APPEAL NO. 001215

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 8, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters. In his appeal, the claimant essentially argues that the hearing officer's determinations that he had some ability to work in the qualifying periods for the 11th and 12th quarters; that he did not make a good faith effort to look for work commensurate with his ability to work in the qualifying periods; and that he is not entitled to SIBs in the 11th and 12th quarters are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance. The self-insured did not appeal the hearing officer's determination that in the relevant qualifying periods, the claimant was unemployed as a direct result of his impairment from the compensable injury.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he did not commute his impairment income benefits; that the 11th quarter of SIBs ran from December 2, 1999, to March 1, 2000; and that the 12th quarter of SIBs ran from March 2 to May 31, 2000. The parties did not stipulate as to the dates of the qualifying periods; however, the two periods were identified without objection as running from August 20, 1999, to February 17, 2000.

Because only the issue of the claimant's ability to work is before us on appeal, our factual recitation will be limited to those facts most relevant to that question. The claimant testified that he was not able to work in the relevant qualifying periods because he had not been released to return to work by Dr. R, his treating doctor. In addition, the claimant stated that he is not able to work because of the combination of his severe pain, the medications he must take in order to manage his pain, and his severe depression. He testified that he has difficulty with the activities of daily living and that he is anxious to return to work as soon as he is able to do so.

In an August 18, 1999, report, Dr. R addressed the claimant's ability to work. Specifically, Dr. R stated:

[Claimant] is unable to work due to the following:

1. Poor coordination and strength due to sensory changes and weakness in the bilateral upper extremities with chronic pain due to the nerve involvement in his Complex Region Pain Syndrome (CRPS).

2. SAFETY RISK due to his poor coordination, chronic pain and concentration.

3. Depression which has been severe with homicidal and suicidal ideations and some planning. If the patient feels he is out of control, his depression symptoms become more volatile and directed in nature. With the chronic pain aggravating his depression, any other stress in his life may contribute to his volatility and stability. He could definitely be a danger in work environment with these tendencies.

In summary, the patient's cervical and upper extremity pain related to his injury of _____ has developed into a chronic pain syndrome with severe depression. The patient is a safety risk from physical activity and from the possibility of homicidal rages he has had in the past.

As a physician who is aware of his medical and psychiatric instability, I cannot take on to myself the responsibility of recommending him for a job either part or full time.

In a February 21, 2000, "To Whom it May Concern" letter, Dr. R again opines that the claimant is "unable to work" for the following reasons:

1. Activities, temperatures, and touch which are normal to most people will be painful to him.
2. Repetitive activity will cause increased pain.
3. His constant level of pain interferes with his ability to concentrate and focus.
4. He is a safety risk due to his sensory nerve deficits.
5. He is a safety risk also due to his high dose of opiates and antidepressants.

At the conclusion of her letter, Dr. R further stated

Also complicating any work status is his **SEVERE DEPRESSION**, which involves **suicidal**, **murderous**, and **obsessive** tendencies. His work injury precipitated the most severe and dangerous depression I have seen in any of my patients to date, which has been improved only with multiple medications. This patient is unable to work. **Any person who is responsible for terminating his benefits may be in danger.** He has not been able to work at all during the last four years, from 1995 to present, including all dates. [Emphasis in original.]

The record reflects that Dr. O was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor for purposes of SIBs under

Section 408.151(b). In a report dated January 10, 2000, Dr. O stated that the claimant's functional capacity evaluation demonstrated that he could work in a sedentary to light capacity; however, his cardiovascular conditioning would limit him to sedentary work. Dr. O specifically stated that "[i]f you are going to send this patient back into employment, he could not do anything above the sedentary level."

The claimant's entitlement to SIBs in the 11th and 12th quarters 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 relevant qualifying periods. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. She did so by finding that the claimant failed to meet his burden of proving that he had no ability to work in the qualifying periods for the 11th and 12th quarters. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant had satisfied the requirements of Rule 130.102(d)(3), namely 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 determinations that the claimant had some ability to work in the qualifying periods for the 11th and 12th quarters are 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 those determinations 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 determinations 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 periods and that he is not entitled to 11th and 12th quarter SIBs in light of the fact that the claimant did not look for work in those periods.

As noted above, Dr. O was selected by the Commission to serve as the designated doctor in accordance with Section 408.151(b). We note that the hearing officer did not make any findings on the issue of whether Dr. O's report is entitled to presumptive weight on the issue of the claimant's ability to work. However, the self-insured did not file an appeal asserting error in the hearing officer's failure to resolve that question and, as such, we will not discuss the question further on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge