APPEAL NO. 001749

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 28, 2000. The hearing officer determined that the appellant (claimant herein) is not entitled to supplemental income benefits (SIBs) for the sixth, seventh, eighth, or ninth quarters. The claimant appeals, contending the hearing officer's findings that the claimant had an ability to work during the qualifying periods for the sixth, seventh, eighth and ninth quarters were contrary to the evidence. The respondent (carrier herein) replies that the evidence sufficiently supported the findings 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.

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 Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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, "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter. Under prior Rule 130.102(b), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee met the criteria during the prior quarter or "filing period."

The only question before us on appeal is whether or not the hearing officer committed error in finding that the claimant did not seek 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

[1]The "new" SIBs rules which went into effect on January 31, 1999, control the resolution of the eighth and ninth quarters. The sixth and seventh quarters are controlled by the prior rules. *See* Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999.

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).

The claimant primarily relied on his argument that he was unable to work during the qualifying periods in question. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant," and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*.

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:
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> * * * *
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> (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[.]

Rule 130.102(e) provides:

> (e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, 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. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:
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> (1) number of jobs applied for throughout the qualifying period;
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> (2) type of jobs sought by the injured employee;
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> (3) applications or resumes which document the job search efforts;
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> (4) cooperation with the Texas Rehabilitation Commission;
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> (5) education and work experience of the injured employee;
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> (6) amount of time spent in attempting to find employment;
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> (7) any job search plan by the injured employee;
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> (8) potential barriers to successful employment searches;
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> (9) registration with the Texas Workforce Commission; or
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> (10) any other relevant factor.

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 not entitled to SIBs for the sixth, seventh, eighth, and ninth quarters. The hearing officer found that the claimant had the ability to perform sedentary work during the qualifying periods and there is evidence to support this finding. While the claimant presented some evidence of limited job search and briefly working during the qualifying period for the sixth quarter, the hearing officer was not required to be persuaded that this evidence constituted proof of a good-faith job search.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Ken A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge