

APPEAL NO. 001551

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 26 and June 13, 2000. The issues at the hearing were whether the respondent (claimant herein) was entitled to supplemental income benefits (SIBs) for the seventh and ninth quarters and whether the claimant had permanently lost entitlement to SIBs. The hearing officer determined that the claimant was entitled to SIBs for the seventh and ninth compensable quarters and had not permanently lost entitlement to SIBs benefits. The appellant (carrier herein) files a request for review challenging the hearing officer's determinations. The carrier contends that the claimant was not entitled to SIBs for the seventh and ninth quarters because the determination of the hearing officer that the claimant was underemployed as a direct result of his impairment during the qualifying periods for these quarters was contrary to the evidence. The carrier contends that since the claimant was not entitled to SIBs for the seventh and ninth quarters he had lost entitlement to SIBs by virtue of not being entitled to SIBs for 12 consecutive months. There is no response from the claimant to the carrier's request for review in the appeal file.

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 to his lower back which resulted in an 18% impairment rating; that the Texas Workers' Compensation Commission had determined that the claimant was not entitled to SIBs for the fifth and sixth quarters; that the claimant was not entitled to SIBs for the eighth quarter; that the qualifying period for the seventh quarter was from April 22 through July 21, 1999; and that the qualifying period for the ninth quarter was from October 21, 1999, through January 19, 2000. The claimant testified that as a result of his injuries and failed back surgery he is permanently restricted to very light duty. The claimant testified that during the qualifying period for both the seventh and eighth quarters he was employed full-time selling timeshare units on commission. The claimant testified that this work was within his physical restrictions. The claimant's income fluctuated depending on sales since he worked solely on commission. During the eighth compensable quarter he earned more than 80% of his preinjury wages and thus did not qualify for SIBs. The claimant submitted evidence showing that during the qualifying periods for the seventh and ninth compensable quarters he earned less than 80% of his preinjury wages.

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.

The hearing officer found that the claimant attempted in good faith to seek employment during the qualifying periods for the seventh and ninth compensable quarters. This finding has not been appealed and has become final pursuant to Section 410.169. We have previously held that the question of whether the claimant's unemployment or underemployment was a direct result of his impairment is a question of fact. 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).

Applying this standard of review we find no error in the hearing officer's finding that the claimant's underemployment during the qualifying periods for the seventh and ninth quarters was a direct result of his impairment. The carrier argues that the claimant's underemployment during these periods was a result of economic factors rather than the claimant's impairment. We would not conclude that this is the case as a matter of law. In fact, as the hearing officer points out, we have held that to meet the direct result requirement the claimant merely has to prove that his underemployment is a direct result of his impairment, not the sole cause of it. To the degree there was any evidence in this record that the claimant's underemployment was partly the result of economic conditions, there was certainly no evidence that his underemployment was solely the result of

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.

economic conditions. Absent such evidence, and absent such evidence constituting the overwhelming evidence on this issue, there are no grounds for our reversal.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge