APPEAL NO. 990983

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 15, 1999, a hearing was held. He determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. Appellant (carrier) asserts that two doctors state that claimant can work, that a video of claimant is consistent with some ability to work, and that inability to return to prior work is not the criteria for SIBS. Claimant replied that he agrees with the determination.

DECISION

We affirm.

Claimant worked for (employer) as a welder and mechanic for about 20 years. He did not testify about his injury in detail but did say he had fallen over 20 feet at work and then slipped on ice and fell at work. Dr. G medical review indicates that the _____, compensable injury under consideration was a slip and fall on ice. Dr. G examined claimant on May 6, 1998, on behalf of the carrier. Dr. G concluded that claimant could perform sedentary work eight hours a day with a lifting limit of 20 pounds with no stooping, bending, squatting or repetitive movement of the low back or hip.

The parties stipulated at this hearing that claimant has an impairment rating of 24%, that he commuted no benefits, that the fifth compensable quarter began on February 17, 1999, and the filing period preceding it began on November 18, 1998. (We note that these dates indicate that any SIBS question relative to the sixth quarter will consider a filing period beginning after January 31, 1999, when different SIBS rules are in effect.)

Claimant has had a total hip replacement on the right. He receives epidural injections periodically throughout the year for pain.

Claimant has indicated on his application for SIBS for this quarter that he did not try to find work. His position is that he is unable to work. Claimant did say that the carrier kept providing job leads and, even though his doctor told him not to work, he checked several leads to see if any offered a job. He said these inquiries were primarily before the beginning of the applicable filing period but that some may have been after the beginning of the filing period. He did not say that any offered him a job.

To qualify for SIBS based on an inability to do any work, a claimant has to show through medical evidence that he could not do any work at all. Merely showing that he could not return to his prior employment does not meet this test. In that regard, the medical statement of physician's assistant Mr. E provided on November 17, 1998, is insufficient because, while he says that claimant is "totally disabled," whatever that entails, he also says that claimant "cannot return to the type of employment for which he was trained." Similarly, Dr. R, on March 26, 1998, in effect, said that claimant can work by saying that

claimant could lift 10 pounds with no bending, etc. He summed up by saying that he has "doubts that the patient would be suitable for any occupation except a very specifically designed situation just for him." Section 408.143 does not require that a claimant obtain a job to qualify for SIBS but merely that the claimant attempt in good faith to find work commensurate with his ability; if he has little ability to work, medically, there will probably be little likelihood of finding employment, but employment, as stated, is not the test; attempting is the test.

As stated, Dr. G said that claimant could work at a sedentary level. The medical reports which support an affirmation of this determination are those of Dr. Gi, the treating doctor. He said in October 1998, just before the start of the filing period in question, that he agreed with Dr. G that claimant could do light sedentary work "if he could sit." But, Dr. Gi continued, the claimant cannot sit because of the total hip replacement. He added that claimant had poor sitting and standing tolerance and is "unable to work." This opinion clearly shows that Dr. Gi is not merely talking about whether claimant can or cannot return to his prior employment. He addresses sedentary work and sitting and says claimant cannot do them.

In addition, Dr. Gi on December 11, 1998, within the filing period, said that claimant is "totally disabled." He recited his limitations, including sitting and standing tolerances of less than 15 minutes, and said claimant has no "capability of working, and in my opinion the patient is not qualified for any form of gainful employment and should be disabled." While "gainful employment" is not the test, when it is used in a context in which it reasonably equates to, medically, being unable to do no work of any kind, it may be considered. *See* Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998. Taking Dr. G's opinions together, they address whether claimant can do any work at all, and Dr. G states that claimant cannot. The medical evidence of Dr. G is sufficient to support the determination of an award of SIBS for the fifth quarter.

For a hearing officer to determine that a claimant has not shown a total inability to do any work of any kind, any and all evidence may be considered; it is not limited to medical evidence. In this case, the hearing officer was presented with medical evidence indicating some ability to work from Dr. G, Dr. R and Mr. E. In addition, he considered a video of claimant loading barrels (said to be empty and weighing less than 20 pounds) and doing other activities, such as looking under the hood of a vehicle, and riding with another person to a pasture. It was the hearing officer's responsibility to weigh the evidence from the video. He was not foreclosed from giving the video weight since it was taken on March 11 and 12, 1999, approximately three weeks after the end of the filing period, because claimant testified that he generally is getting worse, not better. However, he did not have to consider that the video showed claimant was able to do some work, and he obviously did not choose to give the video significant weight. The medical evidence was still sufficient to support the determination.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge