APPEAL NO. 000164

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 December 20, 1999. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the eighth quarter. In his appeal, the claimant argues that the hearing officer's determinations that the claimant had some ability to work in the qualifying period, and that he is not entitled to eighth quarter SIBS, are against the great weight of the evidence. In his response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the claimant's unemployment in the qualifying period for the eighth quarter was a direct result of his impairment from the compensable injury.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, in the course and scope of his employment as an electrician's apprentice; that the claimant was assigned an impairment rating of 15% or greater for his compensable injury; that he did not commute his impairment income benefits; that the eighth quarter of SIBS ran from August 12 to November 10, 1999; that the qualifying period for the eighth quarter ran from April 30 to July 29, 1999; and that the claimant did not have any earnings during the qualifying period for the eighth quarter. The claimant testified that he has had two surgeries as a result of his compensable injury, a left shoulder surgery in 1995 and a 360E fusion in his lumbar spine in 1998. He stated that right shoulder surgery has been recommended by his treating doctor. In addition, the claimant testified that he only went to the first grade in Mexico, that he cannot write in English, and that he can only read a little English.

The claimant stated that Dr. G is his treating doctor, that he was under Dr. G's care during the qualifying period, and that Dr. G had not released him to return to work during the qualifying period. The claimant likewise testified that none of the other doctors whom he had seen released him to work. He stated that after he sits for 10-15 minutes, he has to stand because of the pain in his low back and that when he stands, he develops a "shooting" pain down his right leg and into his foot. He further testified that he has to sit and rest after walking 100 to 200 feet, that the pain medication and muscle relaxers that he takes daily make him dizzy and sleepy, that he has to use a cane to assist him in walking, and that he does not drive because it increases his pain and because he is a danger to himself and others when he drives.

In a "To Whom it May Concern" letter dated April 13, 1999, Dr. G stated:

> [Claimant] is currently under my medical care with the history of Lumbar Radiculopathy, due to a work related injury sustained on _____. After a recent complete medical evaluation on 04-13-99 [claimant] continues to complain of chronic pain to his right shoulder and low back, radiating to his lower extremities. He also states walking, standing, and sitting for prolonged periods of time increases his pain. At this time, [claimant] is unable to perform any type of gainful duty. The patient is to remain off work and continue under my medical care.

On August 16, 1999, Dr. G completed a "Physical Capacities Assessment Form," which states that the claimant can never drive; that he can sit, stand, and walk one hour in an eight-hour workday; that he cannot lift, carry or push/pull any weight; that he can never bend/stoop, squat, kneel, crawl, climb, balance, or twist; that he can repetitively use his hands for simple grasping, firm grasping and fine manipulation but not for pushing/pulling; and that he cannot repetitively use either foot to operate foot controls. Dr. G concludes his report by stating:

> Patient at this time is unable to work sedentary work due to low back instability & shoulder stiffness both areas of which are post surgical scarring.

Finally, in an October 15, 1999, letter, Dr. G opined that the claimant's "current symptomatology does not enable him to perform any type of employment." Dr. G noted that the claimant's low back pain is "constant and at times debilitating," that he is "unable to walk, stand or sit for prolonged periods due to increased pain" and that he is "unable to stoop, bend, lift, and carry without aggravating his condition." Finally, Dr. G noted that the claimant's right shoulder is in need of arthroscopy, which Dr. S, an orthopedic surgeon, has agreed to perform.

In a "To Whom it May Concern" letter of July 14, 1999, Dr. JG stated that he has been providing ongoing medical treatment to the claimant for this work-related injury. Dr. JG stated that "[u]nfortunately, at this time, this patient is totally disabled, and is not fit to consider reintegration into the work place." Dr. JG stated that the claimant "is unable to do lifting, pushing, pulling of more than 5 lbs and is unable to [sic] any type of gainful employment." Dr. JG noted that the claimant is taking medications that "have been proven to cause drowsiness and dizziness to a majority of patients" and that "these medications also impair a patient's judgment, which would disallow the patient from participating in any type of activity that requires concentration and attention." Dr. JG concluded "[d]ue to the combination of the ongoing medical treatment, the ongoing disability, and the above mentioned problems with medications, I do not feel it is practical for this patient at this time to be considered a vocational candidate."

In a May 4, 1999, report, Dr. K stated that the claimant's prognosis is "very poor to return to any gainful employment or any employment." Dr. K noted that the claimant is

illiterate, that he says he cannot sit very long, and that he walks slowly with a quad cane. In addition, Dr. K stated that it was "doubtful" the claimant could do any manual labor. In a May 17, 1999, addendum to his report, Dr. K stated:

> I feel the only job he could do would be sedentary work but I question if anyone would hire him using a quad cane, especially since he is illiterate. He cannot lift much of anything or work above his head because of his shoulder restriction. I do not think a Functional Capacity Evaluation will help him. He would need a lot of retraining for a sedentary job.

On August 16, 1999, Dr. C, a doctor who works in the same office as Dr. G, completed a portion of a "Physical Capacities Assessment Form," which checks the box next to sedentary work in the area which asks the doctor to "check the exact degree of work you feel this patient is able to perform." Dr. C did not complete the portion of the form asking the doctor to "describe any other restrictions placed on this patient not previously listed" and to provide the date the patient can return to work in his regular occupation or the date the patient can return to work in a lighter duty capacity. Above that section of the form, a handwritten notation requesting that Dr. G complete that portion of the form appears. As noted above, Dr. G completed a similar form on August 16, 1999, but rather than signing off on Dr. C's assessment, Dr. G stated that the claimant could not return to any type of work.

The claimant's entitlement to SIBS in the eighth quarter is to be determined in accordance with the "new" SIBS rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), which is applicable in this case, provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work if the employee "has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work." 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 her and resolves conflicts and inconsistencies in the 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 qualifying period for the eighth quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. She did so by finding that "[b]ased on a totality of the evidence, Claimant had an ability to work sedentary during the qualifying period for the 8th quarter." The hearing officer further determined that the reports from Dr. G and Dr. JG did not provide sufficient detail to explain how the compensable injury caused a total inability to work, and that the reports from Dr. K and Dr. C "indicated that Claimant had an ability to work at least part time sedentary work based on the compensable impairment." Each of those determinations was a question of fact for the hearing officer to resolve. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant had satisfied the requirements of Rule 130.102(d)(3), specifically the requirements that a narrative specifically explain how the injury causes a total inability to work and that no other records "show" an ability to work. The hearing officer's determination that the claimant had some ability to work in the qualifying period is not 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 that determination 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). Given our affirmance of the determination that the claimant had some ability to work, we likewise affirm the hearing officer's determinations that the claimant did not make a good faith effort to look for work in the qualifying period and that he is not entitled to eighth quarter SIBS in light of the fact that it is undisputed that the claimant did not look for work in the qualifying period for the eighth quarter. Although another hearing officer could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a basis for us to disturb the hearing officer's decision on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge