APPEAL NO. 000649

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. The hearing officer determined that the appellant (claimant herein) is not entitled to supplemental income benefits (SIBs) for the 15th quarter, October 27, 1999, through January 25, 2000; and that the respondent (carrier herein) timely requested a benefit review conference to contest claimant=s entitlement to 15th quarter SIBs, thus not waiving its right to contest entitlement. The claimant appealed, challenging the determinations of the hearing officer that he did not establish a total inability to work during the qualifying period for the 15th compensable quarter and that his unemployment during this period was not a direct result of his impairment. The carrier responded that the findings and the decision of the hearing officer are sufficiently supported by the evidence.

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 the claimant sustained a compensable injury on _____, with an impairment rating (IR) of 15% or greater; that the claimant has not commuted any portion of his impairment income benefits (IIBs); that the 15th compensable quarter for SIBs was from October 27, 1999, through January 25, 2000; and that the qualifying period of the 15th quarter was from July 15, 1999, through October 13, 1999. The claimant testified that he did not seek employment during the qualifying period for the 15th compensable quarter. The claimant testified that during this period he was not able to work or attend classes because of b ack pain from his compensable injury. The claimant asserted that the carrier's denial of injections for pain during this period delayed his ability to return to school or work. The claimant also placed into evidence off-work slips from Dr. C and Dr. M. The carrier put into evidence a report from a functional capacity evaluation dated November 12, 1998, which indicated that the claimant was capable of restricted medium work.

Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

> An employee is entitled to [SIBs] if on the expiration of the [IIBs] period computed under Section 408.121(a)(1) the employee:
>
> (1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
>
> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;

(3) has not elected to commute a portion of the [IIBs] under Section 408.128; and

(4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)) provides that an injured employee who has an IR of 15% or greater and who has not commuted any IIBs is entitled to SIBs if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct result of the impairment from the compensable injury and has made a good faith effort to obtain employment commensurate with the employee's ability to work. "Qualifying period" is defined in Rule 130.101(4) as the 13-week period ending on the 14th day before the beginning date of a compensable quarter. Rule 130.102(d) in effect at the time provides as follows in relevant part:

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

****

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;

(3) 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 fact that the claimant met the first and third of the requirements of Section 408.142(a) was established by stipulation. The hearing officer found that the claimant did not make a good faith effort to seek employment during the qualifying period for the15th compensable quarter and was not unemployed during this period as a direct result of his compensable injury. The claimant appeals this determination. We have previously held that both the questions of whether the claimant made a good faith job search and whether the claimant

was unemployed as a direct result of his impairment are questions 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). 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). There is no indication that the hearing officer did not properly apply the law to the facts in concluding that the claimant is not entitled to SIBs for the 15th quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp

Appeals Judge

Elaine M. Chaney
Appeals Judge