APPEAL NO. 991972

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 9, 1999, a contested case hearing (CCH) was held. With respect to the only issue before her, the hearing officer determined that respondent's (claimant) underemployment for the ninth and 10th compensable quarters was as a direct result of her impairment, that claimant had attempted in good faith to obtain employment commensurate with her ability to work and that claimant was entitled to supplemental income benefits (SIBS) for the quarters at issue.

Appellant (carrier) appeals, basically contending that claimant's efforts at self-employment were "not reasonable nor practical," that claimant was physically able to return to her prior employment as a secretary/receptionist and that the hearing officer (and claimant) failed to properly allocate expenses of the business. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, adding information not presented at the CCH, and urges affirmance.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable (low back) injury on _____, that claimant has a 19% impairment rating, that impairment income benefits were not commuted and that the filing period for the ninth compensable quarter was from November 21, 1998, through February 19, 1999 (old rules), with the qualifying period for the 10th compensable quarter being from February 6, 1999, through May 7, 1999 (new SIBS rules).

Claimant testified that she had been employed as a secretary/receptionist and that she sustained a low back injury removing paper from a printer. Claimant has not had

surgery but did receive a "chymopapain injection" in 1995. Claimant was apparently released to return to work in 1996 with restrictions to avoid prolonged periods of sitting and to be allowed to stand and move about "at least 10 to 15 minutes every hour." A 1997 note from claimant's treating doctor states claimant "was let go from her job last year because of some restrictions" of not sitting for prolonged periods and that claimant has worked with the Texas Rehabilitation Commission "and has tried to apply for many jobs without any luck because of her previous back problems." The doctor's note recites that claimant has "started her own business raising and selling birds" and approves of that business because claimant "can pace herself and it does not require a lot of sitting which is her major problem." A functional capacity evaluation (FCE), performed on July 19, 1999 (after the quarters at issue), summarizes that claimant "is fully capable of continuing her employment in her own private business in pet supply" and established a 20-pound lifting restriction with avoidance of "bending and twisting movements at the same time." Other portions of the FCE are more specific as to exactly what claimant's physical capabilities are. Claimant was assessed as being able to work at the light physical demand level.

Claimant testified that she initially sought employment as a secretary/receptionist but was unable to obtain employment in that field because of her restrictions. Claimant then decided to pursue an earlier hobby into a self-employment enterprise in the aviary business. Subsequently, claimant's husband left his full-time employment with another employer and worked with claimant in the aviary business where claimant (and her husband) kept and sold birds, cages, feed and related supplies. Claimant testified that her husband did the heavy labor of building the store, lifting bags of feed and attending to Spanish-speaking customers, while claimant did 75% of the sales work, attended to the care and feeding of the birds and conducted "show and tell" workshops. Claimant's testimony and documentary evidence establish how income from the business was calculated. Basically, claimant said that she conducted an inventory only once a year (with apparently a running inventory throughout the year); that she took total sales for the given period, subtracted expenses (cost of birds, feed and supplies) and credits, to arrive at a "gross profit" figure and then divided that figure in half (attributing half of the income to her husband) in calculating her earnings. Claimant said that some weeks there might be no "gross profit" or even a negative figure; however, for the ninth quarter claimant's earnings were $891.28 and for the 10th quarter her earnings were $1,489.32.

The hearing officer, in her Statement of the Evidence, commented:

> It is noted that even had Claimant not reduced her earnings by 50%, business's total earnings for both quarters is still less than 80% of Claimant's [AWW]. As such, Claimant has met her burden of showing that she was underemployed during the qualifying periods for the 9th and 10th compensable quarters as a direct result of her impairment.

The hearing officer also commented that both claimant's treating doctor and "the RME [required medical examination] doctor, believe that [claimant's] self-employment business

venture, and the activities she performs in that regard, are well within her job restrictions." The hearing officer further comments:

> In the instant case, Claimant has shown that she and her husband are making every effort to maximize the business. It is clear that the profits of the business are increasing from quarter to quarter, and that Claimant is actively taking steps to increase the profitability of the business. She testified that she has expanded her business by increasing inventory and selling supplies as well as birds. Further, she has taken steps to increase community awareness of her business through advertisement and having community groups out to the business for "tours."

Carrier, in its appeal, contends that claimant's efforts, while commendable, "from a business perspective are not reasonable, practical, nor proper." Carrier states that the "Appeals Panel must determine whether the position taken by [claimant] in operating this business at the Carrier's expense is reasonable." We disagree with carrier's interpretation of what the Appeals Panel's function is. Our standard of review is to determine whether the hearing officer's decision is incorrect as a matter of law or not supported by sufficient evidence or stated conversely 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). We hold that the hearing officer's decision is not incorrect as a matter of law and review the decision to see if it is supported by sufficient evidence.

The Appeals Panel has held that a claimant may establish the required good faith effort through attempts at self-employment. *See* Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. Where a claimant seeks to establish a good faith effort through self-employment commensurate with the ability to work, a hearing officer may consider the nature of the self-employment and the number of hours worked in the venture to determine if the endeavor was entered into to receive wages or an income or was more of a sham to create the appearance of a good faith employment effort. Pertinent to whether the self-employment is good faith, the hearing officer may consider what business records the claimant has, the number of customers and efforts to attract customers and the general nature of the business. As we observed in Texas Workers' Compensation Commission Appeal No. 982820, decided January 11, 1999, where it can be sufficiently demonstrated that a prior side activity has indeed become a legitimate self-employment function for the purposes of the good faith attempt to obtain employment commensurate with the ability to work, then such activity can be appropriately evaluated in determining the entitlement to SIBS. In this case, the hearing officer evaluated the evidence, as demonstrated in her Statement of the Evidence, concerning the aviary business and concluded that claimant had met her burden of proof.

Whether claimant's aviary business was reasonable to maintain two individuals (a family business) and whether claimant followed sound and prudent business practices were factual determinations for the hearing officer to resolve. We have many times noted that

the 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. 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, *supra*; Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Carrier also takes issue with the hearing officer's statement that the profits of claimant's aviary business are increasing from quarter to quarter and that claimant is taking steps to increase the profitability of the business by introducing "gross profit" figures from prior quarters which were not introduced or made part of the record in this case. We note that claimant, in her response, also adds information which was not presented at the CCH. As such, we decline to consider information, clearly available at the time of the CCH, offered for the first time, in this case, on appeal or in claimant's response.

Carrier also asserts reversible error in that the hearing officer failed to insist that claimant prove the proper allocation of expenses to a particular quarter and require claimant to prove "the actual cost of goods sold. . .and that the inventory purchased by [claimant] to expand her business not be attributed to the cost of goods sold during that quarter." That may well be a correct technical accounting principle, however, the issue before the hearing officer was whether claimant's aviary business met the statutory requirements of a good faith effort to obtain employment commensurate with claimant's ability to work and whether the claimant's underemployment was a direct result of her impairment. The issue was not whether claimant had complied with all the technical accounting principles of a business. The hearing officer discussed how claimant's aviary business met her restrictions and how both the treating doctor and RME doctor (who ordered the FCE) believed claimant's self-employment was within her restrictions and ability to work, and concluded that claimant was entitled to SIBS for the ninth and 10th compensable quarters.

We have reviewed the evidence and conclude that the determinations of the hearing officer are supported by sufficient evidence and that there is no legal error. Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge