APPEAL NO. 002392

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 September 28, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter from June 21, 2000, through September 19, 2000, and for the second quarter from September 20, 2000, through December 19, 2000. The hearing officer determined that the claimant was not entitled to SIBs for the first and second quarters. The claimant appealed the adverse determinations on the grounds of sufficiency of the evidence. The respondent (carrier) replied that the evidence was sufficient to support the determinations of the hearing officer and should be affirmed.

DECISION

Affirmed.

The claimant testified that she sustained an injury on _____, to her right hand which required four surgeries to insert plastic bone replacements and that she developed depression as the result of her injury. The claimant contended that her treating doctor, Dr. W, had not released her to work because she could not drive.

At the request of the claimant, Dr. W testified. He opined that the claimant's principal problem was atrophy and chronic pain in her right hand and wrist. He explained that the claimant developed depression because of her injury and that between the dates of March 9, 2000, and the date of the CCH on September 28, 2000, (the dates of the qualifying periods were March 9, 2000, through September 6, 2000) the claimant was not physically or mentally able to return to work because the claimant had not received sufficient therapy to end the depression or pain. Dr. W admitted that vocational rehabilitation would help the claimant if she could be trained to do something else that would allow her to work and feel useful again. He agreed that if the claimant could retrain, a part-time, sedentary job might help her depression. He also agreed that if the claimant could find a job predominantly using her left hand and to some extent using her right hand as a helper hand it would be physically appropriate.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an impairment rating 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. The claimant appealed the adverse findings supporting the determination by the hearing officer that she did not make a good faith effort to obtain employment commensurate with her ability to work. The finding in the claimant's favor that her unemployment was a direct result of her impairment has not been appealed and this determination is final by operation of law. Section 410.169.

The claimant contended at the CCH that she had a total inability to work during the applicable qualifying periods. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(4). This rule provides that the good faith element is met when the injured employee is unable to perform any type of work in any capacity; a narrative from a doctor specifically explains how the injury caused a total inability to work; and no other record shows that the injured employee is able to return to work. We have held that all the elements of Rule 130.102(d)(4) must be established, Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999 (Unpublished), and that the rule is "generally more demanding" than the prior rule in what is required of a claimant to establish a total inability to work. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000.

In support of her contention that she had no ability to work, the claimant offered several documents. A progress note dated May 23, 1999, from Dr. B, a referral physician, reflects that the claimant was currently seeking social security benefits due to physical limitations and to some psychological problems. Dr. B states:

> Again, I have evaluated her for the previous job that she has been able to do and with her age, she would not be suited for previous functions. One could obtain a functional capacity evaluation for this patient but with the underlying psychological stresses as well, I do not think she is going to be able to hold down a regular job.

In addition to the 1999 medical report, the claimant offered three Work Status Reports (TWCC-73) dated February 22, March 20, and April 6, 2000, in which Dr. B simply checked the box "is such that the employee is/has been unable to work and restricted from all work . . . ." The claimant also offered a report from Dr. A, Ph.D., dated July 31, 2000, in which he stated that the claimant had been referred for evaluation by the claimant's attorney. Dr. D diagnosed the claimant with depression and concluded the report with a statement from Dr. A that "she is unable to return to work, until further notice."

In evidence is a report from Dr. X dated March 9, 2000. Dr. X indicates in the report that he was requested to evaluate the claimant with regard to her right wrist. Dr. X noted the claimant's surgical and medical history including her history of depression and, after examination, opined that the claimant had a compromised function of the right hand and weakness of grip with numbness over the dorsum of her right thumb. He found that the claimant had demonstrable weakness in opposition and pinch, but there was no evidence of carpal tunnel syndrome. Dr. X stated that the claimant could return to work, but that he recommended she use the right hand as a helper hand due to weakness in pinch and grip. He believed that her main working hand would be her left hand, leaving the right hand to assist the left.

The hearing officer found that the claimant earned no wages and did not seek employment during the qualifying periods for the first and second SIBs quarters. The hearing officer wrote that the claimant did not provide a detailed narrative report from her treating doctor, or any doctor, that explained why the claimant had a total inability to work during the qualifying periods. The hearing officer noted the work status slips, Dr. X's report indicating some ability to work and Dr. W's testimony discussing the claimant's potential to work using her right hand as a helper hand. The hearing officer noted that Dr. A's report concerning the psychological aspect of her injury was created outside the qualifying periods and we have held that a "doctor" for purposes of Rule 130.102(d)(4) must one who is defined in Section 401.011(17). Texas Workers' Compensation Commission Appeal No. 002160, decided October 23, 2000. In reviewing the evidence, we agree with the hearing officer that there is essentially no narrative that would encompass both the disputed quarters from a doctor which explains how the injury in question caused a total inability 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). It was for the hearing officer, as the 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 (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 (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.). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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 decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determinations are so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We simply cannot agree with the claimant's argument that the evidence compels a finding of inability to work, or that the hearing officer's decision is against the great weight and preponderance of the evidence.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge