APPEAL NO. 001627

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 20, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter of February 1 to May 1, 2000, or the sixth quarter of May 2 to July 31, 2000. In his appeal, the claimant argues that the hearing officer's determinations that he did not make a good faith effort to look for work commensurate with his ability to work in the qualifying periods for the fifth and sixth quarters are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his neck, left shoulder, and low back on _____; that he was assigned a 22% impairment rating for his compensable injury; that the qualifying period for the fifth quarter of SIBs ran from October 20, 1999, to January 18, 2000; and that the qualifying period for the sixth quarter of SIBs ran from January 19 to April 19, 2000. The claimant primarily proceeded on a no-ability-to-work theory for the fifth and sixth quarters; however, he made some job searches in each of the relevant qualifying periods; thus, this decision will address both theories of recovery.

The claimant submitted an Application for [SIBs] (TWCC-52) for the fifth quarter which reflects that the claimant made three employment contacts on January 10, January 15, and January 21, 2000. The claimant testified that he did not make any further job contacts in the qualifying period because he was unable to work and had not been released to return to work by his treating doctor, Dr. WF. The only TWCC-52 for the sixth quarter that the carrier acknowledges receiving reveals that the claimant made four job contacts in the qualifying period for the sixth quarter on March 28, April 3, April 10, and April 18, 2000. A supplement to the TWCC-52 was admitted in evidence at the hearing. The claimant testified that he sent a copy of the supplement to the carrier; however, the carrier denied receiving it. That document references 10 job searches in the period from January 26 to March 22, 2000.

On April 7, 2000, Dr. WF completed a "Certificate to Return to Work or School" stating that the claimant was unable to work from October 1999 to January 25, 2000. On May 23, 2000, Dr. WF completed a second such certificate stating that the claimant "was not able to work from 11-10-99 to Jan. 25, 2000 - Please see attached detailed Reports." In progress notes dated November 10, 1999, Dr. WF states that the claimant continues with neck pain but that "his greatest problem is his left shoulder." Dr. WF further noted that the claimant has "lost partial motion of abduction of the shoulder, but it is not a frozen shoulder, and his range of motion is relatively good" and that the claimant's examination

reveals “classical C5 and 6 radiculopathy on the left. . . .” Dr. WF concluded “[f]rom my standpoint, he is not fit for duty.” In a letter dated April 27, 2000, a week after the end of the sixth quarter qualifying period, Dr. WF opined that the claimant could return to sedentary to light duty, with lifting restrictions of 10 to 15 pounds occasionally and driving of no more than 25 miles per day. On October 13, 1999, the claimant underwent a functional capacity evaluation (FCE). The FCE report states that the claimant’s testing demonstrated that he was capable of working at the light to medium physical demand level.

The claimant's entitlement to SIBs in both quarters is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. The version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) applicable in this case, provides that an injured employee has made a good faith effort to look for work commensurate with the employee's ability to work if the employee "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 is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work in the relevant qualifying periods. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. He did so by finding that the claimant failed to meet his burden of proving that he had no ability to work in the qualifying periods for the fifth and sixth quarters. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant had satisfied the requirement of Rule 130.102(d)(3) that he provide a narrative specifically explaining how the injury causes a total inability to work. The hearing officer's determination in that regard is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of the determination that the claimant had some ability to work, we likewise affirm the hearing officer's determinations that the claimant did not make a good faith effort to look for work in the qualifying period for the fifth quarter and that he is not entitled to fifth quarter SIBs in light of the fact that the claimant acknowledged that he only made three job searches during the qualifying period for that quarter and, thus, did not satisfy the requirement of looking for work in each week of the qualifying period contained in Rule 130.102(e), which

provides in relevant part that "an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

Next, we consider the claimant's challenge to the determination that the claimant is not entitled to SIBs for the sixth quarter. On appeal, the claimant contends that he looked for work in each week of the qualifying period for the sixth quarter. In his discussion, the hearing officer noted that there was some dispute as to whether the claimant provided the supplemental job search list to the carrier. However, he further noted that even if those searches were considered, the application did not reflect that the claimant sought employment during the first and ninth weeks of the sixth quarter qualifying period. That is, neither the claimant's TWCC-52 nor any other documentation reflects that the claimant made any job contacts in those weeks. The hearing officer's determination that the claimant did not look for work in each week of the sixth quarter qualifying period is not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool; Cain. In light of our affirmance of that determination, the hearing officer properly determined that the claimant did not make a good faith effort to look for work commensurate with his ability to work in the qualifying period for the sixth quarter because he determined that the claimant did not look for work in each week of the qualifying period as he was required to do under Rule 130.102(e).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge