APPEAL NO. 990808

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 19, 1999. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 16th and 17th quarters. The claimant appeals these determinations, expressing her disagreement with them and raising various evidentiary and procedural errors. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

This is a no ability to work SIBS case. The claimant sustained a compensable injury on _____. She reached maximum medical improvement on December 22, 1993, and was assigned a 20% impairment rating.

We first address the evidentiary and procedural matters. Dr. R, the treating doctor, testified by telephone at the CCH. In a letter of April 9, 1999, to the Appeals Panel, Dr. R attempted to clarify or supplement this testimony. Our review is limited to the record of the CCH. Section 410.203(a)(1). For this reason, we will not consider this letter in our review of this case.

The claimant asserted for the first time on appeal that she had only three weeks to consult with an attorney before the CCH. She did not hire an attorney and argues on appeal that she "was unfairly put in a position of not being able to find an Attorney . . . ." The claimant was advised at the CCH of her right to hire an attorney and elected to proceed with the assistance of an ombudsman. She did not raise with the hearing officer the matter of not being able to find an attorney. For this reason, we will not consider it for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993.

The carrier offered into evidence a video surveillance tape of the claimant's activities. The videotape was not admitted into evidence over the objection of the claimant that it was not timely exchanged. However, a written report of the contents of the videotape was timely exchanged and was admitted into evidence. The claimant sought to have admitted Claimant's Exhibit No. 7, a two-page document that she prepared and in which she stated her position (including quotes from documents in evidence) and what she believed to be the carrier's position on the disputed issues. The hearing officer did not admit the document because it was untimely exchanged and because she apparently thought it was prepared in reference to the videotape. We agree with the claimant in her appeal that the document appears to have little to do with the videotape and largely re-capitulates the report of the benefit review conference. Errors in evidentiary rulings are considered prejudicial and subject to reversal only if they are likely to and probably did

result in an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Because Claimant's Exhibit No. 7 simply repeats the position of the parties, made amply clear at the CCH and again on appeal, and quotes other evidence, we perceive no harm in the failure of the hearing officer to admit this document. Similarly, the hearing officer refused to admit into evidence Claimant's Exhibit No. 8, a one-page statement of the claimant, which is her response to the videotape, because it was not timely exchanged. While being cross-examined about the written report of the contents of the videotape, the claimant objected about Claimant's Exhibit No. 8 not being admitted while the report of the videotape was. The carrier's attorney stated on the record that he had no objection to her consulting this exhibit in her testimony. In any case, the claimant gave an extensive opinion about the videotape and her opinion of it. Given this testimony, we perceive no prejudicial error in the refusal to admit Claimant's Exhibit No. 8.

With regard to the merits of this case, Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The 16th quarter was from November 12, 1998, to February 10, 1999, and the 17th quarter was from February 11 to May 12, 1999. The filing periods for these quarters were the preceding 90 days.

At issue in this case is whether the claimant established that she made the required good faith job search commensurate with her ability to work. She submitted a Statement of Employment Status (TWCC-52) for each quarter in which she listed no attempts to find employment. She verified in her testimony that she made no such efforts, contending that she was unable to work at all. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured

worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

In a series of letters, Dr. R stated that the claimant was post-cervical discectomy and that she had cervical herniations at other levels, fibromyalgia syndrome secondary to trauma, and severe depression. She also stated that the claimant had poor cardiovascular endurance and experienced difficulties with activities of daily living due to her constant pain. Dr. R repeated this opinion in her testimony that the claimant had no ability to work because of her pain, need for rest, and shortness of breath. She felt the claimant was able to lift only one to three pounds occasionally, and this would include a telephone. She also believed that claimant could do some computer data input on a short-term basis; that the claimant could sit for 15 to 30-minute periods; and that she has short-term memory problems. Dr. R also conceded on cross-examination that the claimant may be able to work in a home-based telephone business for three or four hours per day as some of her other patients were doing.

Also in evidence was a report of a functional capacity evaluation attempt by Dr. O on September 22, 1998. He concluded the test was invalid due to minimal effort by the claimant. He did, however, note that the step test was terminated due to a rapid increase in the claimant's heart rate. On the other hand, the results of strength were so poor that Dr. O commented "[i]f she was as bad as she portrayed on the testing, she would not be able to get out of bed" or to arrive at his office that day. The claimant contended that she had to wait several hours at Dr. O's office and this rendered her unable to complete the test. Dr. O did not agree with this, but offered to retest the claimant. He did so on February 8, 1999. In this retest, Dr. O again noted "minimal endurance" with increased heart rate. He placed her at a "very sedentary" functional level and concluded that if she had a job "where she could stand and sit at will; for example, in telephone solicitation and this type of thing, then she could probably do it." He further concluded that she could not climb stairs or walk any distance and was able to lift no more tha 15 pounds, which he considered "is basically activities of daily living."

The hearing officer considered this evidence and concluded that the claimant had some ability to work during each of the filing periods for the quarters in issue. The claimant appeals this determination, contending that she was far more restricted than Dr. O portrayed because of her constant pain, poor sleep, and medications. She also argues that Dr. O did not measure her "mental or psychological capabilities which really are more relevant . . . ." As noted above, the claimant had the burden of proving she had no ability to work at all during the filing periods, and whether she did or did not have such ability was a question of fact for the hearing officer to decide. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d

629, 635 (Tex. 1986). In this case, the hearing officer found Dr. O more persuasive and credible in his assertion that the claimant had some, albeit very limited, ability to work. Arguably, Dr. R was of the same opinion in her testimony when she referred to home-based telephone work. This evidence was sufficient to support the finding of some ability to work and we decline to reverse that decision under our standard of appellate review. What was required was not that the claimant actually find work at this level, but that she make a good faith attempt to obtain such employment. Having failed to make any such attempts at all commensurate with this ability to work, she was not entitled to 16th or 17th quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge