APPEAL NO. 001915

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 18, 2000. The appellant (claimant) and the respondent (carrier) stipulated that the 14th quarter for supplemental income benefits (SIBs) began on April 22, 1999, and continued through July 21, 1999, and that the next three quarters for SIBs were 90 days each, with the 17th quarter for SIBs ending on April 19, 2000. The hearing officer correctly noted that the filing period for the 14th quarter began on a day that resulted in the "old SIBs rules" applying to the 14th quarter and that the "new SIBs rules" applied to the 15th, 16th, and 17th quarters. He made determinations that during the filing period for the 14th quarter and during the qualifying periods for the 15th, 16th, and 17th quarters, the claimant's unemployment was a direct result of the compensable injury. Those determinations have not been appealed and have become final. It is undisputed that during the filing period for the 14th quarter and the qualifying periods for the 15th, 16th, and 17th quarters, the claimant did not work and did not seek employment.

The hearing officer found that during the filing period for the 14th quarter the claimant had the ability to perform sedentary type work at least on a part-time basis and did not attempt in good faith to find employment commensurate with his ability to work. The hearing officer found that during the qualifying periods for the 15th, 16th, and 17th quarters that the claimant had the ability to perform limited sedentary work; that the claimant did not provide a narrative report from a doctor that specifically explains how the injury causes a total inability to work; and that a report from Dr. A, who examined the claimant at the request of the carrier, shows that the claimant is able to return to work on a limited basis and concluded that the claimant is not entitled to SIBs for the 14th, 15th, 16th, and 17th quarters. The claimant appealed each finding of fact and conclusion of law that is adverse to him; contended that the medical evidence established that he had no ability to work during the filing period and the qualifying periods; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBs for the 14th, 15th, 16th, and 17th quarters. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The claimant sustained a low back injury, had surgery, and received an impairment rating (IR) of 24%. In a letter dated October 6, 1998, Dr. L, the claimant's current treating doctor, wrote:

> [Claimant] has been seen in this office for several years. He has been diagnosed with chronic Low Back Pain, Depression and Anxiety and Chronic Obstructive Pulmonary Disease [COPD]. [Claimant's] anxiety and

depression is aggravated by his low back pain, and I do recommend that he continue to receive Xanax and Zoloft.

On January 6, 1999, Dr. L wrote a similar letter adding "[Claimant's] COPD and back pain is worsening since October 1998" and "[Claimant] is permanently disabled." A letter from Dr. L dated May 10, 1999, is similar to the one dated January 6, 1999, with "Elavil" added to the medication the claimant takes and "unable to work" is added to the sentence that states that the claimant is permanently disabled.

In a letter dated December 23, 1997, Dr. A wrote:

He can only sit and stand for no more than 30-45 minutes and he can only walk half a block. That will make him ineligible for returning back to his own work as a long distance truck driver. These limitations would also make it hard for him to find another job unless he is highly motivated.

In a letter dated January 22, 1999, Dr. a wrote:

This patient was previously seen by me on 12/18/97 for evaluation of a job related injury that occurred on _____. At that time an extensive report was prepared and opinions were given about the MMI [maximum medical improvement] date as well as the [IR]. This most recent visit was January 20, 1999.

According to the patient since his last visit his complaints have not changed. The patient insisted that there was no change in his condition. Prolonged sitting was still giving him a hard time. After sitting for 15-20 minutes he has to lean from one side to another. He is still not able to walk more than half a block. At night he takes 25 mg Elavil to be able to sleep. During the last three weeks his back felt sore. The patient adamantly states that the degree of his pain in relation to his activities has not changed.

EXAMINATION:

The patient was standing with the level pelvis. Tenderness was mostly on the lower sacral segment levels which was moderate. Forward flexion was 45 degrees. Extension was 15 degrees. Left and right lateral bendings were moderately limited. I believe the patient off and on has been seen by [Dr. L]. He has been prescribed Elavil 25mg tablets to be taken at night. He has been using Soma prn and Flexeril, a muscle relaxant. Before the patient was also taking Zanex and Zoloft but not recently.

The question of the patient's return to work status is the main reason for the patient's return to the office today with a list of the restrictions and treatment plan. Since the findings have hardly changed the restrictions as described

> in my previous report still stand. In reviewing all of the records including the utilization review notes of [Ms. D], R.N. she notes that I evaluated the patient and suggested that he was ineligible to return to his former employment as a truck driver and his limitations would make it difficult to find another job. I still cannot think of sending [claimant] back to work as a truck driver since he cannot sit for any appreciable time to drive a long distance truck.

Carrier's exhibits include two copies of the letter of Dr. A dated December 23, 1997, but the record does not contain a copy of an extensive report from Dr. A that gives his opinion about MMI and IR.

We first address the determination that during the filing period for the 14th quarter the claimant had the ability to perform sedentary work at least on a part-time basis. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, 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. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated that a claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally. In Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997, the Appeals Panel cited earlier decisions and stated that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information concerning the claimant's physical limitations and restrictions and that "bald statements" of an inability to work are of limited use in assessing whether a claimant can work during the filing period because of a lack of any discussion of the nature of and the reasons for the claimant's inability to work. In Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996, the Appeals Panel stated that its comments about medical evidence being more than conclusionary did not establish a new or different standard of appellate review and that a finding of no ability to work is a factual determination which is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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 may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer's determination concerning the ability of the claimant to work during the filing period for the 14th quarter is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We also affirm the determinations that during the filing period for the 14th quarter the claimant did not in good faith seek employment commensurate with his ability to work and that he is not entitled to SIBs for the 14th quarter.

We next address the hearing officer's determinations related to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (3) (Rule 130.102(d) (3)) for qualifying periods for the 15th,16th, and 17th quarters. Rule 130.102(d)(3) in effect at the time provides:

> 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:
>
> * * * *
>
> (3) 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; or [.]

The hearing officer determined that during the qualifying periods for the 15th, 16th, and 17th quarters the claimant had the ability to perform limited sedentary work, that the claimant did not provide a narrative report from a doctor that specifically explains how the injury caused a total inability to work, and that other medical records show that the claimant is able to return to work on a limited basis. Those determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed. We also affirm the determinations that during the qualifying periods for the 15th, 16th, and 17th quarters the claimant did not in good faith seek employment commensurate with his ability to work and that he is not entitled to SIBs for the 15th, 16th, and 17th quarters.

We affirm the decision and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge