APPEAL NO. 001607

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 June 6, 2000. The hearing officer determined that the appellant (claimant herein) is not entitled to supplemental income benefits (SIBs) for the 16th quarter. The claimant appeals, contending that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) is unconstitutional and deprives the claimant of due process of law. The claimant also argues that Rule 130.102(d) is contrary to the statute and was not properly adopted pursuant to the Administrative Procedures Act. The claimant argues that even were Rule 130.102(d) valid the certain findings and conclusions of the hearing officer are against the great weight and preponderance of the evidence and should be reversed. The respondent (carrier herein) replies that the claimant named the wrong carrier in her request for review (Highlands Insurance Company rather than Sunbelt Insurance Company). The carrier argues that there is sufficient evidence to support the decision of the hearing officer.

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.

We first need to set the parameters of the scope of our review and of the appeal. First, we reject the carrier's argument that we cannot consider the claimant's request for review because it names the wrong carrier. It is clear from statements made by the claimant and the carrier that (carrier) is the carrier and (company) is acting as a servicing company on the claim. The hearing officer's decision references (carrier). We read the claimant's appeal to mean (carrier) wherever she mentions (company). And second, the claimant makes a number of constitutional arguments concerning Rule 130.102(d). We have stated many times previously that the Appeals Panel does not resolve constitutional questions. The claimant may feel that raising these issues before the Appeals Panel is necessary to preserve them for judicial review. Whether this is the case or not is a question for the courts, as is the constitutionality of Rule 130.102(d). The claimant argues that Rule 130.102(d) is inconsistent with the 1989 Act and its adoption was improper under the Administrative Procedures Act. These are also issues beyond the scope of our review, but matters for the courts to consider. We will consider the arguments of the claimant upon which we have authority to rule, which are those dealing with whether there is sufficient evidence to support the factual findings of the hearing officer.

The parties stipulated that the carrier accepted liability for the claimant's _____ injury; that the claimant has an impairment rating of 15% or greater as a result of this injury; that the claimant did not elect to commute any portion of her impairment income benefits; and that the sixteenth quarter was from November 29, 1999, through February 26, 2000. It was undisputed that the claimant did not seek employment during the qualifying period for the 16th quarter. The claimant argued that she was unable to work

at all during this period due to her injuries and that this was supported by the medical evidence. The carrier contended that the claimant was able to work and pointed to the opinions of its required medical examination order doctor and to the results of a functional capacity evaluation.

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 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 contested case 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:

[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.

(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 for both quarters and neither party has appealed this finding. The basis of the claimant's appeal is that the hearing officer erred in finding that she 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 had some ability to 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 her 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 is not entitled to SIBs for the 16th quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge