APPEAL NO. 001456

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 24, 2000. She determined that the appellant=s (claimant) compensable injury does not continue to constitute a producing cause of the claimant=s current low back injury and that the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter because he had not made a good faith search for work commensurate with his ability to work.

The claimant appeals, arguing that he has had no intervening injury. He argues that his return to work potential is poor and he had no ability to work during the qualifying period for SIBs. The respondent (carrier) responded that the hearing officer's decision is supported by the evidence.

DECISION

We affirm.

The claimant injured his back on _____, through a lifting injury. He was employed in a warehouse by (employer). The claimant had back surgery at the L5-S1 level on June 1, 1998. The claimant's surgeon was Dr. C. The claimant agreed that he told Dr. C in August 1998 that his pain was a score of one to two out of ten. The qualifying period for the first quarter of SIBs ran from October 28, 1999, through January 26, 2000.

The claimant said he was left with left leg weakness, which has caused his leg to buckle. The claimant said that he had fallen a number of times but never an "impact" fall to the ground or against something. He said he had either fallen back on his bed or was able to catch himself. Therefore, he denied that he ever fell with sufficient force to hurt or aggravate his back.

The claimant said that the request by his doctor, Dr. S, for a knee brace had been denied by the carrier. Asked to comment on a report by Dr. S stating that the claimant had fallen and sustained a reinjury, he said that Dr. S indicated that this note would speed the process up for him to get approval for his brace. This report may be the March 6, 2000, report in which Dr. S noted that the claimant had recurrent pain status "post fall" and that he had fallen after lack of approval for the brace. Dr. S stated that the claimant may now be needing a new surgery due to his "recurrent injury post fall." Dr. S wrote on April 7, 2000, that the brace was necessary to prevent falls, and that his falling was a response to, not the cause of, his back condition. He also stated that a herniation at L4-5 would not be new but rather part of his original trauma, and that the fact that surgery was done for the L5-S1 level only was part of the surgeon's conservative approach.

An earlier August 1998 report from Dr. S noted that the claimant reported left knee buckling and that he, Dr. S, would offer the claimant a knee brace. His September 1998 report noted that the claimant reported minimal back discomfort.

The claimant had not looked for work during the SIBs period under review. He said he did not do so because two doctors told him he could not work. A functional capacity evaluation done on October 29, 1999, noted that the claimant did not appear to work to maximum ability. The claimant stopped some tests due to complaints of pain. He was assessed as able to perform at the sedentary level, but a pain program or something to respond to the claimant's psychological needs was recommended. His return to work potential was assessed at poor.

The claimant saw Dr. R for periodic adjustments. On November 2, 1999, Dr. R wrote that the claimant was unemployable due to his condition and skill levels. He said that with retraining the claimant could work a sedentary position with flexible hours. Dr. R noted in a January 3, 2000, letter that the claimant had begun to experience more pain and weakness on the left side. Dr. R noted that prior to the claimant=s surgery, most of the claimant's complaints pertained to his right side. On March 16, 2000, Dr. R wrote a longer letter explaining why the claimant could not work even sedentary work. Dr. R stated that in his experience, sedentary work involved convenience store clerking, secretarial work, or being a security guard, all of which involved activities that the claimant could not perform. One principal reason offered by Dr. R was that prolonged sitting exacerbated the claimant's condition. Considering that the claimant is a man in his early 30s, Dr. R offered a bleak prognosis that it was unlikely that he would ever be gainfully employed again. When asked to describe his day, the claimant said he spent much of the day in his recliner chair, although he had been urged by Dr. S to walk more and engage in more activity. He also said he worked on his home computer. He was able to do light grocery shopping, gardening, and driving.

The claimant saw Dr. S in late 1998, and then not again until January 2000. Dr. S's January 24, 2000, report noted that the claimant was pain free for about a year after his June 1, 1998, surgery. He then noted that the claimant sustained several falls due to secondary weakness in his legs. Dr. S concluded with a concern that the claimant had re-herniated his disc at the L4-5 level. On April 5, 2000, Dr. S wrote that the claimant was having progressive weakness in his left leg, due to the effect on back nerves which enervated his leg. Dr. S added that the claimant was having increasing falls due to this.

The claimant was accepted for services by the Texas Rehabilitation Commission in November 1999, although he contended at the hearing that he had since been denied retraining for sedentary work.

Because we feel that the carrier had the burden of proving that an intervening injury was the "sole cause" of the claimant=s current pain, we will imply a finding of sole cause (as indicated by the hearing officer=s discussion). A trier of fact is not required to accept a

claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). 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 of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). While the decision here could have gone the other way, the hearing officer evidently was persuaded from the postsurgical, long-term recovery of the claimant that his earlier injury had been alleviated. Although the claimant denied that any falls he had were of consequence, the hearing officer evidently disbelieved this. We cannot agree that the determination that the claimant's current back condition was not the result of his earlier back injury but due to an intervening injury, was against the great weight and preponderance of the evidence. However, nothing in this decision operates to preclude the carrier from liability for reasonable and necessary lifetime medical benefits for the effects of the claimant=s compensable injury.

There are four eligibility criteria that must be met to qualify for SIBs, set out in Section 408.142(a): that the employee "(1) has an impairment rating of 15 percent or more . . . ; (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefit . . . ; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work."

The version of Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)) then in effect defines good faith in pertinent part as follows:

> 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:
>
> (3) 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[.]

We cannot agree that the hearing officer did not correctly apply the rule or that her determinations are against the great weight and preponderance of the evidence, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge