APPEAL NO. 000435

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 February 3, 2000. She determined that the respondent (claimant herein) is entitled to supplemental income benefits (SIBS) for the first compensable quarter, beginning November 30, 1999, and ending February 28, 2000. The appellant (carrier herein) files a request for review arguing that the hearing officer erred in determining the claimant was entitled to SIBS. The carrier argues that the claimant, who did not seek employment during the qualifying period, failed to present evidence showing he was totally unable to work and that there was evidence in the record the claimant had an ability to work. The claimant responds that the medical evidence showed he was unable to work, including the evidence upon which the carrier argues showed he was able to work.

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 hearing officer summarized the evidence in her decision and we adopt her rendition of the evidence. We will only touch on the evidence most germane to the appeal, which is the medical evidence concerning the claimant's ability to work. It was undisputed that the claimant suffered a compensable injury and otherwise met the other criteria for SIBS, other than making a good faith job search during the qualifying period for the first compensable quarter of SIBS.[1] It was also undisputed that the claimant did not apply for work during the qualifying period, testifying that he was unable to work and had not been released to return to work by his treating doctor.

Dr. Dr. G, a neurosurgeon, states as follows in a letter dated January 31, 2000:

> [Claimant] was seen in follow-up on January 31, 2000. The patient is having increasing low back pain as well as neck pain. He is evidently going through some stresses because Workers' Compensation is indicating that he can return to work. My statement has clearly been that he is totally and permanently disabled from his injuries both to his neck and low back. He has had multiple back operations. He has had congenital fusion of his cervical spine and has multiple other levels of fusion, in addition. Under the circumstance[s], he is just not able to return to work. It is that simple. The FCEs [functional capacity evaluation] we have done on this gentleman clearly indicate that. He has recently been seen by [Dr. C] who also indicates that he doubts that this patient can even do 3-4 hours of work a day, even on a very limited basis. I believe that is exactly what his statement says. Still, the

[1]We note that the hearing officer=s finding that the qualifying period for the first compensable quarter began August 8, 1999, and ended November 16, 1999, has not been appealed and is thus final pursuant to Section 410.169.

> interpretation by the carriers say, he can return to work. I do not see how you can reach that conclusion; nevertheless, that seems to be the case. His medications were renewed. We are awaiting LS spine and cervical spine follow-up films to see if there are any changes on his record. He is indicating persistent neck and low back pain. The neck pain is more right sided, and leg pain is more left sided. No other changes are noted in present examination. Please note: our opinion has not changed on this gentleman. He is totally and permanently disabled. We will send a report on films when they are available.

Dr. C, an orthopedic surgeon, who examined the claimant at the request of the carrier states in part as follows in a report dated August 19, 1999:

> Overall, this gentleman could possibly do a sedentary type part-time job, if the job would permit him to sit, stand, and move about as needed to give him relief from low back and neck pain. I doubt that he could work for more than 3 or 4 hours a day. He has good function of his arms below shoulder level and adequate hand and forearm strength and manipulative ability. There is no significant neurological impairment of the upper extremities. He should not do any bending of significance. He should not twist, push, pull, squat, crawl, etc., or anything that would aggravate his low back problem. He can drive to and from work in his own car, but should not drive a commercial vehicle of any kind. It should be noted that he is not able to write because of his educational level and therefore this would cause problems finding a job from that standpoint. Generally speaking, with all of his problems, this gentleman is not very employable. Therefore, I would have to agree with [Dr. G] that he is basically incapable of performing any significant work activity other than the considerable restrictions indicated above.

Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(4) (Rule 130.102(d)(4)) provides as follows:

> 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[.][2]

The carrier argues the hearing officer erred in finding that the claimant presented medical evidence that specifically explained how his injury caused a total inability to work and in finding that the report by Dr. C did not show the claimant could return to work. We note that in making this argument the carrier refers to records by Dr. G admitted into evidence other than the one quoted above where Dr. G talks about the claimant's difficulty in returning to work due to his compensable injury in light of his age, limited education, limited language skills and the danger that he would be reinjured if he attempted to work. The carrier argues that all of these matters are improper explanations of how the claimant's injury causes him to be unable to work.

Whether medical evidence specifically explains how an injury causes a total inability to work and whether a record shows that a claimant is able to work are factual matters. *See* Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. The content and wording of the medical evidence will differ from case to case. It is incumbent on a hearing officer to make factual findings concerning these records as it would be impossible to construct any rule or set of rules which could determine these questions as a matter of law in every case in light of differing records.

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).

[2]We note that this provision was previously numbered as Rule 130.102(d)(3) and is so referred to as such in the hearing officer's decision as it is in a number of previous Appeals Panel decisions.

Applying this standard we find sufficient evidence to support the following two findings of fact in the hearing officer's decision:

FINDINGS OF FACT

8. [Dr. G], M.D., the Claimant's treating doctor, provided a narrative report which explained that the Claimant's compensable injury prevented the Claimant from returning to work.

9. Although [Dr. C], M.D. stated that it was possible that the Claimant could work in a sedentary capacity, this doctor did not opine that the Claimant was capable of working.

We find no error in the hearing officer finding the claimant was entitled to SIBS based upon these findings.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

The reference in the preceding opinion to language difficulty and other matters not part of the compensable injury was made, as stated, by a doctor examining claimant on behalf of the carrier. This report and this doctor were not the ones to which the hearing officer referred in saying that a narrative report was provided which explained how the compensable injury caused a total inability to work.

Joe Sebesta
Appeals Judge