

APPEAL NO. 990767

A contested case hearing (CCH) was originally held on September 25, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 982586, decided December 17, 1998, the Appeals Panel noted that the appellant (claimant) and the respondent (carrier) stipulated to the beginning and ending dates for the filing periods for the third, fourth, and fifth quarters for supplemental income benefits (SIBS) and found the evidence to be sufficient to support the determinations of the hearing officer that during those filing periods the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work. The Appeals Panel also noted that during the CCH the hearing officer went off the record, considered documents in the claim file, did not indicate what documents were considered, and determined that the issues of entitlement to SIBS for the third, fourth, and fifth quarters were before her. The Appeals Panel reversed the decision of the hearing officer that the claimant is not entitled to SIBS for the third, fourth, and fifth quarters and remanded for the hearing officer to reconstruct the record to show the documents that she considered that are not in the record in determining that entitlement to SIBS for the third, fourth, and fifth quarters was before her; to determine which issues were before her; and, since the Appeals Panel had used its only remand, to determine whether the claimant is entitled to SIBS for the third, fourth, and fifth quarters, even if she should decide that entitlement to SIBS for one or more of those quarters was not before her. The hearing officer held another CCH on February 17, 1999; identified documents that she considered at the first CCH that were not included in the record; made those documents hearing officer exhibits; kept the record open until March 3, 1999, for the parties to present written arguments; and rendered another decision dated March 15, 1999, in which she again determined that entitlement to SIBS for the third, fourth, and fifth quarters was before her and that the claimant is not entitled to SIBS for the third, fourth, and fifth quarters. The claimant appealed; urged that the hearing officer erred in admitting a letter from an attorney representing the carrier, in not admitting Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms offered by the claimant, and in considering Texas Workers' Compensation Commission dispute resolution information system (DRIS) notes; contended that the hearing officer improperly decided that the issues of entitlement to SIBS for the third, fourth, and fifth quarters were before her; argued that the determinations that during the filing periods the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work are against the great weight and preponderance of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier responded, urging that the decision of the hearing officer be affirmed.

DECISION

We affirm.

At the hearing on remand, the hearing officer reviewed the claim file and DRIS notes, printed copies of some DRIS notes, and added 11 hearing officer's exhibits that

were in the claim file or in DRIS notes and a brief from the attorney representing the claimant. For some unknown reason, the hearing officer also made a letter from an attorney representing the carrier to an adjuster dated September 17, 1998, a hearing officer's exhibit; said that it was not considered at the first CCH and that it would be marked to indicate that it would not be considered; and placed a red marker on it. In the statement of the evidence section of her Decision and Order, the claimant commented on hearing officer's exhibits she considered and there is no indication that she considered the letter dated September 17, 1998. Making that letter a hearing officer's exhibit did not result in reversible error. At the hearing on remand, the attorney representing the claimant requested that the hearing officer consider TWCC-21s filed by the carrier and the hearing officer stated that she did not consider them at the first CCH. The hearing officer did not err in not making the TWCC-21s hearing officer's exhibits.

During the hearing on remand, the hearing officer stated that she considered the handwritten benefit review conference report and read the note "[p]arties agree the 4th and 5th quarter would be added to CCH set Sept. 25, 98." The hearing officer also stated that she remembered that a DRIS note dated September 10, 1998, that states "CLMT AND CARRIER AGREED SIBS 4TH AND 5TH QUARTERS WOULD BE ADDED ISSUES AT CCH SET 092598. ISSUE FOR CCH SET IS 3RD QTR" was considered and caused her to decide that the issues of whether the claimant is entitled to SIBS for the third, fourth, and fifth quarters was before her. The hearing officer included as hearing officer's exhibits other documents and DRIS notes that she had printed for the record. She complied with the direction to reconstruct the record. While there may have been some confusion as to the starting and ending dates of the quarters, the parties stipulated to those dates for the third, fourth, and fifth quarters. The hearing officer's determination that the issues of entitlement to SIBS for the third, fourth, and fifth quarters were before her are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. 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).

In Appeal No. 982586, *supra*, the Appeals Panel found the evidence to be sufficient to support the determinations that during the filing periods for the third, fourth, and fifth quarters the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work. Additional evidence on those questions was not admitted at the CCH on remand. In his appeal on remand, the claimant argued that the carrier did not present medical evidence that he had any ability to work during the filing periods in question. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, and Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998, the Appeals Panel stated that medical evidence is required to support a finding of no ability to work but that medical evidence is not required to support a finding that a claimant had some ability to work. The determinations of the hearing officer that during the filing periods for the third, fourth, and fifth quarters the claimant had some ability to work and did not in good faith seek employment commensurate with his ability to work 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. Pool, *supra*; King, *supra*.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge