APPEAL NO. 000748

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. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 9th and 10th quarter; that the compensable injury does not extend to bilateral carpal tunnel syndrome (CTS) and a right shoulder rotator cuff tear; and that respondent (carrier) timely contested compensability of the alleged bilateral CTS and right shoulder rotator cuff tear. In her appeal, the claimant challenges each of those determinations as being against the great weight of the evidence. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that she had an impairment rating of at least 15%; and that she did not commute her impairment income benefits. The 9th quarter of SIBs was identified as the period from August 6 to November 4, 1999, and the qualifying period was identified as the period from April 24 to July 23, 1999. The 10th quarter of SIBs was identified as the period from November 5, 1999, to February 3, 2000, and the qualifying period was identified as the period from July 24 to October 22, 1999.

In January 1998, the claimant underwent a functional capacity evaluation (FCE) at the direction of Dr. T, who examined the claimant at the request of the carrier. Based on the results of that testing, Dr. T opined in a January 20, 1998, letter that the claimant "demonstrated the ability to work at the sedentary level which is consistent with her previous level of work activity. I feel that she is physically able to return to that type of work and is not disabled, secondary to her work-related injury." The claimant maintains that she the pain in her right shoulder increased dramatically after the FCE. In an April 3, 1998, progress note, Dr. W, the claimant's treating doctor, noted that the claimant has had a "marked exacerbation" following the FCE. The problem with the claimant's right shoulder has been diagnosed as a rotator cuff tear. The claimant has also been diagnosed with bilateral CTS. In a June 2, 1999, progress note, Dr. W stated that CTS is a "known component" of the type of brachial plexus injury that the claimant sustained. That is, Dr. W opined that the claimant's CTS "is only a concomitant part of the thoracic outlet." The claimant was referred to Dr. B for her right rotator cuff tear. Dr. B and Dr. W have opined that the claimant's activities in the FCE caused the rotator cuff tear. In a September 21, 1999, letter, Dr. B opined that he did not think that the claimant's bilateral CTS "is a work related injury, but probably more likely related to diabetes and age, and is more a'disease of life' than the rotator cuff surgery." In a May 17, 1999, letter, Dr. T addressed the causation issue, as follows, "it would be a gross error to assign any rotator cuff or [CTS] that may exist to her injury of 1992."

The claimant testified that she "badgered" Dr. W into releasing her to return to work because she needed the money. In progress notes of September 30, 1998, Dr. W noted that the claimant had been released to work "light duty for a short-term, not more than 2-3 hours per day." In late October 1998, the claimant began working for Dr. J, a chiropractor with whom the claimant had also sought treatment for her shoulder injury. The claimant worked two hours per day, four days per week for Dr. J. The claimant testified that her duties were secretarial in nature and that she continued to work for Dr. J until May 28, 1999, when she "just couldn't do it anymore." The claimant stated that by May 28th, she "was missing more time than she was making." On June 11, 1999, Dr. W completed a form concerning the claimant's ability to work. He checked the box corresponding to the statement that the claimant had "Severe limitation of functional capacity; incapable of minimal (sedentary) activity." Dr. W completed a similar form on December 1, 1999, again checking the same box and adding the statement that the claimant "is 100% disabled from any work." In a December 14, 1999, "To Whom it May Concern" letter, Dr. B opined that the claimant is "unable to work because of severe pain in her shoulder and paraesthesias in her hands, secondary to combined [CTS] and impingement syndrome." The claimant also introduced an "Excuse Slip" from Dr. M, her family doctor, stating that the claimant "needs to be off work indefinitely because of rotator cuff injury and [CTS]."

Initially, we will consider the claimant's assertion that the hearing officer's extent-of-injury determination is against the great weight of the evidence. The claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury and the nature and extent of her injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass=n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, questions of injury and disability can be determined on the basis of the claimant's testimony alone if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of the claimant, as an interested party, only raises an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the 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 (Tex. App.-El Paso 1991, writ denied).

As noted above there was conflicting evidence on the issue of whether the bilateral CTS and the right rotator cuff tear were causally related to the compensable injury. It was a matter left to the hearing officer to resolve those conflicts. The hearing officer was acting within his province as the fact finder in deciding to discount the claimant=s testimony and the other

evidence supporting a causal connection between the bilateral CTS and the right rotator cuff tear and the compensable injury and the treatment she underwent for her injury, namely the January 1998 FCE. Our review of the record does not reveal that the hearing officer=s extent-of-injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination 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).

Next, we consider the claimant's assertion that the hearing officer erred in finding that the carrier had not waived the right to contest compensability of the bilateral CTS and right rotator cuff tear because it raised its dispute of the extent of injury within 60 days of the date it received written notice of the claimed injuries. In Texas Workers' Compensation Commission Appeal No. 000713, decided May 17, 2000, the Appeals Panel was called upon to consider the effect of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.3 (Rule 124.3) on carrier waiver issues in extent-of-injury cases. In that case, we held that "new Rule 124.3 is applicable to those cases in which a [hearing] is convened on or after March 13, 2000 [the effective date of Rule 124.3], to address a disputed issue of carrier waiver in the context of an extent of injury question, because it precludes the [Texas Workers' Compensation Commission] from imposing a waiver after that date." The hearing in this case was held on March 21, 2000; thus, the hearing officer's determination that the carrier had not waived its right to contest compensability is affirmable because he no longer had the authority to impose a waiver in an extent-of-injury case.

Finally, we consider the hearing officer's determination that the claimant was not entitled to SIBs for the 9th and 10th quarters. The claimant's entitlement to those benefits is to be determined under the "new" SIBs rules. The claimant contended that she was entitled to SIBs in the 9th quarter under a mixed theory of having returned to work in a position "relatively equal" to her ability to work for the portion of the qualifying period from April 24 to May 28, 1999, and on an inability to work for the balance of the 9th quarter qualifying period. *See* Rules 130.102(d)(1) and (d)(3). With respect to the 10th quarter, the claimant relied exclusively on the inability to work provision of Rule 130.102(d)(3) to attempt to prove her entitlement to SIBs. In his decision hearing officer noted that "the Claimant's limited employment during the qualifying period for the 9th quarter was much less than she was capable of doing insofar as impairment from the compensable injury is concerned." In addition, the hearing officer noted that Dr. T "provides an excellent discussion of Claimant's circumstances in his report dated January 20, 1998." It is apparent that the hearing officer was not persuaded by the evidence from Dr. W that the claimant had only an ability to work no more than two to three hours per day in the beginning portion of the 9th quarter qualifying period. Similarly, the hearing officer rejected the evidence from Drs. W, B, and M, that thereafter the claimant was unable to work because of the combination of the bilateral CTS and the right rotator cuff tear. The hearing officer was acting within his province in so finding. Nothing in our review of the record demonstrates that the hearing officer's determinations that the claimant did not make the requisite good faith effort to look for work in the 9th and 10th

quarter qualifying periods are so contrary to the great weight of the evidence as to compel their reversal on appeal. Accordingly, we likewise affirm the hearing officer's determinations that the claimant is not entitled to SIBs for the 9th and 10th quarters.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge