

APPEAL NO. 980080

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held, on November 26, 1997. The issues were whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first, second, and third quarters. The claimant and the respondent (carrier) entered into several stipulations, including that the first quarter for SIBS began on March 22, 1997, and ended on June 20, 1997; that the second quarter began on June 21, 1997, and ended on September 19, 1997; and that the third quarter began on September 20, 1997, and would end on December 19, 1997. At the hearing, it was the claimant's position that he was totally unable to work during the filing periods for those three quarters. The hearing officer determined that the claimant had some ability to work during the three filing periods and that he is not entitled to SIBS for the first, second, and third quarters. The claimant appealed; reviewed the medical evidence, including providing quotations from medical reports; urged that the determinations of the hearing officer are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the first, second, and third quarter. The carrier responded, urging that the evidence is sufficient to support the determinations of the hearing officer and requesting that her decision be affirmed.

DECISION

We affirm.

The claimant was involved in a motor vehicle accident on _____. He had fusions at C5-6 and C6-7, has an unoperated disc herniation at L4-5, has pain, suffers from depression, and takes medication.

(Dr. K) examined the claimant at the request of the carrier and in a Report of Medical Evaluation (TWCC-69) dated August 22, 1996, certified that the claimant's impairment rating is 23% and in a narrative attached to the TWCC-69 stated:

I do not believe that he can do the work of a visiting R.N. I think he is at risk on driving an automobile. I think he will have a problem with lifting patients. I do think he could do clerical R.N. type work, if perhaps only on a part-time basis to start with.

Medical reports of (Dr. M), the claimant's treating doctor, contain complaints of the claimant, comments on the claimant's condition, and statements about medication taken by the claimant. In an Industrial Gram dated March 5, 1997, Dr. M stated that the claimant had cervical and lumbar herniated discs with related radiculopathy, that he was unable to work due to disability, and that he should continue some exercise and treatment responses.

In a letter dated July 24, 1997, Dr. M stated that the claimant had been off work because of cervical and lumbar herniated discs with radiculopathy, that from December 22, 1996 (the claimant testified that that date is wrong and should apparently be 1993) through March 1997 the claimant was unable to perform any kind of work and was disabled due to multiple pain and difficulties he was having, and that in about March 1997 the claimant had reached a point of maximum medical improvement, could consider getting back to employment with a job change, and would require vocational retraining. In a letter dated September 15, 1997, Dr. M said that the claimant was totally disabled from returning to work because of specified conditions related to his injury; that he was generally physically too weak and incapable of returning to a nursing type position which would require him to work with patients; that he would definitely be in greater physical risk of reinjury if he attempted to return to nursing work in a regular hospital setting; that he will require an occupational change that requires less physical work; and that until the retraining is completed and he gets adequate control of his pain, he is unable to work. Dr. M was presented with six written questions that were to be answered with yes or no, and on September 22, 1997, he indicated that the claimant's inability was directly related to his compensable injury and that he could not work until further notice.

In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated "claimant's inability to do any work must be supported by medical evidence or must be so obvious as to be irrefutable (the employee is completely bedridden)." In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally.

The claimant introduced the TWCC-69 with an attachment from Dr. K. On appeal, he complains that portions of it pertaining to the ability of the claimant to work should not be considered because it was not rendered during any of the filing periods in question. The report of Dr. K was rendered about four months prior to the start of the filing period for the first quarter. The Appeals Panel has stated that it is best if the medical evidence is from reports rendered during the filing period, but that medical evidence from outside the filing period may be considered, if the report was rendered in close proximity to the filing period. Texas Workers' Compensation Appeal No. 951832, decided December 15, 1995. The hearing officer did not err in considering the medical evidence from Dr. K.

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 because the finder of fact judges the credibility of each and every witness, the

weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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 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). The medical evidence is not the same for each filing period in question. Under those circumstances, it would have been preferable for the hearing officer to have made separate findings of fact on the ability of the claimant to work during each filing period. That a different determination on the ability of the claimant to work during one or more of the three filing periods in question could have been made based on the same evidence is not a sufficient basis to overturn one or more of the determinations of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Her determinations that the claimant had some ability to work during the filing periods for the first, second, and third quarters for SIBS and that he is not entitled to SIBS for those quarters are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The claimant also complained that the hearing officer stated in her Decision and Order that the claimant testified that he had been offered a job, but that he declined it because he did not think he could handle the job and that this was improper because it occurred after the close of the filing period for the third quarter. At the hearing, both the claimant and the carrier argued that the activity concerning the job occurred outside the filing periods in question. As stated earlier, the claimant must establish an inability to work based on medical evidence. It is not clear why the hearing officer included her comment about the job offer since it occurred outside the filing periods in question and there was no contention that the claimant had sought employment during those filing periods. It was not proper for the hearing officer to include the comment that was not relevant to the issues before her; however, there is no indication that it probably resulted in an improper determination on the ability of the claimant to work during the three filing periods, and it did not result in reversible error.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge