

APPEAL NO. 001405

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 17, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 13th quarter. In his appeal, the claimant essentially argues that the hearing officer's determinations that he had some ability to work, that he did not make a good faith effort to look for work commensurate with his ability to work in the qualifying period, and that he is not entitled to SIBs for the 13th quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on June 9, 1995, with a n impairment rating of 30%; that he did not commute his impairment income benefits; that the 13th quarter of SIBs ran from February 22 to May 23, 2000; that the qualifying period for the 13th quarter of SIBs ran from November 9, 1999, to February 7, 2000; and that the claimant did not make a job search in the qualifying period for the 13th quarter. The claimant testified that he did not look for work in the relevant qualifying period because he had not been released to return to work by his treating doctor, Dr. K, who has been treating him for his incisional hernia. The claimant stated that his original injury was to his lumbar spine and both hips. He stated that he underwent lumbar surgery and has also had surgery to replace both of his hips. In addition, the claimant testified that the incisional hernia followed the surgery to replace his left hip.

As noted above, the claimant contends that he had no ability to work in the qualifying period for the 13th quarter. In support of his claim, the claimant introduced a "To Whom it May Concern" letter from Dr. K dated February 4, 2000, which states:

[Claimant] has been under my care for an infected incisional hernia repair. His incision has improved but he is still unable to work.

In a February 25, 2000, "To Whom it May Concern" letter Dr. K released the claimant to sedentary or light duty and in a March 21, 2000, letter, Dr. K states that the claimant is "able to return to full time work, eight hours a day forty hours a week, as of 2/22/00."

Initially, we consider the claimant's assertion that the hearing officer erred in recording the stipulation as to the nature of his compensable injury. We find no merit in this assertion in that the hearing officer's proposed stipulation concerning the nature of the claimant's injury was stated in the same way as it appears in her decision and order and the claimant agreed to the stipulation, without raising an objection as to its phrasing. Accordingly, he did nor preserve

error related to the stipulation. However, we further note that the phrasing of the stipulation does not demonstrate that the hearing officer had a misunderstanding as to the nature of the injury or how it occurred as the claimant appears to be arguing on appeal.

The claimant's entitlement to SIBs in the 13th 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).

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 period. 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 13th quarter. A review of the hearing officer's decision demonstrates the she simply was not persuaded that the claimant had satisfied the requirement of Rule 130.102(d)(3) that he provide a narrative specifically explaining how the injury causes a total inability to work. The hearing officer's determination that the claimant had some ability to work in the qualifying periods for the 13th 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 relevant qualifying period and that he is not entitled to 13th quarter SIBs in light of the fact that the claimant stipulated that he did not look for work in the qualifying period for the 13th quarter.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge