APPEAL NO. 000241

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 in two sessions on November 3, 1999, and January 6, 2000, with the record closing on January 6, 2000. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) had an ability to work in a sedentary or light-duty capacity during the filing/qualifying periods for the third through sixth quarters; that the claimant did not make a good faith effort to find work in the relevant periods; and that the claimant is not entitled to supplemental income benefits (SIBS) for the third, fourth, fifth, and sixth quarters. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence and asks that we reverse the hearing officer's decision and render a new decision that he is entitled to SIBS for the quarters at issue. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance of those determinations. In its cross-appeal, the carrier asserts error in the hearing officer's determination that the claimant's unemployment in the relevant filing and qualifying periods was a direct result of his impairment. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

As noted above, the hearing in this matter was held in two sessions and in addition, the parties submitted voluminous documentary evidence in support of their respective positions. At issue in this case is the claimant's entitlement to SIBS for the third through sixth quarters and our factual recitation will be limited to the facts most germane to that issue. The parties stipulated that the claimant sustained a compensable injury on _____, in the course and scope of his employment with (employer); that the Texas Workers' Compensation Commission has determined that the claimant has an impairment rating greater than 15% and that determination is currently under judicial review; that the claimant did not commute his impairment income benefits; that the third quarter of SIBS ran from December 3, 1998, to March 3, 1999; that the fourth quarter of SIBS ran from March 4 to June 2, 1999; that the fifth quarter of SIBS ran from June 3 to September 1, 1999; and that the sixth quarter ran from September 2 to December 1, 1999. Given the dates of the quarters, the "old" SIBS rules govern the claimant's entitlement to SIBS for the third and fourth quarters, while the "new" SIBS rules govern his entitlement to those benefits for the fifth and sixth quarters. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The filing periods for the third and fourth quarters are the periods from September 3 to December 2, 1998, and December 3, 1998, to March 3, 1999, respectively. The qualifying period for the fifth quarter is the period from February 8 to May 19, 1999, and the qualifying period for the sixth quarter is the period from May 20 to August 18, 1999.

The claimant contends that he had no ability to work in the filing periods for the third and fourth quarters and in the qualifying periods for the fifth and sixth quarters. In support of that assertion, the claimant introduced evidence from his treating doctor, Dr. W, a neurosurgeon. In an October 15, 1998, "To Whom it May Concern" letter, Dr. W noted that the claimant's thoracic MRI has revealed a T7-8 right paracentral disc protrusion which impinges the spinal cord; that electromyography of the cervical and thoracic areas has shown that the claimant has bilateral radiculopathies at C5-6 and T6-7; that his cervical MRI revealed disc herniation at C5-6 and C3-4 that extend into the thecal sac of the spinal cord; and that a cervical myelogram showed a disc protrusion at C3-4 indenting the thecal sac and coming into contact with the spinal cord. Dr. W stated:

> The above medical diagnoses are more than enough evidence that [claimant] is severely and permanently disabled from even sedentary work. At this time the cervical surgery is pending but I have told [claimant] that it is my medical opinion that to have surgery to correct a thoracic herniation is extremely dangerous as well as very painful; and I do not perform this type of surgery. I have expressed to him that I do not recommend this type of surgery.

Dr. W concluded "[i]n view of his persistent symptoms, which prevent even a sedentary occupation and because of his chronic pain, I do not think he will ever be gainfully employed again. It is my understanding that [claimant] has received 27% disability rating, and he is entitled to benefits as stated by the Texas Workers Compensation Commission laws and should not be denied." In a September 15, 1997, letter, Dr. W stated:

> [Claimant] has already been granted a 27% total body disability rating. In view of his persistent symptoms which prevent even a sedentary occupation, and because of his chronic pain, and more-over, because of the fact that he has tried to work since his _____ injury but was unable to do this, I firmly believe that [claimant] is totally and permanently disabled from any form of gainful employment. I would therefore recommend that he be given Social Security Disability at the present time as it seems that he will not be able to find any employment within reason that he could perform on a regular basis. [Emphasis in original.]

Finally, in an August 24, 1999, letter, Dr. W opined that the claimant "is permanently and completely disabled for performance of even the most sedentary tasks . . . ." Dr. W further stated:

> The nature, extent, and prognosis associated with [claimant's] disability has been scrutinized by me and a consulting neurosurgeon, [Dr. B]. We both have signed statements attesting to the fact that [claimant] is permanently and completely disabled to work. In both of our opinions, as evidenced by our letters and based on the tests administered, it seems the patient's impairment is permanent. This has rendered [claimant] permanently and

> completely disabled to perform even light duties. I do not anticipate any improvement in [claimant's] condition.
>
> [Claimant], without the assistance of medications, is unable to sit beyond very short periods of time and is unable to stand very long and should not lift over 10 pounds. Walking is limited to short distances, and there certainly can be n [sic] activities involving stair climbing or rapid movement of any sort.
>
> In conclusion, [claimant] remains totally and permanently disabled. Any attempt by this 55-year-old man to perform even sedentary tasks is risking further damage.

Dr. B noted in a letter of October 14, 1997, that the claimant was granted a "27% total body disability rating" and that "he has attempted to perform sedentary jobs, but has been terminated secondary to multiple absences due to his chronic pain." Dr. B concluded "[i]n light of his continuing symptoms and chronic pain that prevent even sedentary occupations, I believe that [claimant] is permanently disabled, and should be granted Social Security Disability."

The carrier had Dr. K perform a medical record review in order to provide an opinion on the claimant's ability to work. In a letter dated October 26, 1998, Dr. K opined that the claimant is capable of performing job duties in some capacity and that he would have been "fit for restricted duties" by August 1997. The carrier sent additional unspecified records to Dr. K for his review and in a letter of September 23, 1999, stated that his opinion that the claimant had the capacity to work had not changed.

The claimant's entitlement to SIBS for the third and fourth quarters is to be determined in accordance with the "old" SIBS rules. 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. 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 testimony and 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 filing periods for the third and fourth quarters. It was the hearing officer's responsibility to weigh the evidence presented and to determine

what facts had been established. There was conflicting evidence on the issue of the claimant's ability to work. Drs. W and B opined that the claimant was not capable of performing even sedentary work, while Dr. K opined that the claimant had a restricted ability to work. The hearing officer simply was not persuaded that the evidence from Dr. W and Dr. B was sufficient to establish that the claimant had no ability to work in the filing periods. She was acting within her province as the sole judge of the weight and credibility of the evidence in so evaluating that evidence. Our review of the record does not reveal that the hearing officer's determination in that regard is 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).

As noted above, the claimant's entitlement to SIBS for the fifth and sixth quarters is to be determined in accordance with the "new" SIBS rules. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), applicable to 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 determined that the claimant did not sustain his burden of proving that he had no ability to work in the qualifying periods for the fifth and sixth quarters. In the discussion section of her decision, the hearing officer stated that the reports of the claimant's doctors, Dr. W and Dr. B,"do not firmly establish that the Claimant has absolutely no ability to perform any and all employment." Thus, it appears that the hearing officer was not persuaded that the reports from Dr. W and Dr. B provided sufficient explanation as to how the claimant's injury caused a total inability to work. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165 in so finding. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain his burden of proving a total inability to work in the qualifying periods for the fifth and sixth quarters is so against the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*. Accordingly, she properly determined that the claimant did not satisfy the good faith requirement in that it is undisputed that the claimant did not search for employment in the relevant qualifying periods.

The carrier asserts that the hearing officer erred in finding that the claimant's unemployment in the filing periods for the third and fourth quarters and the qualifying periods for the fifth and sixth quarters was a direct result of his impairment. We find no merit in this assertion. In Finding of Fact No. 2, the hearing officer determined that the claimant was "unable to perform all of the tasks of his preinjury occupation, which included some medium or heavy duty work." That finding is supported by the claimant's testimony concerning the requirements of the job he was doing at the time of his injury. Admittedly, the carrier presented evidence from a vocational rehabilitation specialist that the claimant's preinjury occupation was categorized in the Dictionary of Occupational Titles as a light-duty

position and Dr. K opined that the claimant was capable of performing such a position. However, it was a matter for the hearing officer to resolve the conflicts in the evidence and she did so by determining that the claimant cannot reasonably perform the job he was doing at the time of his injury and by further determining that, as a result, his impairment was a cause of his unemployment in the relevant periods. She was acting within her province as the fact finder in so interpreting the evidence. Nothing in our review of the evidence reveals a sound basis for disturbing the direct result determination on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge