

APPEAL NO. 010250

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 January 18, 2001. The hearing officer held that the appellant (claimant) was not entitled to his 16th quarter of supplemental income benefits (SIBs).

The claimant has appealed, arguing that he made a good faith search for employment within his limitations. He also argues that the verification contacts by the respondent (carrier) have compromised his job search. The carrier responds that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision.

The qualifying period in issue ran from July 26 through October 24, 2000. The legislature has required that a SIBs applicant make a good faith search for employment commensurate with the ability to work, in order to continue to qualify for SIBs.

Concerning the job search efforts that should be made, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(e) (Rule 130.102(e)) states that:

- (e) Except as provided in subsection (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 job search efforts.

The provision also goes on to list numerous factors that the Texas Workers' Compensation Commission may consider in evaluating such a documented job search; two of these factors include the amount of time spent searching for employment and the number of contacts made.

The hearing officer did not err in finding that the claimant had not made a good faith search for employment. He appears to have considered the factors listed in the rule. He also noted that the claimant had not followed up on leads provided by the vocational counselor to the carrier. Even if evidence was previously supplied to the carrier for other quarters, all evidence that a claimant wishes a hearing officer to consider must be put into the record of the CCH. Because it is raised in appeal, we would note that while a carrier may permissibly seek to verify job contacts made, care should be taken to ensure that the verification itself does not thwart the ultimate objective of a search--that employment be retained.

We also note that the claimant argued during the CCH that he did not believe there was any work he could do, and the hearing officer found that there was no detailed narrative from the claimant's doctor, as required by Rule 130.102(d)(4) which states:

- (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[.]

A functional capacity evaluation indicated that the claimant could perform at the sedentary level for eight hours a day. Against this was the treating doctor's somewhat short letter stating that the claimant could not work due to back pain and sciatica. We cannot agree that the hearing officer erred in determining that there was some ability of the claimant to work.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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 decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge