

APPEAL NO. 002499

Following a contested case hearing held on September 26, 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 appellant (claimant) is not entitled to the seventh quarter of supplemental income benefits (SIBs). The claimant appealed, asserting that she had no ability to work during the qualifying period for the seventh quarter and had made a good faith effort to seek employment commensurate with her ability to work. The respondent (carrier) responded, stating that there were other records which showed that the claimant had an ability to work during the qualifying period and that the claimant did not prove a good faith effort to seek employment commensurate with her ability to work.

DECISION

Affirmed.

The claimant sustained a compensable left shoulder injury when she slipped and fell while entering her place of employment on _____. She reached maximum medical improvement and was assigned a 19% impairment rating. The issue before the hearing officer was whether the claimant was entitled to the seventh quarter of SIBs, from June 24, 2000, through September 22, 2000. It was undisputed that during the qualifying period, the claimant did not seek any employment. The claimant asserts that she made a good faith effort to seek employment as set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) which states that an injured worker has made a good faith effort to obtain employment commensurate with his 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 claimant asserts that the hearing officer's determination that she had some ability to work during the qualifying period and did not make a good faith effort to seek employment commensurate with her ability to work is against the great weight of the evidence.

In her statement of the evidence, the hearing officer noted that the claimant's treating doctor, Dr. R, had stated his opinion that the claimant had no ability to work and that another doctor, Dr. W, had stated that the claimant could return to work with the restriction that the claimant perform only a sitting job which did not require the use of her left arm. It is noted that the claimant testified that she is right-handed and had trouble even resting her left arm on a desk for any length of time.

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 may believe all, part, or none of any witness's

testimony. 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. 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). 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant had some ability to work, albeit severely restricted, was so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We have urged hearing officers to make findings on each of the three requisites to a finding of good faith under Rule 130.102(d)(4) in order to avoid possible remand for such findings. The hearing officer did not make specific findings on whether Dr. R's report constituted a narrative specifically explaining how the compensable injury resulted in a total inability to work or whether Dr. W's report and the accompanying functional capacity evaluation were records showing that the claimant had the ability to return to work. However, in light of the discussion of the evidence presented and our affirmance of the finding that the claimant had some ability to work during the qualifying period, we decline to remand the case to the hearing officer for further findings.

The hearing officer's decision and order are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge