APPEAL NO. 002298

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 September 1, 2000. The issue involved whether the appellant (claimant), was entitled to supplemental income benefits (SIBs) for his 11th quarter of eligibility.

The hearing officer found that the claimant had failed to search for employment commensurate with his ability to work, which she did not agree was limited in time to three hours a day, as stated by his treating doctor. The hearing officer also found that for the qualifying period, the claimant was not enrolled in a full-time program sponsored by the Texas Rehabilitation Commission (TRC). She held that the claimant could look for employment to supplement his self-employment but failed to do so, and also held that his underemployment was a direct result of his impairment.

The claimant appeals, and arguing that his treating doctor's restrictions should be believed. He also argues that he participated in a TRC-sponsored program during the qualifying period which should be considered. The claimant states that he is entitled to SIBs. The respondent (carrier) responds that the fact determination of the hearing officer should not be set aside by the Appeals Panel.

DECISION

We affirm the hearing officer's decision.

The qualifying period for the 11th quarter of SIBs ran from February 25, 2000, through May 26, 2000. The claimant injured his neck and lower back on September 14, 1995. Part of his injury included a compression fracture at L-1. His treating doctor was Dr. M, who wrote a letter stating that the claimant could work no more than three hours a day because he was in severe pain, could not sit or stand for more than 10 to 15 minutes at a time, and could not push, pull, or carry things. There are two letters from Dr. M to this effect, dated in January and March 2000. The claimant said he had not had surgery because the process to do so was "complicated."

The claimant was examined on February 12, 2000, by Dr. N, for the carrier, who stated that he believed the claimant's restricted motion in his cervical and lumbar spine to be voluntary. Dr. N wrote that such compression fractures as the claimant had rarely caused pain. He said that during the examination, the claimant was able to sit comfortably and rise without hesitation or support. Dr. N stated that the claimant's MRIs showed no surgical abnormality. He stated that while the claimant could not return to heavy manual labor, he could return to work. He also stated his opinion that the claimant did not require further medical care.

The claimant said that he had not searched for employment during the qualifying period because he already had self-employment. This self-employment was described as

selling merchandise at a flea market on Saturdays and Sundays. He sold items on both of those days for five hours a day, and set up and packed up his merchandise. The claimant said he carried the items in tool boxes and plastic bags that he estimated weighed 15 pounds. The merchandise was acquired on Thursdays and Fridays at garage sales. To locate such sales, the claimant said he drove around the neighborhood looking for signs. The claimant did not work Mondays through Wednesdays. He presented evidence of his income and expenses. In addition, he had a small paycheck from a local florist shop for whom he had delivered plants.

The claimant was vocationally evaluated by the TRC and a plan was devised on April 6, 2000. According to this, he was found capable of lifting to 20 pounds and lifting and carrying objects on a frequent basis up to 10 pounds, provided they were lifted from waist-high only. He could stand, walk, and sit for up to 20 minutes. He was actually observed to be able to sit up to 45 minutes during evaluation.

The claimant, pursuant to his plan, went for two months to a class on Tuesdays and Thursdays, three hours each evening, in pursuit of his GED. The claimant presented a letter from a local careers institute certifying that he was enrolled in a full-time course of study as of July 18, 2000. This apparently came to an unfortunate end, according to the claimant, when he "became sick" because of sitting in front of computers or in class, and he had Dr. M remove him from class as of July 28. On June 23, 2000, Dr. M had noted that the claimant had increasing pain and advised bed rest for a few days.

On cross-examination, the claimant revised his testimony that he did not search for work to argue that he reviewed the newspaper every day. The claimant said he would be willing to take a store greeter job "if offered" but expressed the conviction that because he knew he could not hold such a job for more than two weeks, it would likely be futile to look. He said he had sought employment in earlier periods and had not obtained work. The claimant said that he experienced pain and numbness from the waist down at night.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines good faith as follows:

> 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:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] 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.

Good faith is a subjective concept and generally means honesty of purpose, freedom from intent to defraud, and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994.

Although not phrased in terms of the rule, the hearing officer evidently disbelieved Dr. M's assessment of the claimant's limitations, and consequently did not agree that the claimant met the good faith requirement set out under Rule 130.102(d)(1) by virtue of the flea market sales. As she noted, the claimant's testimony as to his activities in this regard showed the ability to exceed the three-hour limitation when motivated to do so. Furthermore, the TRC vocational evaluation was also at some odds with the restrictions noted briefly by Dr. M.

As to the qualifying period under consideration, there was insufficient evidence offered that the GED course qualified as a full-time vocational rehabilitation program. Any program undertaken after the qualifying period could not be considered as such participation during the period under review.

We have reviewed the record and find sufficient support in the record for the hearing officer's findings. 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 of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (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, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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). The hearing officer was not required to accept Dr. M's letter as the absolute limitations on the claimant's ability to work, especially in light of contradictory medical and vocational evaluation evidence. We cannot agree that the decision is against the great weight and preponderance of the evidence, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kathleen C. Decker
Appeals Judge