

APPEAL NO. 001496
FILED AUGUST 8, 2000

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 16, 2000, in _____, Texas, with _____ presiding as hearing officer. She determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the ninth quarter. The claimant appeals, contending that he is entitled to SIBs because he is unable to work due to pain and his need for additional back surgery.

The respondent (carrier) replies that the evidence supported the hearing officer's finding that the claimant was able to work during the qualifying period for the ninth compensable quarter and that he was not entitled to SIBs because he failed to seek employment.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has not elected to commute any portion of his impairment income benefits; that the claimant has reached maximum medical improvement with an impairment rating of 15% or greater; that the ninth quarter was from October 2 through December 31, 1999; and that the qualifying period for the ninth quarter was from June 19 through September 17, 1999. It was undisputed that the claimant did not seek employment during the qualifying period for the ninth quarter. There was medical evidence prior to the qualifying period for the ninth compensable quarter from (Dr. C), the claimant's treating doctor, and (Dr. H), the carrier's required medical examination doctor, that the claimant was capable of sedentary work. The claimant testified that his condition had worsened since the time of these opinions.

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.

¹The "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.

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). 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[.]

The hearing officer stated in his decision that the claimant had met the direct result requirement and neither party has appealed this finding. The basis of the claimant's appeal is that the hearing officer erred in finding that he had the ability to work and therefore did not make a good faith effort to seek employment. Applying this standard, we find sufficient evidence to support the hearing officer's factual finding that the claimant is capable of doing sedentary work. This finding, linked to the undisputed fact that the claimant did not seek employment during the qualifying period, is sufficient

to support the finding of the hearing officer that the claimant did not seek employment in good faith commensurate with his ability to work. The finding that the claimant did not make a good faith job search during the qualifying period is sufficient to support the hearing officer's conclusion of law that the claimant was not entitled to SIBs for the ninth quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge