APPEAL NO. 002157

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 31, 2000. The issues at the CCH were whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBs) for the first and second quarters of eligibility.

The hearing officer held that the claimant was not entitled because, although he had some ability to work during the qualifying periods under review, he failed to make a good faith search for employment commensurate with his ability to work. She found that he did not document a job search in every week of the qualifying periods.

The claimant has appealed. He contends that the decision is against the great weight and preponderance of the evidence. The claimant also argues that the hearing officer abused her discretion by not allowing a deposition on written questions to be taken of the treating doctor. The respondent (carrier) responds that the hearing officer made the correct decision based upon the facts presented and did not abuse her discretion.

DECISION

We affirm.

The claimant said he sustained a respiratory injury due to a chemical exposure on March 18, 1995. He asserted that his treating doctor, Dr. K, did not want him to work at all but he searched anyhow because he was told he had to do so. The claimant was in his late 30s during the time period under review. The qualifying periods ran from mid November 1999 through May 17, 2000.

The claimant said that his searches were done primarily by telephone. He also had a friend drive him to places close by. He visited some places more than once because he thought they might have new jobs come up and they were close by. The claimant said he had to use a nebulizer about four times a day.

A March 12, 1997, report of respiratory specialist Dr. D found that the claimant had bronchial hyper-responsiveness and asthma, but that his airflows at rest were in the normal range. A neuropsychological evaluation done on December 17, 1997, found that the claimant's functioning was due in large part to an emotional reaction to his exposure, but that it was likely he could not return to his former occupation. Dr. K, a family practitioner, rated the claimant's impairment rating (IR) in the range of 95 to 100% in January 1998. A designated doctor assessed IR at 51%. Part of this was due to cognitive disturbance and depression.

Dr. K wrote a long letter on May 10, 2000, detailing the claimant's medical treatment. He indicated that the exposure left the claimant reactive to environmental irritants which would cause sinusitis and shortness of breath. Based upon the evaluation of an expert in hydrogen sulfide exposure, Dr. K said that due to difficulties in concentration, it would be doubtful that the claimant could perform sedentary, repetitive work satisfactorily. He also said that the claimant could not drive or operate machinery. It was noted by Dr. K that if the claimant's emotional reaction to the exposure were treated, his ability to function would improve greatly. He said that he believed that the claimant could perform no gainful employment. Dr. K noted that the claimant had syncopal episodes, and needed antibiotic treatment due to sinusitis. He also noted that the claimant continued to suffer from depression.

The Application for [SIBs] (TWCC-52) for the first quarter lists 25 job contacts; the TWCC-52 for the second quarter lists 14 contacts. At the close of his evidence, the claimant asked that the record be held open to propound written questions to Dr. K. The hearing officer pointed out that she had denied the request two months before the CCH; the claimant and the carrier searched and found that the order had been mailed to each party, albeit attached to other items. The hearing officer announced that she denied the request for written questions because it was not apparent to her that such questions were not already answered by the medical records in evidence. We note that there was also no showing why such information could not have been obtained by the time of the May 23 benefit review conference. We cannot agree that the hearing officer abused her discretion by disallowing time to take deposition on written questions.

The 1989 Act requires that an applicant for SIBs make a good faith search for employment commensurate with his or her ability to work. Section 408.143(a)(3). By rule, the Texas Workers' Compensation Commission has allowed for certain limited circumstances in which the good faith requirement may be met through other activities. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) sets out requirements of a good faith effort as follows:

> (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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> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
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> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;
>
> (3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is

included in the Registry of Private Providers of Vocational Rehabilitation Services;

(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; or

(5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

And, under Rule 130.102(e)m where a job search is undertaken, certain conditions must be met:

(e) Except as provided in subsections (d)(1)(2),(3) and (4) 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 search efforts.

We find that the hearing officer's decision on the merits is not against the great weight and preponderance of the evidence. 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the

evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We accordingly affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge