APPEAL NO. 000819

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 April 3, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth quarter. The appellant (carrier) appealed, contending the hearing officer erred in finding that the claimant was entitled to SIBs. The carrier argues that the claimant failed to establish a good faith job search based upon an inability to work as the medical evidence did not sufficiently explain why he was unable to work and there was medical evidence showing the claimant could work. There is no response from the claimant to the carrier's request for review in the appeal file.

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 _____; that the claimant reached maximum medical improvement (MMI) on September 28, 1997, with an impairment rating (IR) of 18%; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period for the sixth quarter began on September 28, 1999, and ended on December 27, 1999, and that the sixth quarter began on January 10, 2000, and ended on April 9, 2000. The hearing officer summarized the evidence at the CCH and the rationale for her decision as follows:

> It is undisputed that Claimant sustained a compensable low-back injury on _____. He testified that at the time of his injury, he was employed as assistant manager for an equipment rental company, whose duties included heavy lifting on a regular basis.
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> Claimant testified that he had undergone numerous treatments for his injury including medication, physical therapy, injections and two surgeries. He testified that his first surgery was performed in September of 1995 and that his last surgery, which included a fusion at L5-S1, was performed in February of 1999.
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> It is further undisputed that Claimant reached MMI on September 28, 1997 with an 18% [IR].
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> On August 4, 1999, Claimant's treating doctor, [Dr. D] noted that Claimant had severe pain in the L5-S1 distribution on the right and noted some improvement. However, on December 8, 1999, [Dr. D] noted that Claimant had persistent back pain and lower extremity pain and that he could sit for 30-45 minutes, stand for 10 minutes, walk for 5-10 minutes and was unable

to bend or squat. He noted that Claimant could bathe, dress and feed himself, and drive a short distance if necessary. However, [Dr. D] stated that Claimant had severe disabling low back and lower extremity pain and "is not likely to improve at all." On January 25, 2000, [Dr. D] stated that Claimant continued to have persistent low back and lower extremity pain which was refractory to all forms of conservative treatment. The doctor noted that Claimant was making progress in physical therapy, but that said therapy was stopped by the insurance company. He noted that x-rays showed slow progression of bony fusion (performed in February of 1999) probably secondary to his liver disease. The medical records show that Claimant suffers from hepatitis, which Claimant testified was under control until his injury and the numerous medications he has been prescribed in the treatment of that injury. [Dr. D] stated that Claimant "cannot work at sedentary or high-motivated job secondary to chronic severe radiculopathy secondary to an injury from a herniated lumbar disc." On January 28, 2000, Claimant underwent a functional capacity evaluation [FCE]. The physical therapist conducting the FCE opined that Claimant could work in the light physical demand level, occasionally lifting 20 pounds, frequently lifting 10 pounds and constantly lifting a negligible amount. The therapist recommended that Claimant avoid prolonged sitting or standing, or repetitive climbing, squatting or stooping. On February 18, 2000, [Dr. D] disagreed with the physical therapist. He opined that Claimant could not perform any work at any level due to severe back pain and pain that radiates down both lower extremities which is aggravated by any kind of activity. He noted that Claimant had failed maximum conservative treatment and had continued pain and that he believed that Claimant would have chronic severe back and lower pain which would be permanent. He recommended intrathecal narcotics, e.g., morphine, for control of the pain.

The qualifying period for the 6th quarter began on September 28, 1999 and continued through December 27, 1999. As such, Claimant's 6th quarter entitlement falls under the "new" rules for [SIBs] which became effective on January 31, 1999. Under those rules, Claimant must show that his underemployment/unemployment is a direct result of the impairment from his compensable injury. It is undisputed that Claimant neither worked, nor made any job contacts during the qualifying period for the 6th quarter. Claimant has shown, by a preponderance of the evidence, that he sustained a serious injury with lasting effects and that due to that compensable injury, he can no longer reasonably perform the duties she [sic, should be he] performed at the time of his injury. As such, Claimant has shown that his unemployment during the qualifying period for the 6th quarter is a direct result of his impairment.

Claimant must also show, under the new rules, that he has made a good faith effort to obtain employment commensurate with his ability to work. Claimant

asserts that he had no ability to work during the qualifying period for the 6th quarter. That assertion is supported by the narrative reports from her [sic, should be his] treating neurosurgeon, [Dr. D]. [Dr. D's] reports of December 8, 1999, January 25, 2000 and February 18, 2000, show that Claimant had an inability to work during the 6th quarter qualifying period, and explained how the injury caused the total inability to work. Finally, the January 28, 2000 FCE does not constitute a record which shows that Claimant can return to work. This reports [sic] is not credible in light of the fact it was performed by a physical therapist, not a doctor, and the fact that Claimant's treating doctor disagreed with the FCE and explained in detail the reasons why he disagreed with the therapist's findings. The FCE is not supported by any medical record from any doctor. Further, in September of 1999, the vocational rehabilitation counselor, hired by the Carrier, stated that she was hired to monitor the medical care, facilitate scheduling and progress in treatment for Claimant. She stated, after attending his appointments and consulting with his treating doctor, that Claimant's fusion was healing slowly and that she did not feel that he was capable of working at that time, until the fusion had healed. Claimant has shown that he was excused from looking for work during the qualifying period as he had no ability to perform any type of work in any capacity during the qualifying period. As such, Claimant has shown that he is entitled to [SIBs] for the 6th quarter.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b))[1], the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

The hearing officer found that the claimant met the direct result requirement and this finding is not appealed. The only question before us on appeal is whether or not the hearing officer committed error regarding whether the claimant sought employment in good faith commensurate with his ability to work. 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

[1]The "new" SIBs rules which went into effect on January 31, 1999, control in the present case. *See* Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant," and, in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required if a claimant is relying on such inability to work to replace the requirement of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*.

Rule 130.102(d) 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[.]

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBs for the sixth compensable quarter. The carrier argues that the claimant failed to provide a narrative report from a doctor which specifically explained how his injury caused a total inability to work. The hearing officer weighed all of the medical evidence and determined that it established an inability to work during the qualifying period. We find that this factual determination was sufficiently supported by the evidence. The carrier points to contrary medical evidence which it argues showed the claimant was able to return to work. The hearing officer explained why she did not find that this evidence showed an ability to work. The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this. Here, the hearing officer explained her reasoning in not giving any weight to the evidence that the claimant was able to work during the qualifying period and we will not substitute our judgment for hers in regard to this factual determination.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately to restate my views concerning the "mixing and matching" of the three prongs of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)). In Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000, the majority opinion which I authored, stated as follows:

We find error in the hearing officer's determination that Dr. B's April 13, 1999, report does not constitute a record showing that claimant is able to return to work because of the content of other medical records. While the content of all the medical records the hearing officer finds relevant are considered when determining whether the first prong of Rule 130.102(d)(3) has been satisfied by claimant, we do not read the rule as providing that a record that may show an ability to return to work is trumped by other records that show the contrary. To state this proposition another way for clarity's sake, the records should be evaluated to determine if a record, or records, "show that the injured employee is able to return to work," the third prong of Rule 130.102(d)(3). The narrative reports should be evaluated to determine if a narrative report "specifically explains how the injury causes a total inability to work," the second prong of the rule. All of the evidence should be evaluated to determine whether the claimant "has been unable to perform any type of work in any capacity," the first prong of the rule. As previously stated, all three criteria of Rule 130.102(d)(3) must be satisfied by a claimant seeking supplemental income benefits under a "no ability" to work theory. Further, also as previously stated, the hearing officer should make specific findings of fact on each of the three criteria of Rule 130.102(d)(3).

Philip F. O'Neill
Appeals Judge