APPEAL NO. 000302

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 January 20, 2000. The hearing officer determined that the respondent (claimant) made a good faith effort to look for employment commensurate with his ability to work during the qualifying period and is entitled to supplemental income benefits (SIBS) for the 10th compensable quarter. The appellant (carrier) files a request for review, challenging particular findings of the hearing officer and arguing that we should reverse the decision. The claimant responds, contending we should affirm.

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.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement (MMI) on July 14, 1996, with an impairment rating (IR) of 19%; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period of the 10th quarter began on August 3, 1999, and ended on November 1, 1999; and that the 10th quarter began on November 15, 1999, and ends February 13, 2000. The hearing officer summarizes the evidence as follows in the section of her decision entitled "Statement of the Evidence":

> It is undisputed that Claimant sustained a compensable injury to his neck and left shoulder on _____, while employed as a crude oil truck driver. Claimant testified that at the time of his injury his job duties included regularly lifting between 40 to 50 pounds and extensive driving.
>
> Claimant testified that he underwent cervical fusion surgery in June of 1995, which surgery failed and was redone in July of 1996. The medical evidence shows that Claimant had been through conservative therapy and aggressive therapy including a spinal cord stimulator and epidural steroid injections. It is undisputed that Claimant reached MMI on July 14, 1996, with an [IR] of 19%.
>
> The qualifying period for the tenth quarter began on August 3, 1999 and ended on November 1, 1999. Claimant testified that his treating doctor is [Dr. M] and that he sees this doctor every thirty to forty-five days.
>
> He testified, and the medical records show, that in early 1999, his doctor put him on Vicoprofen for his pain. He testified that at that time, he had constant pain that would become excruciating at times. In January of 1999, Claimant underwent a functional capacity evaluation [FCE] at the request of Carrier. A physical therapist performed the evaluation and opined that Claimant could

work at the medium physical demand level. Claimant testified that he was unable to do anything for days after the FCE as he was asked to do more than he was physically able to do by the evaluator. He testified that he was scheduled to see a Carrier-selected doctor, [Dr. S] at the same time, however, [Dr. S] was unavailable and he never saw Claimant. [Dr. S] wrote a report on February 10, 1999. Although his report leads the reader to believe that he actually examined the Claimant, [Dr. S] did not perform an examination of the Claimant. His report is based on a review of records and the report of the physical therapist. For some unknown reason, in his first paragraph, [Dr. S] opines that Claimant never had a work-related injury, although clearly the Commission [Texas Workers' Compensation Commission] had already determined that he did. Without the benefit of any physical examination, and after making a point of discrediting even the existence of Claimant's injury, [Dr. S] opined that Claimant could return to work immediately in a medium physical demand level position.

Claimant's treating doctor, on June 7, 1999, assessed Claimant with "post-laminectomy pain syndrome of the cervical spine; however, it is controlled with Vicoprofen although I think he could use more than what he is doing; extensive myofascial spasm secondary to previous surgery; he has significant physical disability secondary to #1 and #2. . . ." Claimant testified that in July of 1999, his pain was getting worse and the Vicoprofin [sic] would not control it for long. He testified, and the records show, that he returned to his treating doctor on August 31, 1999, and was assessed as follows: "Post-laminectomy pain syndrome of the cervical spine that responds well to the analgesics; however, he does not like to take them very often. As such, I think a long-acting analgesic would be his best option and make him much more functional. . . ." At that time, [Dr. M] put Claimant on OxyContin. Claimant testified that the medication was designed to last longer and help in his management of his pain. He testified that this medication helps him tolerate the pain, but affects his cognitive abilities, specifically his memory, and slows him down. He testified that he cannot drive while taking the medication.

On September 28, 1999, [Dr. M] noted that the OxyContin made Claimant more comfortable. He opined that Claimant's impairment "render it almost impossible for this gentleman to get a job which requires much driving. It would be unsafe for him to be in a car and trying to turn around side to side and look behind him." On November 30, 1999, [Dr. M] stated that Claimant's medication controls his pain but has significant side effects including sedation which make it unsafe for him to drive, but on the other hand, the medication is necessary in order for Claimant to be functional. He noted that while Claimant can be functional for short periods, he experiences severe exacerbation of his pain and must limit his activity to bedrest for days. He stated that Claimant suffers from a failed spine surgery syndrome with

intractable pain of the cervical spine as well as residual neuralgia and radiculopathy at C-7. His treating doctor opined that Claimant is not able to work due to these factors, as well as the side effects of the medication.

It is undisputed that Claimant was unemployed during the qualifying period for the tenth quarter. The testimony and medical evidence support Claimant's position that he suffered a serious injury with lasting effects, and that he can no longer reasonably perform the duties of his previous job. As such, Claimant has met his burden of showing that he was unemployed during the qualifying period as a direct result of his impairment.

Claimant testified that he looked for work during the qualifying period, beginning on August 25, 1999. He testified that he was unable to work or look for work prior to that time, and that he was really not able to look for any work until his medication was changed on August 31, 1999. The evidence showed that during the qualifying period, Claimant made approximately seventeen job contacts. The TWCC-52 [Application for Supplemental Income Benefits] shows that Claimant looked for work during and documented his job search each week beginning with the sixth week of the qualifying period.

The qualifying period for the tenth quarter falls under consideration of the "new" SIBS rules which became effective January 31, 1999. Under those rules, a claimant, in order to satisfy the good faith requirement of the rule, must show that he/she "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." Otherwise, an injured employee must show that he/she looked for work during the qualifying period commensurate with his/her ability to work.

In the instant case, Claimant has shown, by a preponderance of the evidence, that he was unable to work during the first five weeks of the qualifying period. Arguably, the medical evidence shows that Claimant could not work at all during the qualifying period, however, Claimant did make an effort to look for work despite his very limited ability. The records of [Dr. M] show, in narrative form, that Claimant was unable to perform any type of work in any capacity and specifically explain how the injury causes a total inability to work during the first five weeks of the qualifying period. No other record shows that Claimant is able to return to work. The records of the physical therapist of the FCE performed six months prior to the beginning of the qualifying period, and the obviously biased report of [Dr. S], who did not even examine the Claimant are not credible as records that show Claimant had an ability to work. As such, Claimant was excused from looking for work during the first five weeks of the qualifying period for the tenth quarter.

> Claimant has shown that following the change of his medication, he was able to perform a minimal job search. Therefore, Claimant has shown that he had some ability to work from the sixth week of the qualifying period through the end of the qualifying period. It is not believed that the evidence shows an ability to work in the medium physical demand level, and based on [Dr. M's] records, it would appear that Claimant would be able to work at a sedentary level on a part-time basis, at best. Under the new rules, a Claimant who has some ability to work, like Claimant herein, must provide sufficient documentation that he/she has made a good faith effort to obtain employment during the relevant qualifying period. The new rules also require that a claimant who has some ability to work "shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." The Appeals Panel has held that the documentation requirement of Rule 130.102(e) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e)] is mandatory and that a hearing officer can not consider non-documented employment contacts in arriving at the good faith determination. [Texas Workers' Compensation Commission Appeal No.] 992321, [decided November 22, 1999] and [Texas Workers' Compensation Commission Appeal No.] 992247 [decided November 23, 1999]. In this case, Claimant documented his job search and looked for work every week of the qualifying period beginning with the sixth week, and has documented his job search efforts sufficiently. The evidence shows that, in light of his limitations, Claimant's job search effort was made in good faith. As such, Claimant is entitled to [SIBS] for the tenth quarter.

The hearing officer stated:

> Even though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

The carrier challenged the following finding of fact and conclusion of law in the hearing officer's decision as not being sufficiently supported by the evidence:

FINDINGS OF FACT

2. During the qualifying period of the tenth quarter:

* * * *

2. Claimant was unable to work in any capacity for the first five weeks of the qualifying period.

* * * *

4. Claimant was excused from looking for employment during the first five weeks of the qualifying period as he had no ability to work during that period.

5. Claimant make [sic] a good faith job effort to look for employment commensurate with his ability to work every week of the qualifying period and documented his job search efforts from the sixth week of the qualifying period to the end of the qualifying period.

CONCLUSIONS OF LAW

3. Claimant is entitled to [SIBS] for the tenth compensable quarter.

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.

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 sought employment in good faith commensurate with his 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 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

[1]The "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.

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:

> (d) 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[.]

Rule 130.102(e) provides:

(e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:

(1) number of jobs applied for throughout the qualifying period;

(2) type of jobs sought by the injured employee;

(3) applications or resumes which document the job search efforts;

(4) cooperation with the Texas Rehabilitation Commission;

(5) education and work experience of the injured employee;

(6) amount of time spent in attempting to find employment;

(7) any job search plan by the injured employee;

(8) potential barriers to successful employment searches;

(9) registration with the Texas Workforce Commission; or

(10) any other relevant factor.

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBS for the tenth compensable quarter. The carrier argues that the claimant failed to provide a narrative report from a doctor which specifically explained how his injury caused a total inability to work. The hearing officer weighed all of the medical evidence and determined that it established an inability to work during the first five weeks of the qualifying period. We do find that this factual determination was sufficiently supported by the evidence. The carrier points to contrary medical evidence which it argues showed the claimant was able to return to work. The hearing officer explained why she did not find that this evidence showed an ability to work. The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this. Here the hearing officer explained her reasoning in not giving any weight to the evidence that the claimant was able to work during

the first five weeks of the qualifying period and we will not substitute our judgment for hers in regard to this factual determination.

The hearing officer also found that the claimant's job search during the remainder of the qualifying period constituted a good faith effort to seek employment commensurate with his ability to work. Once again the carrier points to conflicts in the evidence and once again we will defer to fact finder in resolving such conflicts. It was up to the hearing officer to weigh the evidence and the factors outlined in Rule 130.102(e) in making her factual determination concerning good faith job search. We find sufficient evidence to support her findings and no error of law.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge