APPEAL NO. 001371

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 25, 2000. The appellant (self-insured) and the respondent (claimant) stipulated that the qualifying period for the 11th quarter for supplemental income benefits (SIBs) began on December 16, 1999, and ended on March 17, 2000. The hearing officer found that during the qualifying period the claimant was unemployed as a direct result of her impairment and that she had no ability to work and concluded that she is entitled to SIBs for the 11th quarter. The self-insured appealed, cited Appeals Panel decisions, commented on the evidence, urged that the evidence is not sufficient to support the decision of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBs for the 11th quarter. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d)(4) (Rule 130.102(d)(4)) effective November 28, 1999, applies to the case before us; contains the same language as is in Rule 130.102(d)(3) effective January 31, 1999; and provides:

> (4) 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:
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> * * * * *
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> (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[.]

Dr. RLS is the claimant=s treating doctor. In a brief letter dated September 9, 1999, Dr. RLS said that the claimant was under his care for chronic low back pain, that she continued

to be totally disabled from gainful employment, and that he found no evidence of any future potential for improvement. In a letter dated December 6, 1999, he stated that the claimant continued to be under his care for a low back problem; that she is permanently and totally disabled from a standpoint of gainful employment; that she has been required by Workers= Compensation to at least apply for a job and seek employment@; that because of a recent ankle fracture and surgery, she has been unable to get out of the house and look into further employment opportunities; and that she will continue to be disabled from a standpoint of the ankle for at least another four or six weeks. On March 27, 2000, Dr. RLS reported that the claimant remained under his care for a chronic low back problem; that she continued to be permanently and totally incapacitated from gainful employment; that she specifically can do no lifting, bending, stooping, carrying, standing for long periods, sitting for long periods, or driving for long periods; and that he considered this to be permanent disability. In a letter dated April 14, 2000, Dr. RLS wrote:

> [Claimant] has been under my care for a number of years for a Workers= Compensation-related low back injury. She has had several surgeries in the past and she has a chronically weak and painful left leg. Because of the radicular problem in the left leg from her low back, the patient has had multiple falls, with three resulting in a fracture of the left ankle. Essentially, the patient=s left ankle fractures have all been related to her Workers= Compensation injury. Since the last fracture, the patient has been unable to look for jobs as required by Workers= Compensation. She has had a restriction placed on her by Dr. M, her orthopedic surgeon. Until recently, she has been limited from a standpoint of walking, standing, and driving. This would preclude her from seeking employment.
>
> The patient continues to be permanently and chronically disabled from a standpoint of her prior employment. She cannot lift, bend, stoop, carry, stand for long periods, sit for long periods, or drive for long periods. I do not foresee any significant change in her status in the foreseeable future.

Dr. RJS examined the claimant at the request of the self-insured. In a letter dated April 3, 2000, he stated that he had seen her previously on July 14, 1999; that she had just completed a functional capacity evaluation (FCE); that he suggested that she could work at a light physical demand job for an eight-hour period; and that he felt that she was employable, but had no desire to return to gainful employment. Dr. RJS also said that she was five feet six and one-half inches tall and weighed 275 pounds, that her lower back was mildly tender, that there was evidence of recent surgery and swelling in the left ankle, and that she was protective of the left ankle. Dr. RJS reported that an FCE was completed on March 28, 2000; that the report indicated that the therapist felt that the claimant could do some type of sedentary work that allowed sitting and frequent position changes; that because of the risk of reinjury, it was not recommended that she return to her previous job; that she could be doing some type of desk work that does not involve lifting, carrying, or standing for prolonged periods; that her endurance is low and she is deconditioned; that she should have some sort of ankle rehabilitation program as well as a general conditioning program; and that she should be referred to the Texas Rehabilitation Commission (TRC) for vocational testing and retraining. Dr. RJS wrote:

> The [FCE] done on March 28th at [clinic] indicates that the patient is capable of some level of work. They did not indicate the number of hours, but I am quite sure this patient would not do well with a full eight-hour job to begin with at least. Her treating physician has indicated in letters on at least two or thee occasions that she is not capable of any work. This is not in full agreement with the [FCE]. The problem exists that there are so many factors involved in returning to work. These include patient=s motivation, patient=s level of skill, patient=s physical capacity, and the ability to find a job that matches her restrictions. With all of these in mind I do not think that the patient will return to work but I am of the opinion that she could return to work if she would go through the process of retraining perhaps with the [TRC], reconditioning, and if she were motivated to do the same. Currently, she is, however, disabled and

> leads a very quiet inactive life at home. According to the information obtained during the FCE she apparently spends much of her time in bed and in inactive situations. She reports that she can walk about a half hour, stands for 10-15 minutes, can sit for up to an hour but has to shift constantly, and reports that she could sit perhaps two hours out of an eight-hour period. Nothing in the FCE indicated that her activity level would be any better than that.

A copy of the report of the FCE was not admitted into evidence because it had not been timely exchanged.

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 may believe all, part, or none of any witness=s testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness=s testimony, and resolves conflicts and inconsistencies in the testimony. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer did not make findings of fact on each of the three criteria in Rule 130.102(d)(4) as she should have. From her comments in the statement of the evidence in the Decision and Order, it can be inferred that she made determinations concerning those three criteria. The medical evidence is certainly subject to different interpretations. The implied determinations of the hearing officer and the finding of fact and conclusion of law that she did make are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re

King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge