APPEAL NO. 991674

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 1, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the claimant was entitled to supplemental income benefits (SIBS) for the first quarter; that she was not entitled to SIBS for the second quarter; that the filing period for the third quarter began on July 9, 1998, and ended on October 7, 1998; and that the fourth quarter began on October 8, 1998, and ended on January 6, 1999. The hearing officer made findings of fact that the claimant's unemployment during the filing periods for the third and fourth quarters was a direct result of her impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer also found that during those filing periods the claimant did not make a good faith effort to seek employment commensurate with her ability to work and concluded that she is not entitled to SIBS for the third and fourth quarters. The claimant appealed, attached numerous documents to her appeal, stated that she disagreed with the decision of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer. A response from the self-insured has not been received.

DECISION

We affirm.

The claimant attached a copy of the Texas Workers' Compensation Commission rules related to SIBS to her appeal. Rules that are pertinent to an appeal are considered without being attached to an appeal or a response to an appeal. In addition, the claimant attached to her appeal some documents that were admitted into evidence at the CCH. We will consider those documents. The claimant also attached copies of receipts for payments signed by her in April, May, and June 1998; two letters from doctors; and a Specific and Subsequent Medical Report (TWCC-64) dated in March and May 1999 that were offered into evidence by the claimant but were not admitted because they were not timely exchanged. In her request for review, the claimant does not contend that the documents were improperly not admitted. We nonetheless hold that the hearing officer did not err in not admitting those documents and we will not consider them. As a general rule, the Appeals Panel considers only the record developed at the CCH and not other documents that are not part of the record. Section 410.203. The documents that are attached to the appeal and are not in the record, other than the rules, will not be considered.

The claimant contends that she is entitled to SIBS for the second quarter. At the CCH, an agreement that the parties agreed that the claimant is entitled to SIBS for the first quarter and is not entitled to SIBS for the second quarter was admitted into evidence. A stipulation restating that agreement was proposed by the hearing officer, he carefully explained the proposed stipulation to the claimant, and she stated that she agreed to the

stipulation. The claimant has not established a basis for being relieved of the stipulation that she is not entitled to SIBS for the second quarter.

The claimant testified that she worked for the self-insured in an administrative job, that she used a computer and telephone in her job, that she was paid $16.87 an hour when she was injured, that she was injured when a temporary wall in the office fell and hit her shoulder and neck, that she is in a leave of absence status and has not been terminated, that she cannot sit for long periods of time and falls a lot, that she cannot return to do the work that she was doing at the time that she was injured, and that she would return to that job if she could. She said that during 1998 her grandchildren ages 3, 9, and 13 were taken to her residence and that she watched them before and after school for a total of about four hours a day, that she was paid to watch her grandchildren, and that during the filing periods she did not seek other employment. The claimant stated that she did not agree with a report of Dr. P that she was capable of performing at least sedentary or light job duties.

In a note dated December 16, 1997, Dr. S said that the claimant would be off work for a minimum of six to twelve months. On March 4, 1998, Dr. S wrote that the claimant was unable to work because of her physical condition and the medication she took. In a report dated May 29, 1998, Dr. S said that the claimant's condition was getting worse; that she was totally disabled and unable to work; and that if she is able to return to work, it would be at a light-duty position with no heavy lifting, pulling, or pushing and she would need to be able to frequently change positions. In a follow-up report dated August 12, 1998, Dr. S said that the claimant was disabled and unable to work at the time and that she is a candidate for a fusion at L4-5 and L5-S1. On September 14, 1998, Dr. S stated that the claimant was not a candidate for surgery because of her risk factors such as obesity. In a follow-up report dated October 16, 1998, he wrote that the claimant continues to be off work and that she told him that there are days she cannot get out of bed without help. Dr. R examined the claimant on April 3, 1998, and reported that her ability to stand, move about, lift, and carry and handle objects was significantly and substantially impaired but that her ability to sit, hear, and speak did not appear to be substantially impaired. A report of a functional capacity evaluation (FCE) dated February 25, 1998, indicates that the claimant could work in the sedentary category. At the request of the self-insured, Dr. P examined the claimant and assigned a 13% impairment rating for specific disorders of the lumbar and cervical spine and no impairment for loss of range of motion or neurological dysfunction. In a letter dated March 4, 1998, Dr. P said that an FCE indicated that she was in a sedentary classification; that the examination was inconsistent with magnified pain behaviors; that it was impossible to tell the claimant's full FCE; and that, in his opinion, she was at least capable of sedentary or light job duties.

An injured employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent quarters if the employee, during the filing period (1) has been unemployed or underemployed as a direct result of the impairment from the compensable injury and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. The claimant has the burden to prove entitlement to SIBS. Texas Workers'

Compensation Commission Appeal No. 941490, decided December 19, 1994. Good faith is the state of mind denoting honesty of purpose, freedom from intention to defraud, and being faithful to one's duty or obligation. Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993.

The claimant contended that she had no ability to work during the filing periods for the third and fourth quarters. The hearing officer did not make a finding of fact on the ability of the claimant to work during the filing periods as he should have since the question was before him; however, a finding that the claimant had some ability to work during those filing periods may be inferred from his brief comments in the statement of the evidence and discussion in his Decision and Order. 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. While medical evidence is required to support a finding of no ability to work, 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). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The medical evidence and the other evidence are sufficient to support the implied determination of the hearing officer that the claimant had some ability to work during the filing periods for the third and fourth quarters and those implied determinations of the hearing officer 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). The claimant testified that during the filing periods in question she was paid for watching her grandchildren and that she did not

seek any other employment. Being in a leave of absence status did not relieve her of the requirement to seek employment commensurate with her ability to work to be entitled to SIBS. The evidence is sufficient to support the determinations that during the filing periods in question she did not seek employment commensurate with her ability to work and that she is not entitled to SIBS for the third and fourth quarters.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge