APPEAL NO. 001243

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 000234, decided March 14, 2000, we remanded the issue of the appellant's (claimant) entitlement to supplemental income benefits (SIBs) for the first quarter back to the hearing officer because he had applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) in a quarter to which the rule did not apply. We remanded for the hearing officer to determine if the claimant made a good faith job search commensurate with his ability to work in the filing period for the first quarter under the rules in effect prior to January 31, 1999. The hearing officer determined that the record was sufficiently developed at the January 19, 2000, hearing; thus, he did not hold a hearing on remand. With respect to the single issue before him, the hearing officer determined that the claimant is not entitled to SIBs for the first quarter. In his appeal, the claimant asserts that the hearing officer's determinations that he had some ability to work in the filing period for the first quarter and that he is not entitled to SIBs for that quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The first quarter of SIBs ran from April 30 to July 29, 1999, with a corresponding filing period of January 29 to April 29, 1999. It is undisputed that the claimant sustained a compensable injury on _____, in the course and scope of his employment as a sandblaster. The claimant testified that his left leg fell through a hole in the platform where he was working, causing injury to his left leg and low back. On November 21, 1997, Dr. S performed surgery on the claimant's left knee. The claimant testified that because of his injury, it is difficult for him to bend, climb stairs, walk, and lift heavy weights. He stated that when he walks, his leg swells to the point that his sock becomes tight. He further testified that he is 58 years old, that he went to school until the sixth grade in Mexico, and that his work experience has been in sandblasting, janitorial, baking, furniture painting, and heavy machinery operation.

The claimant's treating doctor is Dr. M, a chiropractor. In a "To Whom it May Concern" letter dated August 9, 1999, Dr. M stated, in relevant part:

> [Claimant] is currently under my medical care for injuries sustained at place of employment on date mentioned above. Patient sustained injuries to the lumbar region of the spine and left lower extremity. Patient underwent a surgical intervention of the left knee joint with very limited success.
>
> [Claimant] has been unable to work from 1-29-99 to 4-29-99 due to his disability. He continues to be 100% disable [sic] and at present, unable to

seek employment services because of pain and discomfort being experienced during the ambulatory process.

The claimant did not look for work in the filing period for the first quarter; thus, his entitlement to SIBs for that quarter is dependent upon his establishing that he had no ability to work in the filing period.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. 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 filing period for the first quarter. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant had established that he had no ability to work in any position in the filing period. That determination 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 in the filing period, we likewise affirm the hearing officer's determinations that the claimant did not make a good faith effort to look for work and that he is not entitled to first quarter SIBs in light of the fact that it is undisputed that the claimant did not look for work in the filing period.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge