APPEAL NO. 991763

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 July 15, 1999. The issues at the CCH were whether the appellant (claimant) timely filed her supplemental income benefits (SIBS) application for the second compensable quarter, and whether the claimant is entitled to receive SIBS for the third quarter, May 16, 1999, through August 14, 1999. The hearing officer determined that the claimant did not timely file her SIBS application for the second compensable quarter and is entitled to SIBS for the second compensable quarter, less three weeks to account for the time frame during which the claimant failed to timely file her SIBS application for that quarter, and that the claimant is not entitled to SIBS for the third quarter. The claimant appeals the findings of fact and conclusion of law pertaining to the third compensable quarter, urging that she had no ability to work and met the good faith criteria. The respondent (carrier) replies that the great weight and preponderance of the evidence demonstrates that the claimant failed to meet her burden of proof that she is entitled to SIBS for the third quarter and the hearing officer's decision should be affirmed.

DECISION

Affirmed.

Not appealed are the hearing officer's findings that the claimant sustained a compensable injury on _____, which resulted in an impairment rating greater than 15 percent; that the claimant commuted no portion of the impairment income benefits; that the claimant did not fail to cooperate with the Texas Rehabilitation Commission; that during the qualifying period preceding the third SIBS quarter the claimant had not returned to work earning at least 80% of her preinjury average weekly wage (AWW); and that during the qualifying period preceding the third quarter of SIBS, the claimant's unemployment was a direct result of the impairment caused by the claimant's compensable injury of _____. The claimant testified that she has carpal tunnel syndrome and thoracic outlet syndrome which affects her upper torso. The claimant's treating doctor is Dr. K, a thoracic surgeon. According to the claimant, Dr. K has not released her to return to work, she is unable to work in any capacity, and she did not make an effort to look for any employment during the qualifying period.

The claimant testified that she knows of no job that she could perform. The claimant states that she cannot work because she cannot lift over two pounds, cannot stand or sit for too long, and cannot type without her hands getting numb. On cross-examination, the claimant testified that she drove to the benefit review conference (BRC) and CCH, a one hour drive each way, and carried a large bag full of documents into the BRC. The claimant submitted one medical report to support her position that she was unable to work during the qualifying period. On February 8, 1999, Dr. K states:

> Patient is symptomatically the same. She still has a good deal of problems with chest pain. She seems to be in good spirits, tolerating her symptoms. She seems to be doing better with physical therapy. Recommendations: Continue all medical and physical therapy. Refill Elavil, Flexeril. Return to care three months.

The carrier had the claimant examined by Dr. M on March 15, 1999. Based on his evaluation, Dr. M opined that the claimant could return to work and recommended a functional capacity evaluation to determine what limitations should be given to the claimant prior to returning to work.

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 AWW as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999 (a new SIBS rule), provides in pertinent part that "[a]n injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee: . . . (3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; . . ." Rule 130.102(e), effective January 31, 1999, provides in pertinent part that "[e]xcept as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

The hearing officer made findings that during the qualifying period for the third quarter the claimant did not seek work of any type, was not totally unable to work in any capacity, and did not make a good faith search for employment commensurate with her ability. The hearing officer applied Rule 130.102(d)(3), stating that a total inability to work must be supported by a detailed medical narrative, that the claimant has not provided such a document, and that the record contains a report from another doctor which indicates that the claimant is capable of returning to work. The claimant argues that she has not been released to return to work; however, the absence of a release to return to work is insufficient to meet the requirement of Rule 130.102(d)(3).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determinations that the

claimant has not made a good faith search for employment commensurate with her ability and is not entitled to SIBS for the third quarter.

The claimant also attached a number of documents to her appeal, all of which were not offered at the hearing, but which are dated prior to the hearing. Regardless of whether the carrier had such documents in its possession, it was the claimant's burden to prove her case and offer documents in support of her position. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, those documents which are attached to the appeal, but which are not in evidence, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that those documents attached to the appeal which were not offered at the hearing do not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge