

APPEAL NO. 980149
FILED MARCH 9, 1998

On December 4, 1997, a contested case hearing (CCH) was held with the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third quarter. In a decision signed on December 12, 1997, the hearing officer wrote that the issue was third quarter SIBS and that the claimant claimed that she was unable to work during the filing period for the third quarter; however, his decision was that the claimant is not entitled to SIBS for the fourth quarter. In an Order on Motion to Correct Clerical Error signed on March 6, 1998, but effective December 12, 1997, the Director of the Hearings Division of the Texas Workers' Compensation Commission (Commission) modified the hearing officer's decision of December 12, 1997, to reflect the filing period for the third quarter in the findings of fact and the third quarter in the conclusion of law and decision, thereby correcting the hearing officer's decision to reflect that the claimant is not entitled to SIBS for the third quarter. The claimant appeals the hearing officer's finding that she failed to make a good faith attempt to find employment commensurate with her ability to work and requests reversal of the hearing officer's decision that she is not entitled to SIBS for the third quarter. The respondent (carrier) requests affirmance.

DECISION

Determining that the claimant's request for appeal was not timely filed and that the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer, as corrected by the Order on Motion to Correct Clerical Error, has become final pursuant to Section 410.169.

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." See *a/so* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Rule 102.5 provides general rules for written communications to and from the Commission, and Subsection (h) of that rule states that "[f]or purposes of determining the date of receipt of those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed."

Records of the Commission reflect that the hearing officer's decision signed on December 12, 1997, was mailed to the claimant on December 23, 1997. Under Rules

102.5(h) and 102.3(a)(3) the claimant is deemed to have received the hearing officer's decision on Monday, December 29, 1997. The 15th day after December 29, 1997, was Tuesday, January 13, 1998. The claimant's request for appeal is dated January 20, 1998, and the envelope in which it was mailed to the Commission is postmarked January 21, 1998. The request for appeal was received by the Commission on January 26, 1998. Since the claimant's request for appeal was not mailed to the Commission by January 13, 1998, and was not received by the Commission until January 26, 1998, it was not timely filed using a deemed date of receipt of December 29, 1997, under Rule 102.5(h). The claimant's attorney states in the request for appeal that the claimant received the hearing officer's decision on January 8, 1998; which was over two weeks after the mailing date. No explanation is given for the delay in receiving the hearing officer's decision. We have held that an unexplained delay in receiving the hearing officer's decision does not extend the receipt date beyond the deemed date of receipt under Rule 102.5(h). Texas Workers' Compensation Commission Appeal No. 94117, decided March 3, 1994; Texas Workers' Compensation Commission Appeal 941057, decided September 22, 1994. We note that, despite the hearing officer's error in referencing the fourth quarter in his decision signed on December 12, 1997, the claimant understood that the hearing officer's decision was for the third quarter because in her request for appeal she states that she disagrees with the hearing officer's decision that she is not entitled to SIBS for the third quarter.

The claimant testified that as a result of her compensable injury and medication for pain she was unable to work during the filing period for the third quarter and that she did not look for work during that filing period. The claimant's treating doctor wrote a note during the filing period for the third quarter that the claimant was in pain and that he had not released her to return to any type of work. However, a videotape, a portion of which was taken of the claimant about three months before the filing period for the third quarter, showed the claimant engaged in certain physical activities, which the hearing officer thought were inconsistent with her claim that she is unable to do any type of work, and a report of a functional capacity evaluation done on the claimant about two months after the filing period for the third quarter stated that the claimant could perform sedentary work. Thus, although there was conflicting evidence concerning the claimant's ability to work, the hearing officer, as the sole judge of the weight and credibility of the evidence, was responsible for resolving the conflicts in the evidence and determining the facts. There is sufficient evidence to support the hearing officer's decision, as corrected by the order of March 6, 1998, that the claimant is not entitled to SIBS for the third quarter because she did not make a good faith attempt to obtain employment commensurate with her ability to work.

The hearing officer's decision and order, as corrected by the Order on Motion to Correct Clerical Error dated March 6, 1998, has become final pursuant to Section 410.169.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge