APPEAL NO. 001692

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 21, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter. In his appeal, the claimant argues that the hearing officer's determinations that he had some ability to work in the qualifying period for the first quarter; that he did not make a good faith job search commensurate with his ability to work in the qualifying period for the first quarter; and that he is not entitled to SIBs for the first quarter are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determination that the claimant's unemployment in the qualifying period for the first quarter was a direct result of his impairment.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he did not commute his impairment income benefits; that he reached maximum medical improvement on December 9, 1998, with an impairment rating of 22%; that the first quarter of SIBs ran from March 16 to June 14, 2000; that the qualifying period for the first quarter of SIBs ran from December 3, 1999, to March 2, 2000; and that the claimant did not have any earnings during the qualifying period for the first quarter of SIBs. The claimant testified that he did not look for work in the qualifying period for the first quarter because he was not able to work because of his pain, his physical abilities and restrictions, and on the advice of his treating doctor, Dr. G.

In a "To Whom it May Concern" letter dated December 9, 1999, Dr. G stated "[u]nfortunately at this time, this patient is totally disabled and is not fit to consider reintegration into the work place." Dr. G explained that the claimant was taking pain medication and muscle relaxers and that those medications "have been proven to cause drowsiness and dizziness to a majority of the patients that take [them]." Dr. G concluded "[d]ue to the combination of the ongoing medical treatment, the ongoing disability, and the above mentioned problems with medications, I do not feel that it is practical for this patient at this time to be considered a vocational candidate."

On March 23, 2000, the claimant underwent a functional capacity evaluation (FCE). The FCE report concluded that the claimant "is currently testing safely at less than sedentary physical demand level . . . ." The report further notes that the claimant exerted inconsistent effort in testing, that he engaged in pain behavior, and that some of his functional deficits "are not pathologically related."

On March 16, 2000, Dr. P examined the claimant as the carrier's required medical examination doctor. In his report of the same date, Dr. P opined:

> This patient has no physical limitation imposed wherein he could not work. The restrictions in terms of the type of work surely would be quite minimal. The pathophysiologic changes evidence on the diagnostic studies are indeed quite minimal. The patient might even be able to return to his former work with the provision that he avoid the necessity of heavy exertional effort, repeated bending and heavy lifting. There are many jobs, though, that surely would be able to accommodate the relative restrictions that would be advised.

The claimant's entitlement to SIBs in the quarter at issue is to be determined in accordance with the "new" SIBs rules. Texas Workers' Compensation Commission Appeal No. 991555, decided September 7, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) 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 her 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 period. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. She did so by finding that the claimant failed to meet his burden of proving that he had no ability to work in the qualifying period for the first quarter of SIBs. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant had satisfied the requirement of Rule 130.102(d)(4) 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 first quarter and that he is not entitled to first quarter SIBs in light of the fact that the claimant acknowledged that he did not look for work in the first quarter qualifying period. In his appeal, the claimant argues that the hearing officer erred in considering the opinion of Dr. P on his ability to work because his examination of the claimant occurred after the end of the qualifying period. We have long recognized that the fact that evidence falls outside the qualifying period may effect the weight the hearing officer decides to assign to a given piece of evidence but it does not preclude the hearing officer from considering that evidence in resolving the issue before her. Texas Workers' Compensation Commission Appeal No. 000096, decided February 29, 2000; Texas Workers' Compensation Commission Appeal No. 960901, decided June 20, 1996. Accordingly, we perceive no error in the hearing officer's having considered Dr. P's report in this case.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Gary L. Kilgore
Appeals Judge