

APPEAL NO. 002091

Following a contested case hearing held on August 15, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the respondent (claimant herein) is entitled to supplemental income benefits (SIBs) for the 18th quarter. The appellant (carrier herein) has filed a request for review, asserting that the hearing officer's findings that the claimant made a good faith effort to obtain employment commensurate with her ability to work and that her unemployment was a direct result of her impairment are against the great weight of the evidence. There is no response from the claimant to the carrier's request for review in the appeal file.

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.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant had 21% impairment rating (IR); that the claimant did not commute any portion of her impairment income benefits (IIBs); and that the eighteenth quarter ran from May 17, 2000, through August 15, 2000. The medical evidence showed that the claimant's diagnoses included a failed back syndrome with an L5 nerve deficit and drop foot deformity. Medical evidence also showed that the claimant was suffering from a life-threatening neurological condition--parietal infarct and stenosis at the right internal carotid artery, which was apparently not related to her compensable injury.

Dr. M, the claimant's treating doctor, stated in a number of reports that the claimant was not able to work. He specifically stated, in part, in a report dated July 17, 2000, as follows:

[The claimant] is a patient at our clinic. [The claimant] is and has been unable to work in any capacity since her accident date _____. Her assessments are 1)[.] Bilateral lumbar facet syndrome. 2). Bilateral sacroiliitis. 3). Myofascial pain syndrome. 4). Bilateral cervical facet syndrome. 5). Cervicogenic headaches. 6). Cervical radiculopathy. 7). Failed back surgery syndrome. 8). Lumbar radiculopathy.

[The claimant] is unable to remain in the same position for long periods of time without increasing her severe pain. She has to be able to switch positions at her on [sic] volition, from sitting to standing, walking or lying down. She is unable to bend over, unable to lift, push or pull any object weighting [sic] more than 5 lbs without worsening her severe condition. She is unable to kneel, and to perform repetitive movements of her lower extremities. She is currently receiving powerful narcotics and muscle relaxants to make her pain tolerable and allow her to function at a minimal

level. She is in no condition to drive vehicles or to operate any kind of machinery.

A functional capacity evaluation (FCE) performed on November 13, 1997, indicated that at that time the claimant fell within the lower end of the medium-work category. An FCE performed on September 29, 1998, stated that the claimant is functioning at the sedentary physical-demand level.

Section 408.142(a) provides that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

Concerning the "direct result" criterion, the hearing officer found that between February 3 and May 3, 2000, the claimant was unable to work and did not work as a direct result of her impairment from her _____, injury. The carrier disputes this finding arguing that there was evidence the claimant could not work due to health problems unrelated to her compensable injury.

The claimant had the burden to prove by a preponderance of the evidence that she is entitled to SIBs for the 18th quarter. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We are satisfied that the finding concerning the "direct result" criterion is sufficiently supported by the evidence. The Appeals Panel has many times stated that the good faith job search and direct result requirements are different SIBs eligibility criteria and that the direct result criterion was not intended as another method to evaluate the job search requirement. See, e.g., Texas Workers' Compensation Commission Appeal No. 960165, decided March 7, 1996. We have also consistently stated that a claimant need not establish that his or her impairment is the only cause of the unemployment or underemployment to satisfy the direct result criterion and that a claimant need only establish that his or her impairment is a cause of the unemployment or underemployment. See, e.g., Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996. Further, we have noted that a finding that the claimant's unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence

that the injured employee sustained a serious injury with lasting effects and could not return to the type of work being done at the time of the injury. See, e.g., Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994.

As we stated, Section 410.165(a) provides that the contested case 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, supra. 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company 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, supra.

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), 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(4), "qualifying period" is defined as the 13-week period ending on the 14th day before the beginning of a compensable quarter. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment 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[.]"

In regard to these requirements the hearing officer made the following findings of fact:

2. Between February 3, 2000 and May 3, 2000, the Claimant was unable to work in any capacity pursuant to narrative reports provided by her treating doctor, [Dr. M].
3. [Dr. M's] reports, as referred to in Finding of Fact #2 above, specifically explain how the Claimant's _____ injury caused her inability to work between February 3, 2000 and May 3, 2000.
4. No other records credibly show that the Claimant could have returned to work between February 3, 2000 and May 3, 2000, given her condition due to the _____ injury and the medications she was taking for the condition.

The carrier contends that Dr. M's narrative reports do not specifically explain how the claimant's injury of _____, causes a total inability to work in any capacity during the qualifying period for the 18th quarter. The carrier further contends that the two FCE reports clearly constitute other records showing an ability to return to work, albeit sedentary or light.

In Texas Workers' Compensation Commission Appeal No. 000323, decided March 29, 2000, the Appeals Panel stated that the question of whether another record shows an ability to work is a factual question, just as the questions of whether the claimant is unable to work and whether a narrative report specifically explains how the injury caused a total inability to work are factual questions, citing Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. Further, in Texas Workers' Compensation Commission Appeal No. 002102, decided October 11, 2000, we found that a report detailing significant restrictions could be interpreted to constitute a narrative specifically explaining how the injury caused a total inability to work. In light of this, the hearing officer in the present case could rely on Dr. M's reports detailing the claimant's restrictions and the debilitating effects of his medication in determining that the claimant was unable to work. In addition, the hearing officer could reasonably determine that no other records show an ability to work based upon her determinations that the FCEs did not adequately consider the effects of the claimant's medications or current condition and that Dr. M's reports were credible and more accurately stated the claimant's physical condition during the qualifying period.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCUR IN THE RESULT:

Robert W. Potts
Appeals Judge