APPEAL NO. 001617

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 2, 2000, and May 25, 2000. The hearing officer determined that the respondent's (claimant herein) closed head injury is a result of the compensable injury sustained on or about _____; that although the appellant (self-insured herein) did not timely dispute the closed head injury, the current rules in this regard establish that the self-insured had no obligation to dispute the closed head extent of injury matter; and that the claimant is entitled to supplemental income benefits (SIBs) for the 12th quarter, from December 22, 1999, through March 21, 2000. The self-insured appeals, challenging the factual finding by the hearing officer that the claimant had a total inability to work during the qualifying period and arguing that the hearing officer erred in finding the claimant was entitled to SIBs because there were other records in evidence that showed the claimant could work. The claimant responds that there was sufficient evidence in the record to support the hearing officer's finding of total inability to work and that other records did not actually show an ability to work.

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 on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period of the 12th quarter began on September 9, 1999, and ended on December 8, 1999; and that the 12th quarter was from December 22, 1999, through March 21, 2000. The claimant was injured when he was in a motor vehicle accident with an eighteen wheel truck while working as a trash truck driver. There was medical evidence from Dr. H, the claimant's treating doctor, that the claimant's injuries from this accident included a closed head injury resulting in memory loss, post-concussive syndrome, bilateral TMJ dysfunction, left shoulder pathology, lumbar strain, and cervical strain. Dr. H testified at the CCH and stated in a number of reports that the claimant was not able to work explaining that the claimant was primarily prevented from working by his mental status due to his injury. An April 5, 1998, functional capacity evaluation (FCE) also indicated that the claimant was unable to perform any kind of work. An August 12, 1999, FCE indicated that the claimant was able to work at the medium level. Dr. H stated that this latter FCE was meaningless because the findings excluded tests for the claimant's mental status, depression and headaches. Dr. D, who had performed the earlier FCE, expressed a similar opinion regarding the August 12, 1999, FCE. Also in evidence were reports from Dr. G and Dr. S, both of whom are psychiatrists, which stated the claimant suffered from major depression with severe psychotic features, numerous symptoms of depression including depressed mood, irritability, poor appetite, poor sleep, paranoid ideation and auditory hallucinations. Dr. C testified telephonically that he had not

examined the claimant, but that based upon his review of medical records, he believed the claimant was capable of working.

The hearing officer's findings of fact included the following:

FINDINGS OF FACT

2. The credible medical reports of [Dr. H] beginning with the first report, dated March 16, 1994 (four months after the date of injury), established the diagnosis of closed head injury with post concussive syndrome based on objective clinical data.

3. The credible reports of psychiatrists [Dr. G] and [Dr. S] established in conjunction with the opinion of [Dr. H], that Claimant suffered from severe major depression during the 12th quarter qualifying period preventing him from having an ability to work during that time period.

4. The credible narratives of [Dr. H] established that as a result of Claimant's compensable injury including his mental capacity and poor memory, Claimant had a total inability to work during the 12th quarter qualifying period.

5. The August 12, 1999 FCE, dated August 17, 1999 and the report of Dr. Cassidy [Dr. Ca] attempting to show an ability to work, during the relevant quarter qualifying period, were rendered less than credible by the opinions of [Dr. H], [Dr. G], [Dr. S] and [Dr. D], D.C.

6. During the 12th quarter qualifying period, [Dr. H's] medical narrative established that Claimant had a total inability to work as a result of his impairment from the compensable injury and no credible medical report in the record showed that Claimant had an ability to work during that time period.

7. Based on a totality of the medical evidence, during the 12th quarter qualifying period, Claimant had a total inability to work.

8. During the 12th quarter qualifying period, Claimant satisfied the good faith search criterion of the Rule [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)], by not looking for work.

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), 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, "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 met the direct result requirement and this finding has not been appealed and has become final pursuant to Section 410.169. The only question before us on appeal is whether or not the hearing officer committed error in finding that the claimant sought employment in good faith commensurate with his ability to work. We have previously held that the question of whether a claimant made a good faith job search is a question 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[.]

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBs for the 12th compensable quarter. The hearing officer determined the evidence established an inability to work during the qualifying period. We do find that this factual determination was sufficiently supported by the evidence. The self-insured points to contrary medical evidence which it argues showed the claimant was able to return to work. The hearing officer explained why she did not find that this evidence showed an ability to work. The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may determine the evidence failed to show this. *See* Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. Here, the hearing officer explained her reasoning in not giving any credibility to the evidence that the claimant was able to work during the qualifying period. In finding that this evidence did not show an ability to work, she points out that such evidence failed to address the claimant's head injury and mental status in relation to his ability to work. The hearing officer explicitly found the head injury was part of the claimant's compensable injury and that he was unable to work due to his mental status. In light of those findings, we find no error in her finding evidence of the claimant's ability to work, which failed to consider those factors, not credible, particularly since determining the credibility of the evidence is the province of the hearing officer. We will not substitute our judgment for hers in regard to this factual determination.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge