

APPEAL NO. 991653

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 (CCH) was held on June 29, 1999. The issues reported as unresolved at the benefit review conference (BRC) are whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 9th, 10th, 11th, and 12th quarters and did the claimant permanently lose entitlement to income benefits because he was not entitled to SIBS for 12 consecutive months. The claimant and the respondent (carrier) stipulated that on \_\_\_\_\_, the claimant sustained a compensable right wrist, right elbow, right shoulder, right hip, and cervical, thoracic, and lumbar spine injury; that his impairment rating is 33%; that the filing period for the ninth quarter for SIBS began on April 16, 1998, and ended on July 17, 1998; that the filing period for the 10th quarter began on July 18, 1998, and ended on October 16, 1998; that the filing period for the 11th quarter began on October 17, 1998, and ended on January 15, 1999; and the filing period for the 12th quarter began on January 16, 1999, and ended on April 16, 1999. The claimant filed a written motion requesting that the following issues be added:

Whether the carrier is liable for the 11th quarter of SIBS.

Did the carrier timely dispute claimant's entitlement to the 11th [quarter of SIBS].

Did the carrier timely dispute claimant's entitlement to the 12th quarter of SIBS.

The motion was again made at the CCH. The hearing officer denied the motion. He made the following findings of fact:

**FINDINGS OF FACT**

2. Claimant had the ability to perform some work during the filing periods for the ninth, tenth, eleventh, and twelfth compensable quarters of [SIBS].
3. Claimant spent a total of three (3) hours contacting ten (10) prospective employers over a seven day (7) day period during the filing period for the ninth compensable quarter of [SIBS].
4. Claimant's job search was self-restricted, selective, and lacked timing, forethought, and diligence during the filing period for the ninth compensable quarter of [SIBS].
5. Claimant neither looked for work nor conducted a job search during the filing periods for the tenth, eleventh, and twelfth compensable quarters of [SIBS].

6. Claimant's unemployment or underemployment during the filing periods for the ninth, tenth, eleventh, and twelfth compensable quarters of [SIBS] was a direct result of Claimant's impairment.
7. Claimant has not in good faith attempted to obtain employment commensurate with Claimant's ability to work during the filing periods for the ninth, tenth, eleventh, and twelfth compensable quarters of [SIBS].
8. Claimant has not been entitled to [SIBS] for twelve (12) consecutive months.

The hearing officer concluded that the claimant is not entitled to SIBS for the 9th, 10th, 11th, and 12th quarters and that he permanently lost entitlement to income benefits. The claimant appealed; urged that the hearing officer erred in denying the motion to add the issues; contended that there is "no evidence" to support Findings of Fact Nos. 2, 3, 4, 6, 7, and 8 and the conclusions of the hearing officer; and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier responded, urged that the hearing officer did not err in denying the motion to add issues, stated that the evidence is sufficient to support the appealed findings of fact and conclusions of law of the hearing officer, and requested that his decision be affirmed.

#### DECISION

We affirm.

A BRC was held on May 20, 1999, and the BRC report was distributed by a letter dated May 26, 1999. On June 11, 1999, the attorney who represented the claimant at the CCH filed a motion to add the issues set forth earlier in this decision, contending that the issues were raised at the BRC. Nothing in the BRC report indicates that the requested issues were mentioned at the BRC. Neither the attorney who represented the claimant at the CCH nor the adjuster who represented the carrier at the CCH were present at the BRC. Statements from the representatives who were present at the BRC were not offered into evidence. The attorney representing the claimant said that the requested issues were discussed at the BRC and the adjuster representing the carrier said that they were not. The claimant testified that he was under the influence of medication at the BRC and did not remember if the requested issues were discussed at the BRC. The claimant contends that the hearing officer modified the standard of review to require written documentation in the BRC report and questioned why the carrier was perceived as being more trustworthy on the matter. The hearing officer did not change the standard of review. In his Decision and Order, the hearing officer stated that the BRC report did not substantiate the claimant's argument, that the attorney representing the claimant was not at the BRC, and that the claimant testified that he could not recall if the issues were raised at the BRC. He also said that after considering all of the arguments by the parties, he found the claimant's request was without merit and no good cause to add the issues and denied the request. He gave a

similar explanation at the CCH. The burden was on the claimant to show good cause to add the requested issues. He testified that he did not remember if they were discussed at the BRC and did not offer a statement of the attorney who represented him at the BRC. The claimant did not meet his burden of proof. There is no indication that “the carrier is always perceived as being more trustworthy and right than the claimant or his counsel” as contended by the claimant in his appeal. The hearing officer did not abuse his discretion in not granting the motion to add the requested issues.

The Decision and Order of the hearing officer contains a detailed, nine-page statement of the evidence. Review of the record reveals that it is accurate. Briefly, the report of a functional capacity evaluation performed in June 1997 indicates that the claimant could perform sedentary to light work for less than eight hours a day. In a report dated June 12, 1998, Dr. B, a clinical psychologist, said that the claimant reported that he was staying busy around his house and yard; that he took care of his young daughter; that he visited a sick neighbor in the hospital and took care of the sick neighbor’s yard and flowers while she was in the hospital; that he encouraged the claimant to do volunteer work; and that the claimant told him that he had fallen on stairs and on a boat dock. The claimant testified about his activities, including caring for his six-year-old daughter while his wife worked. In two letters dated May 27, 1999, Dr. B said that he was aware that the claimant was attempting to obtain SIBS, that the claimant’s depression worsened between June 1997 and December 1998, and that by early 1998 the depression was so severe that he believed that it precluded the claimant’s ability to seek or retain competitive employment. In a letter dated April 22, 1999, Dr. V stated that he told the claimant not to work at any place of employment between January 16 and April 16, 1999, “because of his physical condition, with physical activity significantly aggravating his pain, the usage of medication that causes drowsiness and sleepiness”; that the claimant’s range of motion in his neck and low back impaired his ability to perform even sedentary activities; and that he needed frequent rest periods. In a letter dated June 23, 1999, Dr. V said that the claimant had been unable to work since the date of the injury because of his physical impairments and the pain medication he takes. The Statement of Employment Status (TWCC-52) for the ninth quarter contains information about 10 job contacts. The claimant testified about the time he spent conducting the job search during that filing period.

Clearly there is some evidence to support each of the appealed findings of fact and conclusions of law. The hearing officer judges the credibility of witnesses and resolves conflicts and inconsistencies in the evidence. Texas Workers’ Compensation Commission Appeal No. 92657, decided January 15, 1993. The burden is firmly on the claimant to show no ability to work. Texas Workers’ Compensation Commission Appeal No. 941382, decided November 28, 1994. Medical evidence is required to support a finding 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. None of the appealed determinations are 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).

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge