APPEAL NO. 990629

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 23, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third quarter from September 29 to December 28, 1998, and that she is not entitled to SIBS for the fourth quarter from December 29, 1998, to March 29, 1999. In her appeal, the claimant argues that the hearing officer's determinations that she did not make a good faith job search in the filing period for the fourth quarter and that she is not entitled to fourth quarter SIBS are against the great weight of the evidence. In its response, the respondent (self-insured) urges affirmance. The self-insured did not appeal the hearing officer's determinations that the claimant is entitled to SIBS for the third compensable quarter and that her underemployment in the filing period for the fourth quarter was a direct result of her impairment.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable occupational disease injury, with a date of injury of _____; that she reached maximum medical improvement, with an impairment rating of at least 15%; and that she did not commute her impairment income benefits. The fourth quarter of SIBS ran from December 29, 1998, to March 29, 1999, with a corresponding filing period of September 29 to December 28, 1998. The claimant estimated that she worked about 20 hours per week for her husband's painting business during the filing period for the fourth quarter. She testified that she was paid $150.00 per week and that her job duties include answering the telephone, faxing the bids for painting jobs, doing the payroll, and "keeping things on schedule." She acknowledged that she did not seek any employment in addition to the work she performed for the family business during the fourth quarter filing period. She testified that she did not look for additional work because Dr. V, her treating doctor, and Dr. B, a Texas Workers' Compensation Commission-selected required medical examination doctor, have both told her that the work she performs for the family business is about "all she needed to be doing."

On May 15, 1998, the claimant underwent a functional capacity evaluation (FCE). Dr. B examined the claimant and reviewed the results of the FCE. In his report of June 9, 1998, Dr. B stated that the claimant could lift eight pounds frequently and occasionally lift up to 15 pounds, that she could sit, stand, walk, bend, squat and reach for up to 33% of the day, and that she could sit up to 66% of the day. Dr. B concluded:

> Regarding the patient's ability to work, it is noted that the patient does assist with the family business by answering the phone and doing paperwork. She also cares for her husband who is in poor medical condition. Based on

> specific results of the [FCE] as to physical limitations, it does appear that the patient would be able to perform a sedentary type work position, which apparently she does perform for the family business. Hence, I do feel the patient does have an ability to work, based on the [FCE], physical examination and history from the patient.

In a progress note of January 7, 1999, Dr. V, the claimant's treating doctor, stated as follows with respect to her ability to work:

> The patient does have work on the family business, doing paperwork and answering the phone from home. She cannot go out and do heavy, repetitive work or work away from home because of the persistent discomfort in the medial aspect of the elbows with the cubital tunnel and the ring and little finger numbness and aching up the arm and residual from the carpal tunnel. She has been trying to exist with doing work from her home and this allows her also to take care of her husband. She cannot get the surgery done because she cannot leave her husband and as long as he is severely ill and she cannot have the surgery, she is limited in her work and use of the hand.

The hearing officer determined that the claimant did not make a good faith effort to look for work in the filing period for the fourth quarter. That question presented a question of fact for the hearing officer to resolve. It was the hearing officer's responsibility, as the sole judge of the evidence under Section 410.165(a), to consider the evidence and to determine if the claimant sustained her burden of proving good faith. In her discussion, the hearing officer noted that the claimant did not present medical evidence that she was restricted to part-time work and that in the absence of such evidence, the claimant's effort of working part-time for the family business was insufficient to satisfy the good faith requirement. The hearing officer was free to consider that factor in resolving the good faith issue. After reviewing the testimony and evidence, the hearing officer simply was not persuaded that the claimant had sustained her burden of proof. Our review of the record does not reveal that the hearing officer's determinations that the claimant did not make a good faith effort to seek employment in the filing period for the fourth quarter and that she is, therefore, not entitled to SIBS for that quarter are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the hearing officer's decision on appeal. Pool v. Ford Motor Co. 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The fact that another fact finder could have drawn difference inferences from the evidence, which would have supported a different result, does not provide a basis for us to reverse the decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur based upon our standard of review. However, it is critical not to lose sight of the fact that the 1989 Act was intended to also compensate "underemployment." It is crystal clear that the Legislature intended that SIBS be paid in cases where people were working part time. Although the hearing officer holds that there was "no" medical evidence that the claimant was limited to 20 hours a week, I believe that Dr. B's assessment of the FCE can reasonably be read as his indication that claimant's part-time work is commensurate with her ability. The FCE was essentially invalid because of the claimant's severe (and bona fide, because there were no indications of fakery) physical limitations.

_____
Susan M. Kelley
Appeals Judge