

APPEAL NO. 000937

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 30, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter. The claimant appeals, arguing that the hearing officer erred in finding that the claimant's unemployment during the filing period was not a direct result of his impairment from the compensable injury. The respondent (carrier) replies that the decision of the hearing officer should be affirmed.

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 with an impairment rating of 15% or greater; that the qualifying period for the third quarter was May 27 through August 25, 1999; that the third quarter began on September 9 and ended on December 7, 1999; that the claimant did not commute any portion of his impairment income benefits; that the claimant had no earnings during the qualifying period for the third quarter; that the claimant made no job searches during the qualifying period for the third quarter; and that the claimant had no ability to work during the qualifying period for the third quarter. We have previously dealt with the claimant's entitlement to SIBs for the first and second quarters in Texas Workers' Compensation Commission Appeal No. 991978, decided October 27, 1999, and for the fourth quarter in Texas Workers' Compensation Commission Appeal No. 000835, decided June 5, 2000.

The relevant facts of the present case are dealt with at some length in our prior decisions and are addressed in the decision of the hearing officer. We will only briefly touch on the evidence directly germane to the claimant's appeal. This includes medical evidence establishing that as a result of the claimant's compensable injury he underwent cervical spinal fusion surgery. Later, in October 1997, the claimant underwent an event that is described as a stroke or which resulted in stroke-like symptoms. As a result of this event, the claimant has been confined to a wheelchair and is able to perform even the functions of daily living with great difficulty.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. During the qualifying period for the 3rd quarter, Claimant's inability to work was not a result of the compensable injury of _____, but a result of unrelated cerebral vascular pathologies.

3. Claimant's unemployment is not a direct result of the impairment from the compensable injury.

CONCLUSION OF LAW

3. Claimant is not entitled to [SIBs] for the third (3rd) 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(4), "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 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) provides as follows in relevant part:

¹The "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.

- (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 hearing officer stated in his decision that the claimant had met the good faith requirement due to an inability to work and neither party has appealed this finding. The basis of the claimant's appeal is that the hearing officer erred in finding that the claimant's unemployment was not a direct result of the impairment from the compensable injury. The claimant points out that 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. See Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. The claimant argues that the hearing officer recognized in his decision that evidence of this existed in the record and we agree. We do not retreat from these cases. However, these holdings do not mandate that the hearing officer find direct result in every instance where the evidence showed an injury with lasting effects and that the claimant could not reasonably perform his preinjury work. In the present case, in light of the evidence of the severe limitations the claimant had resulting from his medical problems unrelated to his compensable injury, which problems clearly rendered him totally unable to work, we find the hearing officer's finding that the claimant's unemployment was not a direct result of the impairment from his compensable injury is sufficiently supported by the evidence. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We, in fact, affirmed the decision of the hearing officer in Appeal No. 000835, *supra*, with much the same evidence in finding the claimant in the present case met the direct result requirement for the fourth quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

CONCUR IN THE RESULT:

In his appeal, the claimant cites cases in which a carrier contended that something other than the impairment from the compensable injury is the sole cause of the unemployment or the underemployment. In my opinion, the severe limitations the claimant had resulting from his medical problems unrelated to his compensable injury which clearly render him totally unable to work are not sufficient to decide the direct result issue. There still needs to be a determination whether the claimant "has not returned to work . . . as a direct result of the employee's impairment." In his Decision and Order, the hearing officer said that it was not clear that the claimant's unemployment was a direct result of the compensable injury and that it was not. The evidence is sufficient to support that determination.

Tommy W. Lueders
Appeals Judge