APPEAL NO. 000846

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 10, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter because claimant had no ability to perform any work during the filing period for this quarter. The hearing officer also determined that the claimant was entitled to SIBs for the third quarter. The appellant (carrier) files a request for review, arguing that the claimant was not entitled to SIBs for either the first or the third compensable quarter. The claimant responds that the findings and decision of the hearing officer were 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 on _____, the claimant sustained a compensable injury; that the claimant had an impairment rating of 16%; that the claimant has not commuted any portion of her impairment income benefits; that the qualifying period of the first quarter of SIBs was from May 19 through August 17, 1999; and that the third quarter was from November 17, 1999, through February 15, 2000. The hearing officer summarizes the evidence as follows in the section of her decision entitled "Statement of the Evidence" and "Discussion":

> The Claimant maintained that she was entitled to SIB'S for the first and third quarters. The Claimant sustained an injury in the form of repetitive trauma occupational disease to both upper extremities while working for Employer. On 3-4-98, the Claimant had surgery on her right upper extremity which she did not feel was beneficial. According to the Claimant although [sic] she was offered surgery for her left upper extremity, but declined since the surgery to her right upper extremity did not help.
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> During the qualifying period for the first quarter, the Claimant attended college to be an occupational therapy assistant through the Texas Rehabilitation Commission [TRC] until in February 1999, when she resigned from the program. The Claimant started the program during the spring of 1997, and during the first part of 1999, she was in the practical part of the program. The Claimant explained that she was unable to do the practical course work because she had pain, tingling, and numbness in her fingers and did not have enough feeling to perform the work so she had to discontinue the program. (CR. EX. 6) [Dr. E] took the Claimant off work from February 16, 1999, through May 18, 1999, because of decreased range of motion, pain

and weakness. Accordingly, I have determined the Claimant had no ability to work during the qualifying period for the first quarter.

Regarding the qualifying period for the third quarter, the Claimant was in the Pride program until September 24, 1999, when she was released to return to work, and her limitations were clarified in a October 15, 1999, letter from [Dr. A]. [Dr. A] indicated the Claimant could work at a sedentary level with no lifting more than eight pounds, and she could perform a repetitive activity as long as she had frequent stretch breaks four to five times a day. The Claimant started the Pride program on July 2, 1999, and at that time it was determined she was temporarily totally disabled and would remain so while pursuing the functional restoration program. (CL. EX. 1)

After the Claimant was released to return to work on September 29, 1999, she made over twenty job contacts through November 2, 1999. Subsequently, during the qualifying period for the fourth quarter the Claimant found employment.

Based on the Claimant's participation in the Pride program and then her subsequent job searches once released to return to work, I have determined the Claimant made a good faith effort to find employment commensurate with her ability to work.

Even though all of the evidence presented was not discussed, it was considered. The findings of Fact and Conclusions of Law are based on all of the evidence presented.

The carrier challenged the following findings of fact and conclusions of law in the hearing officer's decision as not being sufficiently supported by the evidence:

FINDINGS OF FACT

2. During the qualifying period for the first compensable [SIBs] quarter, the Claimant was unable to perform any type of work, in any capacity, as a direct result of her impairment because a narrative from a doctor which specifically explained how the injury caused a total inability to work, was provided and no other records showed the Claimant was able to work.

3. During the qualifying period for the third compensable [SIBs] quarter, the Claimant was unemployed as a direct result of her impairment.

4. During the qualifying period for the third compensable [SIBs] quarter, Claimant attempted in good faith to obtain employment commensurate with Claimant's ability to work.

CONCLUSIONS OF LAW

3. Claimant was excused from attempting to find work for the first [SIBs] quarter because Claimant had no ability to perform any work.

4. Claimant is entitled to [SIBs] for the first quarter.

5. Claimant is entitled to [SIBs] for the third 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.

We have previously held that both the question of whether the claimant made a good faith job search and whether the claimant's unemployment was 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). 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

[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 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).

Rule 130.102(d), effect at the time of the CCH, provides:

> (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[.][2]

Rule 130.102(e) provides:

> (e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:
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> (1) number of jobs applied for throughout the qualifying period;
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> (2) type of jobs sought by the injured employee;
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> (3) applications or resumes which document the job search efforts;
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> (4) cooperation with the [TRC];
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> (5) education and work experience of the injured employee;
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> (6) amount of time spent in attempting to find employment;

[2]This rule was renumbered on November 28, 1999. Prior to this it was numbered Rule 130.102(d)(3).

(7) any job search plan by the injured employee;

(8) potential barriers to successful employment searches;

(9) registration with the Texas Workforce Commission; or

(10) any other relevant factor.

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 first and third quarters. While the report cited by the hearing officer in her decision by itself does not establish an inability to work in any capacity during the qualifying period, the medical evidence read as a whole is sufficient to support the finding of the hearing officer in this regard. The carrier argued that there was medical evidence indicating the claimant could work dating back to 1996. The claimant argued that this evidence was prior to a worsening of her condition and the hearing officer could have believed that it did not show an ability for the claimant to work during the qualifying period for the third quarter.

The hearing officer also found that the claimant's job search during the qualifying period constituted a good faith effort to seek employment commensurate with her ability to work. The carrier argues that the claimant did not make sufficient job contacts during the qualifying period, did not spend sufficient time looking for work, sought jobs only through telephone or fax, did not sufficiently document her job search, and did not look for jobs commensurate with her ability to work. It was up to the hearing officer to weigh the evidence and the factors outlined in Rule 130.102(e) in making her factual determination concerning good faith job search. We find sufficient evidence to support her findings and no error of law.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge