APPEAL NO. 000746

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 March 21, 2000. After stipulations were entered into, whether the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the seventh quarter depends on whether he met the requirements in Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) during the qualifying period that began on August 12, 1999, and ended on November 10, 1999. The hearing officer determined that the claimant had some ability to work during the qualifying period and that he is not entitled to SIBs for the seventh quarter. The claimant appealed; urged that according to his treating doctor, Dr. L, he had no ability to work; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBs for the seventh quarter. The respondent (carrier) replied, urged that the record does not contain a report from a doctor that explains how the injury caused a total inability to work and does contain records that show that the claimant is able to return to work, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

At the request of the carrier, the claimant was examined by Dr. B. In a letter dated September 8, 1999, Dr. B stated that the claimant had lumbar surgery in June 1996; that the claimant has elected not to have additional surgery; that lift tests indicate that the claimant could work at the sedentary level; that considering the results of the functional capacity evaluation, there did not appear to be any medical reason which would preclude the claimant from traveling to work, being at work, and performing appropriate tasks and duties if he wished to do so; that the claimant=s ability to reenter the job force is based on his disability perception, chronic pain behavior, residual deconditioning, and chronic pain complex; and that probably the strongest inhibitor is that he does not have a great deal of motivation or anticipation of returning to the workforce.

In an office visit note dated October 22, 1999, Dr. L wrote:

> He=s [sic] condition has not changed any. He=s still having the same problem which is pain in the back and leg whenever he walks and whenever he moves and he cannot sit for any length of time and because of that he cannot be driving for any length of time.
>
> His pain is fairly mechanical, a fusion perhaps would take care of things, but he=s deadly afraid of having any surgery and because of that reason he has declined. He takes one Darvocet every six hours and that controls the pain, but makes him dizzy and drowsy to the point that he goes to sleep. This is why he

missed the appointment yesterday because he took one Darvocet and just fell asleep.

I told him that he needs to take just **2** tablet and I showed him how to break them in halves. He recently was evaluated by [Dr. B] at [clinic] and his opinion is that he could go back to work in a sedentary occupation lifting not more than 10 lbs. But [Dr. B] was quite doubtful that [claimant] would return to work. This was done on 9-8-99.

My feeling is that this man cannot go back to work because he cannot sit, he cannot lift, he cannot walk, he cannot do anything for any length of time and he needs to be on medication all the time and that makes him so sleepy that he cannot be driving or concentrating on any activities.

I plan to see him back here in about 3 or 4 months. He will take the same medications, hopefully **2** tablet will control the pain and will not make him sleepy.

In a letter dated December 3, 1999, Dr. L said that he saw the claimant on October 22, 1999; that the claimant remained off work until his next follow-up appointment scheduled for January 2000; and that he continued to need pain medication which impairs his ability to drive or concentrate.

Rule 130.102(d)(3) provides:

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:

* * * *

(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 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 may believe all, part, or none of any witness=s testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness=s testimony, and resolves conflicts and inconsistencies in the testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos,

666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer=s finding of fact that during the qualifying period the claimant had some ability to work is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The hearing officer should have also made findings of fact concerning the other two criteria in Rule 130.102(d)(3), but he did not. However, from his statement of the evidence in his Decision and Order, it can be inferred or implied that he made determinations against the interest of the claimant on those criteria. The evidence is sufficient to support those implied or inferred determinations and the conclusion of law that the claimant is not entitled to SIBs for the seventh quarter.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O=Neill
Appeals Judge

CONCUR IN RESULT:

I concur in the result because I believe the hearing officer=s decision and findings were sufficient in this case.

Judy L. Stephens
Appeals Judge