APPEAL NO. 001172

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 May 10, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter. The claimant appeals, arguing that the evidence established he had a total inability to work during the qualifying period for the eighth compensable quarter. There is no response to the claimant's request for review from the respondent (carrier) 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 February 26, 1997, with an impairment rating of 21%; that the claimant did not commute any portion of his impairment income benefits; that the eighth quarter of SIBs was from February 10 through May 10, 2000; that the qualifying period for the eighth quarter of SIBs was from October 29, 1999, through January 26, 2000; that during the qualifying period for the eighth quarter of SIBs, the claimant had no earnings; and that during the qualifying period for the eighth quarter of SIBs, the claimant made no job search.

The claimant put into evidence medical reports concerning his ability to work. In a medical report dated December 22, 1999, Dr. T, states as follows:

> Evaluation today was compared to [the claimant's] previous evaluation on 12/17/98. No significant change has been noted. Patient is felt to continue to be disabled. Patient is unable to return to his previous work. I also do not feel that the patient will be able to return to any light duty status. I feel that this is most likely a permanent position, mainly caused by the chronic mechanical low back pain along with multiple lumbar surgeries he has had.

Dr. C, stated as follows in a report dated January 29, 2000:

> At this point, [the claimant] continues to be 100% totally and likely permanently disabled on the basis of his work-related injury and subsequent surgery. He has significant loss of useful lumbar range of motion as well as strength loss in his lower extremities and a significant burden of ongoing and chronic pain. He is unable to carry out gainful employment.

Dr. D, stated as follows in a report dated March 17, 2000:

> Based on [the claimant's] overall presentation and history, it is my opinion that he remains totally and permanently disabled from gainful employment. I believe that he would be at risk for further reinjury or aggravation of the condition if he were to embark on any type of physical activities.

The carrier put into evidence the report of a functional capacity evaluation (FCE) dated February 28, 2000. This report states as follows:

> The results indicate that [the claimant] is able to work at the LIGHT Physical Demand for an 8 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991. His specific acceptable Leg Lift capability was 20 lbs. and Torso Lift capability was 20 lbs. The detailed results are recorded on the enclosed FCE form.

An 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. During the qualifying period for the eighth quarter of [SIBs], Claimant had some ability to work.

3. The narrative reports from Drs. [T, C and D] do not state that Claimant has no ability to work, but rather state only that Claimant cannot perform more than light duty and/or state a conclusion that Claimant is unable to engage in gainful employment.

4. The narrative reports provided do not specifically explain how the compensable injury causes a total inability to work.

5. The [FCE] of February 28, 2000 is a record which shows that Claimant has some ability to return to work.

6. Claimant did not make a good faith effort to seek employment commensurate with his ability to work.

7. As a result of the impairment from his compensable injury, Claimant is no longer able to engage in employment which requires the same or substantially similar physical demands as Claimant's preinjury employment. .

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

CONCLUSION OF LAW

3. Claimant is not entitled to [SIBs] for the eighth quarter from February 10, 2000 through May 10, 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

[1]The "new" SIBs rules which went into effect on January 31, 1999, and the November 1999 amendments, control in the present case. *See* Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

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:

> (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.).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge