52s were timely filed. However, he found that the claimant did not have entitlement to SIBS for any of the disputed quarters because he did not search for work commensurate with his ability to work. The hearing officer rejected the claimant's contention that he was unable to work.

The claimant filed a brief appeal, asserting that he was unable to work during any of the periods of time under review and should be found entitled to SIBS. The respondent (self-insured) argues that the hearing officer properly gave more weight to the opinion of a doctor appointed by the Texas Workers' Compensation Commission (Commission) that the claimant had the ability to work during the disputed periods. There is no appeal of the decision that the claimant timely filed his application.

DECISION

Affirmed.

The claimant was employed as a custodian by the self-insured. He hurt his back on _____, and had surgery. The claimant had physical therapy until he had a stroke and was no longer able to go to therapy. His treating doctor relevant to the periods of time in issue was Dr. S.

The claimant said he was aware of pain all the time, even if it might not hurt that bad at any one particular time. He said that Dr. S had not released him back to work. He was able to do some household tasks but required the assistance of his family to go anywhere. He said that he received his first quarter of SIBS. Because the self-insured had not furnished TWCC-52 applications to him, the claimant said he had to obtain them from the Commission and file them.

The claimant was examined on May 17, 1999, by Dr. B, who was appointed as a Commission-selected required medical examination doctor to opine about the claimant's ability to work. Dr. B stated that he believed that the claimant could work at an unrestricted sedentary level and a restricted light level. Dr. B felt that the claimant had this ability throughout the time periods in issue and said that if the claimant had been unable to work, it would be due to the effects of his June 25, 1997, stroke rather than his compensable injury. On the other hand, there are two short statements from Dr. B stating that the claimant has been "totally disabled" since his injury and unable to do any type of work. The

March 20, 1998, statement says that the claimant will remain disabled for another three months at least, due to muscle spasms and back pain. The July 30, 1999, statement, which is typed in capital letters and appears to have a signature stamp, states that the claimant "HAS UNDERDONE [sic] SURGICAL INTERVENTION" and concludes: "I RECOMMENDT [sic] HE LEAD A TOTAL SEDINTRAY [sic] LIFE."

All of the time periods in question were determined under the "old" SIBS rules. There are two eligibility criteria that must be met to continue after the first quarter to qualify for SIBS, set out in Section 408.143(a). The injured employee must prove that he or she has earned less than 80% of the employee's average weekly wage as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work.

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, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. We have held that the burden of establishing no ability to work at all is "firmly on the claimant" (Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994) and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

In our review of the record, we cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge