APPEAL NO. 001350

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 18, 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 fourth quarter. In her appeal, the claimant essentially argues that the hearing officer's determinations that she had some ability to work in the qualifying period for the fourth quarter, that she did not make a good faith effort to look for work, and that she is not entitled to SIBs for the fourth 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 parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement on July 30, 1998; that her impairment rating is 15%; that she did not commute her impairment income benefits; that the fourth quarter of SIBs ran from March 10 to June 8, 2000; and that the qualifying period for the fourth quarter ran from November 27, 1999, to February 25, 2000. At issue in this case is the claimant's entitlement to SIBs for the fourth quarter under a no-ability-to-work theory. As such, our factual recitation will be limited to the facts most relevant to that inquiry.

The claimant's treating doctor is Dr. F, a chiropractor, who is also her nephew. In a "To Whom it May Concern" letter dated May 30, 1999, Dr. F noted that the claimant has "extensive degenerative cervical spondylosis, spinal cord compression at C5-6 and C6-7 with right-sided neuroforaminal stenosis at C6-7, as well as cervical [herniation] and posterior osteophytes" and that she is not a surgical candidate. He concluded that "it is my professional opinion, after reviewing all the medical documentation and exhausting all efforts to return [claimant] to her pre-injury status, that she is permanently disabled." In a letter dated February 14, 2000, Dr. F states that the claimant is "permanently disabled and unable to return to her previous employment or a new employment position." In a March 30, 2000, letter, Dr. F opines that the claimant "simply is not physically able to maintain employment at this time, in any capacity." Finally, in a May 15, 2000, letter to the claimant, Dr. F states that he "would like to strongly reiterate the fact that in my opinion you are totally and completely without a doubt unable to return to the workforce at any time or in any capacity."

The claimant has also treated with Dr. T, who has performed cervical epidural steroid injections. On February 2, 2000, Dr. T referred the claimant for a functional capacity evaluation (FCE). The FCE report concludes that the claimant "is not demonstrating the physical demand for any work category due to complaints of pain

associated with all functional activities." In a February 10, 2000, letter Dr. T addressed the issue of the claimant's ability to work, as follows:

> As you know, you have multilevel painful cervical disc degeneration which is not amenable to surgery because of the multiple levels involved. As I said, any use of your arms, even in the lightest conditions aggravates your neck pain and arm pain. It is my recommendation to you that you not work in any capacity.
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> * * * *
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> I just want to reiterate that based on the evaluation done in our Physical Medicine Department, you do not show the physical capabilities to perform work, even in the sedentary category. I feel that your attempt to work would only exacerbate your condition requiring you to take greater and greater amounts of medication, which would have very negative consequences. Because we know that your condition will not improve with time and surgery is not an option to you, I recommend that you not try to work in any capacity.

In a March 17, 1999, letter, Dr. T had previously opined that in her medical opinion the claimant "will not be able to work in any capacity, even at sedentary type work," noting that the claimant had arm and neck pain at rest and that any type of work she might try to do would only aggravate the claimant's condition.

The carrier had Dr. M examine the claimant for the purpose of providing an opinion on her ability to work. Dr. M referred the claimant to Mr. B, a physical therapist, for an FCE. In his FCE report, Mr. B stated that the claimant exhibited the physical capabilities to perform at the sedentary physical demand level. Dr. M reviewed the FCE from Mr. B and agreed that the claimant could perform sedentary-type work.

The claimant's entitlement to SIBs in the fourth 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).

It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. He did so by determining that the claimant did not sustain her burden of proving that she had no ability to work in the relevant qualifying period. 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), 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 was acting within his province as the fact finder in so finding. The hearing officer's determination that the claimant had some ability to work in the qualifying period for the fourth quarter 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 she is not entitled to fourth quarter SIBs in light of the fact that the claimant acknowledged that she did not look for work in the qualifying period.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge