APPEAL NO. 001151

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 25, 2000. The hearing officer determined that the appellant (claimant herein) is not entitled to supplemental income benefits (SIBs) for the fourth quarter. The claimant appeals, arguing that the evidence established he had a total inability to work during the qualifying period for the fourth compensable quarter. There is no response to the claimant's request for review from the respondent (self-insured herein) 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 on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on March 6, 1997, with an impairment rating of 39%; that the claimant did not commute any portion of his impairment income benefits; that the fourth quarter of SIBs was from March 3, 2000, through June 1, 2000; that the qualifying period for the fourth quarter of SIBs was from November 19, 1999, through February 17, 2000; that during the qualifying period for the fourth quarter of SIBs, the claimant had no earnings; and that during the qualifying period for the fourth quarter of SIBs, the claimant did not seek employment.

The claimant put into evidence medical reports from Dr. C, his treating doctor. Dr. C stated as follows in a report dated October 21, 1999:

> At the present time, [the claimant] is unable to return to work. He has a significant loss of cervical ROM [range of motion] and upper extremity muscle strength. This coupled with a significant burden of chronic, intractable pain and an anxiety depressive disorder that renders him unemployable at the present time.

Dr. C also stated as follows in a report dated January 21, 2000:

> At the present time [the claimant] continues to be 100% totally and permanently disabled, unable to carry out gainful employment on the basis of his ongoing and severe cervical spine problems and continued cervical radiculopathy which limits his available cervical [ROM] and ability to use his upper extremities. He also has significant give-away weakness in the left upper extremity.

A functional capacity evaluation (FCE) dated April 10, 2000, concludes as follows:

> At this time the client does not demonstrate the physical strength nor work tolerance in order to perform gainful employment in any work category as defined by the Department of Labor's Dictionary of Occupational Titles. At this time [the claimant] is considered to be 100% permanently disabled and unable to carry out gainful employment based on testing and continued cervical spine problems.

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

FINDINGS OF FACT

2. Claimant was not unable to perform any type of work in any capacity during the qualifying period for the fourth quarter of [SIBs].

3. Claimant did not provide a narrative report from a doctor which specifically explained how the injury causes a total inability to work.

4. The narrative reports from Claimant's treating doctor did not state that Claimant had no ability to work, but rather only that Claimant could not return to his preinjury employment and was unable to perform gainful employment.

5. Claimant had some ability to work, using his dominant right hand with sitting and standing as needed, no lifting of over five pounds with his left arm, and no work above his shoulders, during the qualifying period for the fourth quarter of [SIBs].

6. The [FCE] of April 10, 2000 is ambiguous and contradictory.

7. Claimant had limitations as a result of his impairment during the qualifying period for the fourth quarter of [SIBs] which precluded his return to his preinjury employment or other employment with the same or similar physical demands.

8. Claimant's unemployment during the qualifying period for the fourth quarter of [SIBs] was a direct result of his impairment.

9. Claimant did not make a good faith effort to seek employment commensurate with his ability to work during the qualifying period for the fourth quarter of [SIBs].

CONCLUSION OF LAW

3. Claimant is not entitled to [SIBs] for the fourth quarter from March 3, 2000 through June 1, 2000.

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:

[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.

(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 direct result requirement and neither party has appealed this finding. The basis of the claimant's appeal is that the hearing officer erred in finding that he had the ability to work and therefore did not make a good faith effort to seek employment. The claimant argues that the medical evidence showed he was unable to work and there was no medical evidence showing he had an ability to work. It was up to the hearing officer to decide what weight to give to the evidence. Applying the standard of review discussed above, we cannot say that the hearing officer erred in finding that the claimant was not unable to work. 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 have also on numerous occasions held that the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deems most reasonable, even though the record contains evidence of inconsistent inferences. Garza *supra*; Texas Workers' Compensation Commission Appeal No. 93334, decided June 14, 1993; Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge