APPEAL NO. 990526

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 February 16, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the claimant sustained a low back injury on _____; that his impairment rating for that injury is 16%; that the claimant was entitled to supplemental income benefits (SIBS) for the first 12 quarters; and that the filing period for the 13th quarter for SIBS began on October 4, 1998, and ended on January 2, 1999. The claimant contended that he had no ability to work during the filing period for the 13th quarter and whether he is entitled to SIBS for the 13th quarter depends on whether he had some ability to work during the filing period for that quarter. The hearing officer determined that the claimant had some ability to work during the filing period and that he is not entitled to SIBS for the 13th quarter. The claimant appealed, urged that the evidence is sufficient to support that he had no ability to work during the filing period and is entitled to SIBS for the 13th quarter, and requested that the decision of the hearing officer be reversed. The carrier responded, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the medical evidence will be included in this decision. The claimant testified that, after being injured in _____, he had surgery in 1995 at L5-S1 and that he had repeat surgery on January 14, 1998. An operative report of the January 1998 surgery indicates that a redo laminectomy and diskectomy was performed at L5-S1 and that a laminectomy was performed at L4-5. In a note dated December 1, 1998, Dr. H said that he diagnosed muscle spasms and recurrent lumbar pain and that the claimant was "permanently totally disabled." In a letter dated December 2, 1998, Dr. H wrote that the claimant had chronic post-operative lower back pain, that he was on pain medication that hindered his physical and mental abilities, and that he was unable to stand/sit for more than 30 minutes at a time. In a letter dated January 19, 1999, Dr. H wrote that the claimant had failed low back surgery, that he continued to have pain in his low back radiating into both lower extremities, that he occasionally falls due to deconditioning of his lower back, that he is on pain medication and an anti-inflammatory agent, that he has acute pain exacerbations that prevent him from productive work, that he was not able to tolerate aggressive rehabilitation, and that he is not ready to return to work until he completes rehabilitation. In a letter to the carrier dated November 5, 1998, Dr. Z, the doctor who performed the surgery in January 1998, stated that the claimant was to remain in an off work status and would need a work capacity evaluation and complete rehabilitation so he could return to work. On December 3, 1998, Dr. Z said that the claimant was to continue in an off work status and that he was being referred to another doctor. In a letter to the carrier dated December 29, 1998, Dr. Z stated that the claimant complained of low back pain radiating into his legs off

and on, that he was to remain off work, and that he may need a work capacity evaluation. In a letter dated January 26, 1999, Dr. Z said that the claimant complained of low back pain radiating into the lower extremities on and off, that x-rays showed good alignment, that the claimant may need epidural or trigger point injections, that he will need a work capacity evaluation, and that he cannot work and needs to be rehabilitated first.

Dr. H referred the claimant to Dr. M. In a report dated October 7, 1998, Dr. M noted the complaints of the claimant, said that he had marked pain behavior on examination, that his limited range of motion at the hip was out of proportion to his range of motion when sitting in a chair, that the claimant's pain complaints decrease whenever he is distracted away from the physical examination, that there is symptom magnification, and that he thinks that the claimant would benefit from a psychological profile. Dr. K examined the claimant at the request of the carrier. In a letter dated December 2, 1997, Dr. K stated that this was an addendum to an earlier report; that what the claimant said he could not do was not compatible with the physical examination; that psychological evaluation and counseling appeared to be appropriate; and that no objective physical findings indicated the need for further surgery.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. 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 that the claimant's inability to do any work must be supported by medical evidence. 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. In Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997, the Appeals Panel cited earlier decisions and stated that the medical evidence should encompass more than conclusory statements and should be buttressed by more detailed information concerning the claimant's physical limitations and restrictions and that "bald statements" of an inability to work are of limited use in assessing whether a claimant can work during the filing period because of a lack of any discussion of the nature of and the reasons for the claimant's inability to work. In Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996, the Appeals Panel stated that its comments about medical evidence being more than conclusionary did not establish a new or different standard of appellate review and that a finding of no ability to work is a factual determination which is subject to reversal only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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). In his appeal, the claimant contends that the hearing officer should not have considered the report of Dr. K because it was rendered before the claimant had the second surgery in January 1998. At the hearing, the claimant did not object to the admission of the report of Dr. K. In his Decision and Order, the hearing officer stated that Dr. K did not see clinical objective findings to support the pain the claimant said that he had and that there was an indication of magnification of pain. It appears that the hearing officer considered the report of Dr. K concerning the relationship of the claimant's complaints to findings upon physical examination and review of medical records, not as a comment directly on the ability of the claimant to work during the filing period. The hearing officer did not err in considering the report of Dr. K. The hearing officer's determinations that during the filing period the claimant had some ability to work and that he is not entitled to SIBS for the 13th quarter 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 and no improper consideration of evidence, we affirm the determinations of the hearing officer.

We affirm the decision of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge