APPEAL NO. 001386

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 March 28, 2000. The record closed on May 15, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 14th quarter. The appellant (carrier) files a request for review, challenging certain findings of the hearing officer and arguing that the hearing officer erred in awarding SIBs because the claimant failed to establish an inability to work and there was evidence that the claimant had an ability to work. The claimant responds that there is medical evidence which explains why the claimant was unable to work during the qualifying period for the 14th quarter and that any medical evidence of an ability to work is outside the period of the qualifying period. The claimant argues that such medical evidence did not show an ability to work during the qualifying period because since the time it was issued there is further evidence that the claimant needs additional surgery and that the claimant's medication has increased significantly.

DECISION

Reversed and remanded.

The parties stipulated that the claimant suffered an injury in the course and scope of his employment on _____, for which he received a 17% whole body impairment rating; that the claimant did not commute his impairment income benefits; and that the 14th compensable quarter started on January 20, 2000, and ended on April 19, 2000. The claimant testified that he was unable to work due to pain and the effects of the medications he is taking for his injury. The claimant also testified that the dosage of his medications has been increasing.

In a March 7, 2000, report Dr. D, a neurosurgeon to whom the claimant had been referred, stated as follows:

> The patient was scheduled for myelo CT of the lumbar spine. I think he has persistent foraminal stenosis and that accounts for his back and lower extremity pain. He will return to see me after that is complete. At this point, the patient is not able to return to work secondary to the severity of the back and lower extremity pain which is aggravated by activity.

In an April 7, 2000, report Dr. D states as follows:

> [The claimant] is a gentleman that complains of severe low back pain and pain that radiates to the lower extremities. The patient has undergone an anterior lumbar interbody fusion and a pseudoarthrosis at L4-5 and L5-S1 documented by CT scan of the lumbar spine. The patient is unable to work secondary to severe mechanical instability and pain. This is aggravated by any kind of activity. The patient is on a fair amount of medications in an attempt to control

his pain. He will need to have a lumbar laminectomy and fusion with pedicle screws to augment a failed anterior lumbar interbody fusion.

The carrier puts into evidence a functional capacity evaluation dated October 20, 1998, listing the claimant=s physical restrictions. Also in evidence is a January 14, 1999, report from Dr. E in which he states as follows:

> The patient could at this time perform only limited job activities. Given the amount of medication that he is taking, he should not operate any kind of equipment. It would appear to me that at this point he can move well and that his main limitation is related to the large amount of medication that he uses. I believe that the drug use and rehabilitation on an intensive program would be the only solution and that would only work if the patient were willing to agree to and follow such a treatment program.

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).

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

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 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[.]

In the present case, the hearing officer found that the claimant had no ability to work during the qualifying period for the 14th compensable quarter and that the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period. Dr. D's reports supported the hearing officer's finding of no ability to work. The carrier argues that Dr. E's report shows the claimant had some ability to work. The claimant argues that this report is dated and is no longer accurate. Determination of whether or not this report showed an ability to work is a factual question. *See* Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. However, the hearing officer has not made a finding whether another report showed an ability to work. Under these circumstances, we reverse and remand the case for the hearing officer to make such a finding.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Alan C. Ernst
Appeals Judge