

APPEAL NO. 990595

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 March 3, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the filing period for the 16th quarter for supplemental income benefits (SIBS) began on September 16, 1998, and ended on December 15, 1998, and that during that filing period the claimant did not seek employment and did not earn wages. The hearing officer determined that during the filing period the claimant's unemployment was a direct result of his impairment from the compensable injury. That determination has not been appealed and has become final under the provisions of Section 410.169. The hearing officer also determined that during the filing period for the 16th quarter for SIBS the claimant had some ability to work; that during that filing period he did not attempt in good faith to obtain employment commensurate with his ability to work; that the claimant is not entitled to SIBS for the 16th quarter; that in Texas Workers' Compensation Commission Appeal No. 990006, decided February 18, 1999 (Unpublished), the Appeals Panel affirmed a decision that the claimant was not entitled to SIBS for the 13th, 14th, and 15th quarters; and that the claimant permanently lost entitlement to SIBS because he was not entitled to them for 12 consecutive months. The claimant appealed, urged that he was unable to work during the filing period for the 16th quarter because of his physical and psychological conditions, 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 16th quarter. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

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 claimant's inability to do any work must be supported by medical evidence.

At the request of the carrier, Dr. O performed a functional capacity evaluation. In a letter dated March 17, 1997, Dr. O reported that strength-wise the claimant could perform at the medium work level, that he should not lift above his head for a significant length of

time, that he could stand for about an hour without a break, and that he can do any sitting job that did not require him to lift over his head. In a letter to the claimant dated April 10, 1997, Dr. D, the claimant's treating doctor, stated that strictly speaking, from a physical orthopedic standpoint, he could not dispute or argue against Dr. O's conclusions. Dr. D referred the claimant to a center for rehabilitative medicine for a psychological evaluation. In a 10-page report dated January 30, 1998, Dr. S, a psychologist with a Ph.D., stated that the claimant would benefit from referral for psychiatric evaluation for the possibility of medication to treat the difficulties suggested in the evaluation and that if there was successful intervention, the most appropriate type of employment setting for the claimant would involve a work setting in which he would not be required to interact with others and in which he could work at his own pace. In a note dated February 23, 1998, Dr. D stated that he reviewed the very thorough evaluation submitted by Dr. S and that he had no disagreement with the evaluation or its recommendations. Dr. F, a psychiatrist, wrote to Dr. D on August 17, 1998, stating that he had completed a psychiatric evaluation on the claimant, that the claimant is an intelligent man, and that he found no psychological reason to preclude his employment. In a letter to the carrier dated August 21, 1998, Dr. D stated that he had reviewed the report of Dr. F and that it was his preference for Dr. F to continue with antidepressant prescription and management. Dr. P examined the claimant on January 30, 1999. The record does not reveal why Dr. P examined the claimant. Dr. P reported that in addition to his physical complaints the claimant reported that he was depressed and that the depression affected his daily routine. Dr. P said that he thought that the claimant would have trouble sitting for more than 30-40 minutes at a time, that the claimant could stand for about 15-20 minutes at a time, and that walking would be difficult and would probably be limited to less than 10 minutes at a time.

The hearing officer determined that the claimant had some ability to work during the filing period for the 16th quarter for SIBS. Reports from physicians, a psychiatrist, and a psychologist indicate that the claimant had some ability to work. The claimant did not offer a medical report or opinion indicating that because of his physical and psychological limitations he could not work. The claimant had the burden of proving that he had no ability to work during the filing period. Such inability to work must be supported by medical evidence. The determination of the hearing officer that during the filing period for the 16th quarter the claimant had some ability to work is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and is affirmed. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). A copy of Appeal No. 990006, *supra*, affirming a decision of the hearing officer that the claimant is not entitled to SIBS for the 13th, 14th, and 15th quarters is in the record. We affirm the determination that the claimant permanently lost entitlement to SIBS because he was not entitled to them for 12 consecutive months.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge