

APPEAL NO. 000918

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 respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter. The appellant (carrier) files a request for review, arguing that the hearing officer erred in finding that during the filing period for the first quarter, the claimant attempted in good faith to find employment commensurate with his ability to work and in finding that the claimant's unemployment during the filing period was a direct result of his impairment. The carrier also contends that the hearing officer erred in admitting into evidence the field office copy of the claimant's Application for Supplemental Income Benefits (TWCC-52). The appeal file does not contain a response from the claimant.

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's impairment rating (IR) is 15%; that the claimant did not elect to commute any portion of impairment income benefits (IIBs); and that the first quarter began on May 11, 1999, and continued through August 7, 1999. The hearing officer summarized the evidence at the CCH as follows:

The basic facts surrounding this claim are not in dispute. Claimant injured his back in a lifting incident at work on _____. Claimant had surgery to the lumbar and thoracic area of the spine in December of 1997. Claimant has recovered from surgery and still has residual symptoms. Claimant has the ability to do some type of work but he cannot return to a heavy manual labor job.

Claimant received an [IR] of 14% from [Dr. M], the [Texas Workers' Compensation Commission (Commission)] selected designated doctor, dated October 30, 1998. This [IR] was not disputed until the summer of 1999 and a Benefit Review Conference took place in September of 1999. Following that conference, the Benefit Review Officer requested clarification on September 15, 1999 from [Dr. M], concerning the [IR] on October 15, 1999. [[Dr. M] provided an amended certification of the [IR] on October 15, 1999. This resulted in a 15% [IR]. This [sic] parties have stipulated that the [IR] is 15%. As a result of this change in the [IR] by the designated doctor, Claimant is now eligible for [SIBs].

The filing period for the first quarter began on February 10, 1999 and continued through May 10, 1999. The Commission advised Claimant that he may be entitled to [SIBs] on November 9, 1999, almost 6 months after the end of the filing period.

Claimant testified that he did attempt to find employment during the qualifying period because he needed a job. Claimant stated that he did not keep records of his job search because he didn't know that he would later be entitled to [SIBs]. Claimant testified that he filed applications for employment during the filing period but he can't remember the exact employees [sic]. Claimant testified that he attended language training classes for a total of 16 hours per week in order to improve his English language skills so that he could find a job.

We first address the carrier's evidentiary objection. The carrier contends that the hearing officer erred in admitting a copy of the claimant's TWCC-52 from the files of the Commission as a hearing officer exhibit. We note that carrier made no objection at the CCH to the hearing officer doing this. Without objection below, no error has been preserved for our review, as we generally do not consider matters raised for the first time on appeal.

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

An employee is entitled to [SIBs] if on the expiration of the [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.

The fact that the claimant met the first and third of these requirements was established by stipulation. This case revolved around whether the claimant met the second and fourth of these requirements. 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 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).

Applying this standard of review, there is certainly evidence to support the hearing officer's finding of good faith job search. The claimant testified that he looked for jobs at a number of places during the qualifying period and the hearing officer accepted this testimony. The hearing officer and the parties recognized that the "new" SIBs rules, which went into effect on January 31, 1999, do not apply in the present case. We have previously held that these rules only apply to cases where the quarter begins on or after May 15, 1999. See Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished). We therefore review the present case without reference to the "new" SIBs rules. We caution that application of these rules in regard to later quarters could lead to a different result, especially considering the new rule that requires claimants to look for work every week of the filing period, in most cases.

The carrier makes no specific arguments in regard to direct result. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. Evidence to this effect exists in the record before us.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge