APPEAL NO. 001122

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 April 26, 2000. With respect to the single issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter. In his appeal, the claimant argues that the hearing officer's determinations that he had some ability to work, that he did not make a good faith effort to look for work commensurate with his ability to work, and that he is not entitled to SIBs for the second quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the claimant's unemployment in the relevant qualifying period was a direct result of his impairment.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned an impairment rating of 15% or greater; that he did not commute his impairment income benefits; that the second quarter of SIBs ran from October 13, 1999, to January 11, 2000; that the qualifying period for the second quarter ran from July 29 to September 29, 1999; that the claimant had no earnings during the qualifying period for the second quarter; and that the claimant sought no employment during the qualifying period for the second quarter. The claimant testified that he had cervical surgery as a result of his compensable injury and that his condition improved for a short time after surgery and then it deteriorated. He stated that he has limited range of motion (ROM) in his neck, that he has numbness in his arms and fingers, and that he has constant pain in his neck and left shoulder. The claimant maintained that he was not able to look for work in the second quarter qualifying period because of the constant pain in his neck, the numbness and weakness in his arms, which make it difficult for him to lift and carry anything, and because of the side effects of the medications he is required to take in an attempt to manage his pain.

Dr. M is the claimant's treating doctor. In progress notes of July 26, 1999, August 9, 1999, and August 23, 1999, respectively, Dr. M states that an examination of the claimant's cervical spine revealed "mild to moderate tenderness to palpation," "[s]light tenseness of the paravertebral muscles," and "[p]ainful [ROM] and slightly decreased in all directions." In each of those progress notes, Dr. M continues the claimant in an off-work status for two weeks until his next follow-up appointment. In a September 23, 1999, letter, Dr. M addressed the issue of the claimant's ability to work, as follows:

> [Claimant] sustained an injury to the cervical spine region, which necessitated an anterior cervical diskectomy. Unfortunately, [claimant] has not done well and has remained with extreme pain to the cervical spine

> region. As a result of the intense pain associated with his post surgical syndrome, [claimant] requires the continued use of narcotics and muscle relaxants, which are known to have marked side effects including drowsiness and marked sedation at times. [Claimant] has marked limitation in [ROM] of the cervical spine region, as well. Based on my opinion and in all reasonable medical probability, [claimant] is not employable and his employability should not be an issue at this point. In my opinion, he is totally disabled for substantial gainful employment and it is further my opinion that [claimant] is not capable of seeking employment while he is utilizing narcotic medication to control the pain.

On September 17 and 20, 1999, the claimant underwent a functional capacity evaluation (FCE). In the FCE report, Dr. G, states that "[b]ased only on his lifting capacity, the results indicate that [claimant] may be able to perform light duty work. Based on the remainder of the evaluation, it is my opinion that [claimant] is not employable and has a very high potential for reinjury." Dr. G recommended that the claimant undergo a six-week course of work hardening. The claimant testified that he started a work hardening program after the FCE and that he attended for about a week and one-half and then he had to stop because he was no longer able to stand the pain. In a letter dated October 22, 1999, Dr. G stated that the claimant refused to attend work hardening, that he was absent two days in the second week, and that he was discharged from the work hardening program for non-compliance.

The claimant's entitlement to SIBs in the second quarter is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) applicable in this case, provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work if the employee "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 is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the qualifying period for the second quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what

facts had been established. He did so by finding that the claimant failed to meet his burden of proving that he had no ability to work in the qualifying period for the second quarter. In his discussion, the hearing officer stated that Dr. M's September 23, 1999, letter "is insufficiently specific to persuasively explain why the Claimant was unable to work in any capacity." In addition, the hearing officer noted that the FCE "indicated that the claimant was unrestricted in his ability to sit and walk and that he had some ability to lift, which would clearly indicate the physical ability to perform sedentary work." Each of those determinations was a question of fact for the hearing officer to resolve. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant had satisfied the requirements of Rule 130.102(d)(3), specifically the requirements that a narrative specifically explain how the injury causes a total inability to work and that no other records "show" an ability to work. The hearing officer's determination that the claimant had some ability to work in the qualifying period is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of the determination that the claimant had some ability to work, we likewise affirm the hearing officer's determinations that the claimant did not make a good faith effort to look for work in the qualifying period and that he is not entitled to second quarter SIBs in light of the fact that the claimant stipulated that he did not look for work in the qualifying period for the second quarter.

In his discussion the hearing officer stated:

> To state that the Claimant has continued pain and must take potent medication that has drowsiness-inducing side effects is merely to state common characteristics of many, if not most, [SIBs] recipients – all of whom must have significant permanent impairment, commonly accompanied by pain, to meet the threshold initial qualification. Without more, [Dr. M's] note does not differentiate this Claimant from the numbers of other SIBs recipients who have limited motion in the injured body part and significant pain, who are taking strong pain medication, and who nevertheless are working or seeking work.

The claimant contends, based on this language, that the hearing officer has added a requirement that the claimant differentiate his condition from other SIBs recipients in order to prevail. We cannot agree that the hearing officer has imposed any requirements beyond those listed in Rule 130.102(d)(3) in this case. Rather, we read this portion of the hearing officer's decision as providing an explanation of why he did not find Dr. M's narrative report persuasive to establish that the claimant had no ability to work and, as such, the hearing officer did not err in including it in his decision.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Thomas A. Knapp
Appeals Judge