

APPEAL NO. 000479

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 25, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 17th, 18th, 19th, 20th, and 21st quarters and that the respondent (carrier) would be relieved of liability for SIBS for the 20th and 21st quarters because of the claimant's failure to timely file his Statement of Employment Status (TWCC-52) for the 20th quarter and his Application for Supplemental Income Benefits (TWCC-52) for the 21st quarter.¹ In his appeal, the claimant essentially argues that the hearing officer's determinations are against the great weight of the evidence and requests that he be awarded SIBS for the 16th through 23rd quarters. The claimant's entitlement to SIBS in the 16th, 22nd, and 23rd quarters was not at issue at the hearing and likewise is not before us on appeal. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The hearing officer's decision contains a detailed factual summary which will not be repeated herein. Rather, we will briefly summarize the evidence. The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement with an impairment rating of 15% or greater; that he did not commute his impairment income benefits; that the 17th quarter of SIBS ran from July 2 to September 30, 1998, with a corresponding filing period of April 2 to July 1, 1998; that the 18th quarter of SIBS ran from October 1 to December 30, 1998, with a corresponding filing period of July 2 to September 30, 1998; that the 19th quarter of SIBS ran from December 31, 1998, to March 31, 1999, with a corresponding filing period of October 1 to December 30, 1998; that the 20th quarter of SIBS ran from April 1 to June 30, 1999, with a corresponding filing period of December 31, 1998, to March 31, 1999; and that the 21st quarter of SIBS ran from July 1 to September 29, 1999, with a corresponding qualifying period of March 18 to June 17, 1999.

During the filing period for the 17th quarter, the claimant did not return to work; however, his TWCC-52 lists 35 job contacts, which were all provided by Ms. M, the vocational rehabilitation specialist provided by the carrier. The claimant did not follow up on all of the leads provided by Ms. M and he did not conduct an independent search for employment. Ms. M testified that she contacted the employers listed on the claimant's TWCC-52 and none could verify that he had made an application. The claimant's TWCC-

¹Based on the starting and ending dates of the quarters stipulated by the parties, the claimant's entitlement to SIBS for the 17th through the 20th quarters is to be determined under the "old" SIBS rules and his entitlement to SIBS for the 21st quarter is to be determined under the "new" SIBS rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999.

52 for the 18th quarter reflects that he made 23 job contacts. The claimant looked for work on five days in July and five days in September. He made no job search efforts in August. The claimant stated that in the filing period for the 19th quarter, he did not make any job searches because he did not have the money for gasoline. The claimant testified that he told the carrier that he would not be completing any applications because it had stopped paying him benefits.

The claimant did not look for work in the filing period for the 20th quarter or the qualifying period for the 21st quarter. He stated that his treating doctor took him off work and advised him that he would need additional spinal surgery. The claimant introduced a letter from Dr. P, a chiropractor, who became his treating doctor on October 8, 1999, some four months after the end of the qualifying period for the 21st quarter. Dr. P's October 8th report is silent on the issue of the claimant's work status; however, in a November 1, 1999, "To Whom it May Concern" letter, Dr. P stated that in his opinion "the patient is not able to become gainfully employed at this time." Dr. P noted that the claimant is not able to sit for long periods and that "[l]ifting, climbing, squatting, and kneeling are obviously out as well." Dr. P opined "[i]n light of his physical condition, it is my opinion that the patient is totally disabled at this time and unable to work."

On the issue of whether the claimant timely filed his TWCC-52s for the 20th and 21st quarters, the evidence demonstrates that the claimant's TWCC-52 for the 20th quarter is dated August 30, 1999, five months after the end of the filing period for the 20th quarter and two months after the end of the quarter itself. The claimant's TWCC-52 for the 21st quarter is also dated August 30, 1999, well after the June 17, 1999, ending date of the qualifying period for that quarter. Although August 30th is about a month before the ending date of the quarter, the claimant did not present any evidence to demonstrate whether, and if so when, the carrier received the TWCC-52 for the 21st quarter.

The hearing officer determined that the claimant did not make a good faith search for employment in the filing periods for the 17th, 18th, and 19th quarters. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant's job search efforts in the filing periods for the 17th and 18th quarters rose to the level of a good faith search. With respect to the 17th quarter, the hearing officer noted that the claimant only followed up on part of the job leads provided by Ms. M and that he did not make any independent searches. Concerning the 18th quarter filing period, the hearing officer noted that the claimant limited his job search efforts to approximately 10 days of the 90-day period. In the filing period for the 19th quarter, the claimant acknowledged that he made no job searches because he did not have money for gasoline, further acknowledging that he told the carrier he would not make a job search because it had stopped paying him benefits. Each of those factors was properly considered by the hearing officer in making the determination of whether the claimant had satisfied the good faith requirement. 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 was acting within her province as the fact finder in resolving the good faith issue against the claimant. Nothing in our review of the record demonstrates that the hearing officer's determinations that the claimant did not make a good faith search for employment in the filing periods for the 17th, 18th, and 19th quarters are so contrary to the great weight of the evidence as to compel their reversal 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).

The claimant contended that he had no ability to work in the filing period for the 20th quarter and the qualifying period for the 21st quarter. As noted above, the claimant's entitlement to 20th quarter SIBS is to be determined under the "old" SIBS rules, while his entitlement to 21st quarter SIBS is to be determined under the "new" 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 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 obtain employment 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 either the filing period for the 20th quarter or the qualifying period for the 21st quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. The hearing officer was not persuaded that the evidence from Dr. P, which came approximately eight months after the end of the filing period for the 20th quarter and five months after the end of the qualifying period for the 21st quarter, was sufficient to demonstrate that the claimant had no ability to work in those periods. The hearing officer 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 those determinations are 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 them on appeal. Pool; Cain.

The hearing officer also determined that the claimant's unemployment in the filing periods for the 17th through the 20th quarters and the qualifying period for the 21st quarter was not a direct result of his impairment. A review of the record does not reveal that those determinations are so contrary to the great weight of the evidence as to compel their reversal on appeal. Although another fact finder could have drawn different inferences from the evidence, which would have supported a different result, that does not provide a

basis for reversing the hearing officer's direct result determinations in this instance. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Finally, we briefly consider the hearing officer's determination that the carrier would be relieved of liability for SIBS for the 20th and 21st quarters, if the claimant had been found to be entitled to those benefits, due to the claimant's failure to timely file his TWCC-52s for those quarters. As noted above, the claimant's TWCC-52 for the 20th quarter is dated August 30, 1999, well after the end of both the filing period for the 20th quarter and of the quarter itself. His TWCC-52 for the 21st quarter is also dated August 30, 1999, a date after the end of the qualifying period for the 21st quarter and two months into the quarter itself. The claimant did not present any evidence as to when his application for the 21st quarter was received by the carrier and, as such, he did not demonstrate that the carrier received it prior to September 29, 1999, the ending date of the 21st quarter. In light of the above, the hearing officer properly determined that the carrier would have been relieved of liability for the 20th and 21st quarters under Section 408.143 had the claimant been found to be entitled to those benefits because he did not timely file his TWCC-52s for those quarters.

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