APPEAL NO. 001737

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 000770, decided May 30, 2000. A hearing on remand was held on June 26, 2000. With respect to the issues before him on remand, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the seventh and eighth quarters. In her appeal, the claimant essentially argues that the hearing officer's determinations that she had some ability to work in the qualifying periods for the seventh and eighth quarters and that she is not entitled to SIBs for those quarters are against the great weight of the evidence. The appeals file does not contain a response to the claimant's appeal from the respondent (carrier). The carrier also did not appeal, the hearing officer's determination that the claimant was unemployed in the qualifying period for the seventh and eighth quarters as a direct result of her impairment from the compensable injury.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on _____; that she reached maximum medical improvement on February 18, 1997, with an impairment rating of 16%; that she did not commute her impairment income benefits; that the seventh quarter of SIBs ran from July 21 to October 19, 1999; and that the eighth quarter of SIBs ran from October 20, 1999, to January 18, 2000. Although the parties did not stipulate as to the dates of the qualifying periods for the seventh and eighth quarters, those periods were identified as running from April 8 to July 7, 1999, and July 8 to October 6, 1999, respectively. On May 30, 1996, Dr. D performed spinal surgery on the claimant. On November 12, 1998, Dr. D performed a second surgery on the claimant's lumbar spine, namely an anterior interbody fusion at L5-S1.

The claimant testified that she did not look for work during the qualifying periods for either the seventh or eighth quarters of SIBs. She stated that she is not able to work because she is in constant pain. She stated that after she sits for 15 to 30 minutes, her right leg develops burning pain and numbness, such that on many occasions she has either twisted her ankle or fallen. The claimant testified that she also develops intense pain and numbness in her leg after walking a short distance. On cross-examination, the claimant stated that she is able to obtain some pain relief if she changes positions; however, she explained that often she is only able to obtain pain relief if she lies flat for one to two hours.

In support of her assertion that she had no ability to work, the claimant relied on three reports. In an October 14, 1999, "To Whom it May Concern" letter, Dr. D stated:

> [Claimant] continues to be under my care and she will follow-up with me on November 15, 1999. [Claimant] will continue to remain off work. She is not to lift more than 10 pounds. She is not to stand more than 30 minutes. She is not to sit for more than 30 minutes and no overhead lifting.
>
> Based upon the evaluation of May 12, 1999, it is definitely my opinion that she is disabled now and will be so for at least one year. I do not think it would be appropriate for her to try to go back to work and in fact if she does, I think it will almost certainly lead to a need for additional surgery.

In a February 10, 2000, letter, Dr. SC, D.O. noted that the claimant continues to suffer from low back pain with radiation into the lower extremity. Dr. SC stated:

> Decreased range of motion of the lumbar area limits her movement to virtually no bending, twisting, turning, stooping, or lifting.
>
> * * * *
>
> It is my opinion that [claimant] is 100 percent totally disabled and is not a candidate for any type of employment at this time due to her pain and limitations. Attempts at any employment before the cause of her continued pain is throughly investigated and determined and necessary treatment instituted could most certainly cause further damage or complications to this lady's already ongoing problems.

Finally, Dr. AC, to whom the claimant has been referred for pain management, addressed her ability to work in an November 8, 1999, "To Whom it May Concern" letter, as follows:

> [Claimant] is about a year out from ALIF at L5-S1 and continues to have severe intractable pain in the lower back and the right lower extremity.
>
> Physical examination reveals a significant loss of usable lumbar range of motion to the point that it is difficult for her to get up and down from the table or out of a chair. Her gait is antalgic and painful and lower extremity weakness is noted on both sides predominantly on the right without much improvement with encouragement.
>
> In addition to her ongoing loss of lumbar range of motion, she has a significant burden of pain and an overlying anxiety/depressive disorder that when considered together, renders her essentially 100% totally disabled and unemployable. At this point it is my opinion that [claimant] is essentially 100% disabled. I am hopeful that her functional status will improve in the future, but at the present time she cannot return to work.

The claimant's entitlement to SIBs in the quarters at issue 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 is not entitled to SIBs for the seventh and eighth quarter because she had some ability to work and did not make a good faith job search. 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 her burden of proving that she had no ability to work in the qualifying periods or the seventh and eighth quarters of SIBs. 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 she provide a narrative specifically explaining how the injury causes a total inability to work. In addition, the hearing officer determined that by speaking in terms of the claimant’s restrictions, Dr. D was implicitly stating that the claimant had a limited ability to work and as a result, the hearing officer determined that Dr. D’s report was another record which showed an ability to work under Rule 130.102(d)(3). The hearing officer's determinations in that regard are 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 them 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 in the qualifying periods for the seventh and eighth quarters, we likewise affirm the hearing officer's determinations that the claimant is not entitled to SIBs in the seventh and eighth quarters in light of the fact that the claimant acknowledged that she did not look for work in the relevant qualifying periods. Although another fact finder may well have drawn different inferences from the evidence, which would have supported a different result, that does not provide us with a basis to disturb the hearing officer’s decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref’d n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge