APPEAL NO. 000791

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 15, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 10th quarter. The claimant appealed, arguing that he was unable to work during the qualifying period for the 10th quarter and asking us to reverse the hearing officer and grant him SIBs benefits for this quarter. The respondent (carrier) responded, stating that while there was conflicting evidence concerning the claimant's ability to work during the qualifying period, there was sufficient evidence to support the hearing officer's determination that the claimant had an ability to work during the qualifying period for the 10th compensable quarter.

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.

In her decision, the hearing officer summarized the evidence at the CCH as follows:

> Claimant testified that he sustained injuries to his back, head, neck, both legs and left elbow on _____. Claimant has been treating with [Dr. S] since the date of injury to the present. Claimant has had an impairment rating [IR] of 24%. Claimant had applied for the 10th quarter of [SIBs]. Claimant contends that during the qualifying period he had no ability to work. Surgery was done during the 9th quarter to both knees. Claimant's overall condition has worsened over the qualifying period for the 10th quarter. Carrier contends that the medical does not establish a total inability to work, there is a medical report which indicated an ability to work and a video which shows Claimant had some ability to work.
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> Medical evidence showed that Claimant had undergone three spinal surgeries, ulnar nerve transposition, left carpal tunnel syndrome (which was surgically treated), and arthroscopic assessment of both knees (done on August 17, 1999). In a letter of December 1, 1999, [Dr. S] stated that Claimant could not work in any capacity based on evidence of pseudarthrosis and radiculopathy of the lumbar area, numerous medications taken by Claimant, the active medical status and need for further treatment and rehabilitation. Medical notes indicate continuing complaints of pain in the lumbar area. In November, 1999 Claimant was examined by a pain management facility and was recommended for a series of injections. An EMG was performed in late October, 1999 in the lumbar area which noted significant denervation worse on the left than the right. There was a progression of notes which indicated improvement in Claimant's knees

from September 2, 1999 through December, 1999 though further rehabilitation was needed.
Claimant was supposed to be examined by [Dr. P], the Carrier's choice of doctor, in November, 1999. Claimant agreed to be seen by a doctor of the Carrier's choice at a Benefit Review Conference, but became wary after discussing the upcoming appointment with his treating doctor. Claimant planned on coming to the Commission [Texas Workers' Compensation Commission] on the date of the appointment to see if he needed to attend but had car problems. Carrier was advised of the car problems and offered to obtain a taxi. Claimant refused. Claimant was not examined by [Dr. P] until January, 2000 - after an order for the examination was obtained. [Dr. P] examined Claimant, and underwent a functional capacity evaluation [FCE], and was found to be able to work at a sedentary capability.

In January, 2000, Carrier also had Claimant under surveillance. Claimant was noted to be in his backyard, installing a dog run. The video is of short duration and exhibited Claimant working with small tools, installing the wire for the dog run, as well as moving the dog around the yard on a leash. The investigator testified that he took the video and that it was approximately 14 minutes in duration - which was the time expended while Claimant was present and included the time Claimant built the dog run.

Claimant is asserting a total inability to work. Rule 130.102(d) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)] provides that a good faith effort has been made if the claimant "has been unable to perform any type of work . . . 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." In this case there is a narrative from [Dr. S] dated December 1, 1999. [Dr. S] was adamant in stating that Claimant was not a candidate to return to gainful employment. Several reasons were given including continuing aggressive treatment, evidence of radiculopathy/pseudarthrosis and medications which are needed for any activities. Though the narrative from [Dr. S] is not short, it gives little detail as to what further treatment will be done (other than therapy) and how that would prevent Claimant for some type of employment. Medical notes during the qualifying period show improvement in Claimant's knees from the August, 1999 arthroscopic surgery as early as September 2, 1999 and continuing throughout the period. [Dr. S's] report only had one line regarding Claimant's knees and which indicated that continuing therapy was recommended. There was no mention of continuing problems with the knees.

It is also of note that the [FCE] and examination, done shortly after the qualifying period, did show some ability to work. The video indicated Claimant was able to manipulate small tools and be pulled on by his dog - with seemingly little pain noted in his countenance. Though this evidence may not have been considered under normal circumstances, in this case Claimant had agreed to attend an

examination with the Carrier's choice of doctor and then did not after discussing it with his doctor. Though it is noted that Claimant's car broke down, it is also of import that Claimant's primary concern was not attending the appointment. The medical from the qualifying period did not change through the time Claimant was examined in January, 2000.

The medical report from [Dr. S] was conclusory and did not rise to the level of establishing a total inability to work. There was a medical report and [FCE] which indicated an ability to work. Based on a totality of the evidence, Claimant did not have an ability [sic] to work during the qualifying period and Claimant did not seek employment in good faith. There is no dispute that Claimant had a serious injury with lasting effects. Claimant has had surgery to his knees, back and arm. Claimant continues to suffer the effects of the compensable injury and treatment is ongoing. Claimant established that his unemployment was a direct result of the compensable impairment.

Also in the appeal file is a letter from Dr. S mailed directly to the Appeals Panel concerning the claimant's ability to work. First, we note that we will not generally consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Applying this standard, we do not consider Dr. S's letter.

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

(A) An employee is entitled to [SIBs] if on the expiration of the impairment income benefit [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.

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)(4)[1], in effect at the time, provides as follows in relevant part:

(d) 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[.]

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 met the second requirement and this determination has not been appealed by either party. The hearing officer found that the claimant did not make a good faith effort to seek employment during the qualifying period for the10th compensable quarter. The claimant appeals this determination. We have previously held that the question of whether a claimant made a good faith job search is a question 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

[1]We note this rule was previously numbered as Rule 130.102(d)(3).

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 10th quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge