

APPEAL NO. 000186

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 November 19, 1999. The issues at the CCH were whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the eighth and ninth compensable quarters. The hearing officer concluded that the claimant was not entitled to SIBS for either the eighth or the ninth compensable quarter. The hearing officer found that the claimant did not establish a total inability to work during the qualifying periods for these compensable quarters and did not make a good faith effort to seek employment commensurate with his ability to work. The claimant appeals contending that the medical evidence established he was totally unable to work during the qualifying periods for the eighth and ninth compensable quarters, entitling him to SIBS for these quarters. The claimant also argues that two of his exhibits excluded by the hearing officer should have been admitted. The respondent (carrier herein) replies that the evidence supported the findings and decision of the hearing officer.

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.

We note that in Texas Workers' Compensation Commission Appeal No. 992323, decided December 1, 1999, we affirmed a decision of a hearing officer that the claimant in the present case was not entitled to SIBS for the fifth and seventh compensable quarters. At the CCH in the present case, the parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on January 7, 1996; that the claimant had an impairment rating of 29%; that the claimant commuted no portion of his impairment income benefits; that the qualifying period for the eighth compensable quarter ran from February 24, 1999, to May 25, 1999; that the eighth compensable quarter began on June 7, 1999, and ended on September 5, 1999; that the qualifying period of the ninth compensable quarter ran from May 25, 1999, to August 23, 1999; and that the ninth compensable quarter began on September 6, 1999, and ended on December 5, 1999. It was undisputed that the claimant did not return to work during the qualifying periods for the eighth and ninth compensable quarters and did not seek employment during these qualifying periods.

The claimant testified that he did not seek employment during the qualifying periods for the eighth and ninth compensable quarters because he had not been released to work and because he was unable to work. There was medical evidence from Dr. W, the claimant's treating doctor, that the claimant was permanently disabled from any work due to multiple lumbar nerve root injuries and four lumbar surgical procedures. There was also medical evidence from Dr. T, a carrier medical examination order doctor, stating that the claimant was "minimally disabled." There was also medical evidence showing the claimant suffers from both diabetes and hypertension, which are not well-controlled.

At the CCH the claimant sought to introduce correspondence from Dr. W which was not admitted. It was undisputed that these documents were not exchanged with the carrier within 15 days of the benefit review conference (BRC), although the ombudsman represented that they were exchanged as soon as he received them. The claimant argued below and on appeal that there was good cause for the lack of timely exchange because Dr. W was out of his office and was therefore unable to respond to the letter from the ombudsman that prompted the creation of these documents. The hearing officer excluded the documents because they were not timely exchanged and he did not find good cause for the untimely exchange because the information contained in the documents could have been requested from Dr. W earlier.

We first address the claimant's evidentiary point. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) requires that parties exchange all documentary evidence within 15 days of the BRC unless the hearing officer determines there is good cause for a party failing to timely exchange documents. Here it was undisputed that the documents in question were not timely exchanged. The hearing officer found no good cause for the failure to timely exchange. We review such rulings by a hearing officer under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 961474, decided September 3, 1996. In determining whether there has been an abuse of discretion in these rulings, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). We conclude that the hearing officer did not abuse his discretion, and, in any event, to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Here, the reports in question essentially only reiterated Dr. W's opinion that the claimant was unable to work. Consequently, even if there were error, we find it would be harmless error not requiring reversal.

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 Rule 130.102(b)¹, the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

¹The "new" SIBS rules which went into effect on January 31, 1999, control in the present case. See Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

The hearing officer found that the claimant met the direct result requirement and this finding, which was not adverse to the claimant, has not been appealed and has become final pursuant to Section 410.169. The only question before us on appeal is whether or not the hearing officer committed error in finding that the claimant failed to seek employment in good faith commensurate with her ability to work. We have previously held that the question of whether a claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. 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).

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 during the filing period, 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." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, supra; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, supra; Cain, supra.

Rule 130.102(d) provides as follows in relevant part:

Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:

* * * *

- (4) 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 claimant argues that the medical evidence from Dr. W showed he was unable to work. The claimant argues that Dr. T supported this position, even though the claimant contends that Dr. T modified his initial position under pressure from the carrier. As stated above, the hearing officer as the finder of fact may choose to believe or disbelieve the testimony of any witness and will determine what weight to give the evidence, including the medical evidence. The hearing officer was not persuaded the medical evidence showed the claimant was unable to work during the qualifying periods for the eighth and ninth compensable quarters. While the hearing officer made no findings of fact as to the "narrative report" and "other records," his determination of some ability to work does not make such findings necessary in this case. Applying the standard of appeal discussed above, we cannot say that this determination is incorrect as a matter of law. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge