

APPEAL NO. 991127

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 April 21, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the claimant has a 17% impairment rating and that the 10th quarter for supplemental income benefits (SIBS) began on January 21 and ended on April 21, 1999. The hearing officer made findings of fact related to the claimant's condition during the filing period; also found that during the filing period he had some ability to work, made no efforts to find employment, and did not make a good faith effort to obtain employment commensurate with his ability to work; and concluded that he is not entitled to SIBS for the 10th quarter. The claimant appealed, asserted that the medication he takes and his pain do not allow him to perform any work 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 10th 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.

The claimant testified that during the filing period he took Oxycontin, Baclofen, Ansaid, Neurontin, and Prilosec and that he was hospitalized from October 28 to November 3, 1998, because of an overdose of the prescribed medication. He described how some of the medication affected him, introduced pages from several publications of the Physicians' Desk Reference concerning some of the medications, and said that during the filing period he was not able to work because of his pain and the medication he takes. The carrier introduced a video of the claimant taken on February 22, 1999, showing the claimant walking, getting in and out of a pickup truck, and driving to another city to see a doctor with no or very little difficulty. The claimant testified that he did not take his medication that day and would not have been able to drive had he taken his medication.

In a letter to the attorney representing the claimant dated October 20, 1998, Dr. M stated that as of May 8, 1998, Dr. H recommended that the claimant was incapable of lifting or carrying objects greater than 25 pounds; to avoid twisting, prolonged periods of sitting or standing, work above shoulder level, and repetitive bending; and restricted from elevated heights, ladders, and stools. At the request of the Texas Workers' Compensation Commission, Dr. E, who is board certified in occupational medicine, examined the claimant and reviewed his medical records. In a letter dated January 14, 1999, Dr. E opined that the claimant could perform only limited job activities and that, given the amount of medication he is taking, he should not operate any kind of equipment.

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 a 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. Medical evidence is required to support findings of no ability to work, but medical evidence is not required to support a determination that the claimant had some ability to work. Texas Workers' Compensation Commission Appeal No. 980879, decided June 15, 1998.

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). His determinations that during the filing period 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 the 10th 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).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge