APPEAL NO. 002358

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 August 17, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third and fourth quarters and that the respondent (carrier) would not be relieved of liability for SIBs because of the claimant's failure to timely file an application for third quarter SIBs. In her appeal, the claimant argues that the hearing officer's determinations that she had some ability to work in the qualifying periods for the third and fourth quarters and that she is not entitled to benefits for those quarters are against the great weight of the evidence. In addition, the claimant contends that she is "entitled to judgment/decision as a matter of law as to all issues presented herein and asserted in Carrier's challenge to the 3rd and 4th quarter entitlements for the reason that Carrier is collaterally estopped from asserting that the medial [sic] reports of [Dr. P] have sufficient evidence to refute the evidence provided by claimant's physicians." In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed, as modified.

The parties stipulated that the claimant sustained a compensable injury on _____; that she reached maximum medical improvement with an impairment rating of 15% or greater; that the third quarter of SIBs ran from January 8 to April 7, 2000; that the qualifying period for the third quarter ran from September 25 to December 24, 1999; that the fourth quarter of SIBs ran from April 8 to July 7, 2000; that the qualifying period for the fourth quarter ran from December 25, 1999, to March 24, 2000; that the claimant did not commute her impairment income benefits; that the claimant did not have any earnings during the qualifying periods for the third and fourth quarters; and that the claimant did not look for work in the relevant qualifying periods. The claimant testified that she was injured in the course and scope of her employment when a heating gun fell from a shelf and struck the back, left side of her head. The claimant stated that she has had cervical fusion surgery from C5-6 to C6-7 and left shoulder surgery as a result of her compensable injury.

The claimant is receiving treatment for her compensable injuries from Dr. H and Dr. S. The medical records in evidence from Dr. H document the ongoing nature of the claimant's symptoms and difficulties in obtaining authorization from the carrier for diagnostic testing, therapy, and medications. In a letter dated February 26, 2000, Dr. H states:

> [Claimant] continues to have pain in her back and neck. It would be impossible for [claimant] to look for a job. At this time, I think she is totally disabled.
>
> She is depressed and it is difficult for her to interact with other people. There is just no way that she could work.

> It is unconscionable that the insurance states that she is not making a good faith effort to find a job. If one cannot work, then it is difficult to show any kind of good faith for seeking employment. There is not much she can do, if anything. I think during her 3rd and 4th quarter [sic] that she was totally disabled and unable to look for a job.

The medical records from Dr. S document the claimant's symptoms and complaints; however, they do not address the question of the claimant's ability to work or her functional abilities and/or limitations.

On October 28, 1999, Dr. P examined the claimant, at the request of the Texas Workers' Compensation Commission (Commission). In his report of the same date, Dr. P states that the claimant "surely may work." Dr. P noted that the work the claimant was doing at the time of her injury (working at a cosmetics counter of a department store) is "relatively sedentary" and he opined that the claimant could return to that work. Finally, Dr. P stated that the claimant's "subjective complaints of pain seem incapacitating"; however, Dr. P further stated that "[o]bjectively, the patient lacks anatomic changes of marked consequence."

As the claimant noted in her appeal, the hearing officer incorrectly listed the claimant's exhibits as the carrier's exhibits and the carrier's exhibits as the claimant's exhibits in her decision and order. As such, we modify the hearing officer's decision to reflect that the claimant offered Exhibits C through L and that the carrier offered Exhibits 1 through 4.

The claimant's entitlement to SIBs in the quarters at issue is to be determined in accordance with the SIBs rules that became effective January 31, 1999, which were amended on November 28, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an injured employee has made a good faith effort to look for work 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." 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 decides the weight to assign to the evidence before her 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant is not entitled to SIBs for the third and fourth quarters because she had some ability to work and did not make a good faith

job search. It was the hearing officer's responsibility to weigh the evidence presented and to determine what facts had been established. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant had satisfied the requirements of Rule 130.102(d)(4) that the claimant provide a narrative specifically explaining how the injury causes a total inability to work. In addition, the hearing officer determined that the report from Dr. P was another record which showed an ability to work. The hearing officer's determinations in that regard are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse them on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Given our affirmance of the determination that the claimant had some ability to work in the qualifying periods for the third and fourth quarters, we likewise affirm the hearing officer's determinations that the claimant is not entitled to SIBs for the third and fourth quarters in light of the fact that the claimant stipulated that she did not look for work in the relevant qualifying periods.

Finally, we briefly consider the claimant's assertion that she is entitled to SIBs as a matter of law under the doctrine of collateral estoppel because the Appeals Panel determined in Texas Workers' Compensation Commission Appeal No. 001466, decided August 8, 2000, which considered the claimant's entitlement to SIBs for the first and second quarters, that Dr. P's report was "insufficient" to serve as another record that shows an ability to work. The claimant's argument is wholly without merit. At the outset, we note that the claimant did not advance a collateral estoppel argument at the hearing. In addition, we cannot agree that the Appeals Panel made a determination that Dr. P's report was insufficient to serve as another record in Appeal No. 001466. However, the more fundamental problem with the claimant's argument is that the doctrine of collateral estoppel does not apply to dictate the outcome of a subsequent SIBs quarter based upon a decision in a prior quarter. To the contrary, entitlement to each quarter of SIBs is to be considered on its own merit. Texas Workers' Compensation Commission Appeal No. 970486, decided May 1, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 951702, decided November 27, 1995.

The hearing officer's decision and order are affirmed, as modified.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge