

APPEAL NO. 000043

This appeal after remand 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 September 13, 1999. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth and fifth quarters. The hearing officer also determined that claimant would have been entitled to SIBS for the sixth quarter; however, because he has not been entitled to SIBS for 12 consecutive months, he permanently lost entitlement to SIBS. Claimant appealed the determination that he is not entitled to SIBS for the fourth and fifth quarters, contending that he met the good faith SIBS requirement. Claimant also challenged the determination that he permanently lost entitlement to SIBS and asked the Appeals Panel to reverse the determination that he is not entitled to sixth quarter SIBS. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

The Appeals Panel affirmed the hearing officer's good faith and SIBS determinations regarding fourth and fifth quarters. Texas Workers' Compensation Commission Appeal No. 992177, decided November 19, 1999. The Appeals Panel remanded the issue of permanent loss of entitlement and sixth quarter SIBS to the hearing officer. The Appeals Panel stated:

The hearing officer stated that claimant had not been entitled to SIBS for the second and third quarters, and she determined in her decision and order that claimant was not entitled to SIBS for the fourth and fifth quarters. We conclude that the hearing officer's determination regarding permanent loss of SIBS entitlement is against the great weight and preponderance of the evidence and we reverse it. We remand this issue to the hearing officer for findings of fact regarding what evidence admitted at the CCH establishes that the Commission determined that claimant was not entitled to SIBS for the second and third quarters. Claimant did not testify that he was not entitled to SIBS for prior quarters and claimant did not state this in argument. The hearing officer should make findings of fact regarding what evidence carrier offered to prove the permanent loss of entitlement.

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Claimant again appeals the denial of SIBS for the fourth, fifth, and sixth quarters and also the determination regarding permanent loss of entitlement. Carrier asserts that the Appeals Panel should affirm the hearing officer's decision and order on remand.

DECISION

We reverse and render.

In his appeal after remand, claimant contends the hearing officer erred in determining that claimant is not entitled to SIBS for the fourth, fifth, and sixth quarters, and that claimant permanently lost entitlement to SIBS. We first note that the remand did not concern the fourth and fifth SIBS quarters. The Appeals Panel has affirmed hearing officer's determinations regarding those quarters. Appeal No. 992177. We will not address those two quarters again. The scope of the remand was for the hearing officer to make findings based on the evidence in the record. The Appeals Panel did not remand for the development of additional evidence. On her own motion, and without convening a remand hearing or otherwise giving notice to the parties, the hearing officer developed evidence from the claim file regarding whether claimant had been determined to be entitled to SIBS for the second and third quarters. Carrier had the burden of proof to establish that claimant permanently lost entitlement to SIBS. See Texas Workers' Compensation Commission Appeal No. 961568, decided September 20, 1996; Texas Workers' Compensation Commission Appeal No. 990897, decided June 9, 1999.

The hearing officer stated in her decision and order that the evidence at the hearing established that claimant was not entitled to SIBS for the second and third quarters. The Appeals Panel remanded for the hearing officer to list the evidence on which she relied. The decision did not state that the hearing officer took official notice of the claims file and such was not agreed-to at the CCH. A review of the record and evidence before the hearing officer at the CCH shows that no evidence supports the hearing officer's determination that the record shows that claimant was not entitled to SIBS for the second and third quarters. Because carrier did not meet its burden to prove that claimant was not entitled to SIBS for the second and third quarters, we reverse the hearing officer's determination that claimant permanently lost entitlement to SIBS. This determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer determined that claimant is not entitled to sixth quarter SIBS because he permanently lost entitlement to SIBS. Because we have reversed the determination regarding permanent entitlement, we must also reverse the determination that claimant is not entitled to SIBS for the sixth quarter.

The carrier had the burden to prove permanent loss of entitlement and should have obtained and offered Dispute Resolution Information System (DRIS) records or other evidence to prove its case. See Texas Workers' Compensation Commission Appeal No. 982154, decided October 21, 1998. It was not the hearing officer's burden to do so at the CCH. Texas Workers' Compensation Commission Appeal No. 950817, decided July 5, 1995. The hearing officer and Appeals Panel are not required to sort through all of the files of the Texas Workers' Compensation Commission (Commission) in order to see if there is evidence that might shore up the case of one party. For instance, the Appeals Panel would not remand for a hearing officer to sift through the DRIS notes to see if there is any evidence that a claimant called the Commission to dispute a first certification of maximum medical improvement and impairment rating. In such a case, the claimant would have to offer the DRIS notes, just as the carrier had the burden to offer the DRIS notes in the case before us. While the hearing officer does have the duty to ensure the development of the record pursuant to Section 410.163(b), it was also carrier's duty to ensure that the critical evidence was offered at the CCH. The hearing officer did not develop the record in this regard at the CCH. The hearing officer could have made

hearing officer's exhibits of DRIS records, but she did not and carrier did not ask her to do so. The Appeals Panel will not permit a remand to allow one party to offer evidence that it was required to offer at the CCH in order to meet its burden of proof or for the hearing officer to develop the evidence that should have been offered at the CCH. See Texas Workers' Compensation Commission Appeal No. 981422, decided August 10, 1998; Texas Workers' Compensation Commission Appeal No. 962637, decided February 10, 1997; Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994.

We reverse that part of the hearing officer's decision and order that determines that claimant permanently lost entitlement to SIBS and render a decision that claimant did not permanently lose entitlement to SIBS. We reverse the hearing officer's determination that claimant is not entitled to SIBS for the sixth quarter and render a determination that claimant is entitled to SIBS for the sixth quarter.

Judy Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge