

APPEAL NO. 000219

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 January 24, 2000. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters of July 16 through October 14, 1999, and October 15, 1999, through January 13, 2000, respectively. The hearing officer determined that the claimant is entitled to SIBS for the second and third quarters. The appellant (carrier) appeals, requesting that the Appeals Panel reverse the hearing officer's decision. The appeals file contains no response from the claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in making the "good faith" finding in this self-employment SIBS case. It asserts that claimant did not make a good faith effort to search for work commensurate with her ability to work.

The hearing officer's decision sets forth fairly and adequately the evidence in this case and it will only be outlined here. Briefly, claimant testified that she is a self-employed physical therapy assistant. She said she sustained a compensable injury to her neck and right shoulder on _____, while working for (company). She testified that at the time of her injury she worked with patients who needed a high level of care, including physical lifting. She said she is now self-employed and that she receives referrals to work with patients who are more independent and self-sufficient, but who need some rehabilitation therapy services in the home. She said she received referrals during the filing period from two companies she works for regularly and that she earned \$3,477.00 during the filing period for the second quarter and \$3,214.20 during the filing period for the third quarter. Claimant's average weekly wage (AWW) is \$596.00. Claimant said she is also on the list to receive referrals from other companies that use physical therapy assistants.

In a 1998 medical report, Dr. R stated under "history" that claimant is "status post-cervical disc injury . . . as well as right shoulder impingement syndrome with decreased range of motion of the right shoulder . . ." and that claimant is being treated for pain management by Dr. C. In a May 20, 1999, work status report, Dr. C stated that claimant may return to work for eight hours per day with the only restriction of "no lifting, pulling, or pushing greater than 22 pounds." Claimant's 1999 functional capacity evaluation (FCE) report indicated that she could do full-time, light-duty work. Claimant said she sometimes turns down work if it is with a patient who requires a high level of care involving lifting that she is unable to perform.

The hearing officer determined that: (1) during the two filing periods in question, claimant attempted in good faith to obtain employment commensurate with her ability to work; (2) her underemployment is a direct result of her impairment; and (3) claimant is entitled to second and third quarter SIBS. The hearing officer noted that claimant earned more money during the second and third quarter filing periods than she did in the first quarter filing period. Claimant received first quarter SIBS, also.

Pursuant to Section 408.142, an employee is entitled to SIBS if on the expiration of the impairment income benefit period the employee: (1) has an impairment rating of 15% or more from the compensable injury; (2) has not returned to work or has returned to work earning less than 80% of the employee's AWW as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefit . . . ; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(1) provides that a good faith effort has been made if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work." A claimant may demonstrate that she has met the good faith and direct result criteria for SIBS even though she is self-employed and has not sought employment with a third party. Texas Workers' Compensation Commission Appeal No. 992932, decided February 11, 2000; Texas Workers' Compensation Commission Appeal No. 950814, decided July 3, 1995. The fact that a claimant does not attempt to obtain employment, other than employment in her own business, is not dispositive regarding her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. We have indicated before that a claimant is not required to seek employment from third parties versus self-employment to qualify for SIBS. The hearing officer may consider the facts of each case and particularly whether the claimant demonstrated that she made good faith efforts to secure business. Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; see *also* Appeal No. 960188, *supra*. Whether the claimant demonstrated good faith efforts to solicit business is a fact question for the hearing officer to determine.

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 is conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when, as here, the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, claimant testified about her restrictions, her work as a self-employed physical therapist assistant, and her efforts to obtain related work. Claimant said the hourly compensation is not paid for hours spent performing such tasks as: (1) completing necessary paperwork to ensure that she and the company with whom she contracts are

paid; (2) driving from job to job; and (3) consulting medical care providers and others about the patients' treatments. There was evidence from which the hearing officer could determine that those tasks are essential to claimant being able to maintain her self-employment that is within her restrictions as a home physical therapist. We conclude that the hearing officer's good faith determination is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain.

Carrier also contends that the hearing officer erred in determining that claimant's underemployment is a direct result of her impairment. Carrier asserts that the reason that claimant is earning less than 80% of her AWW is because the rate of pay for the type of work she does has decreased. The hearing officer determined that claimant sustained a serious injury with lasting effects that prevented her from returning to the work she did before her compensable injury. There was evidence that claimant was under a 22-pound lifting, pushing, and pulling restriction and that she is now limited to working with patients who do not require a high level of care. There was evidence from which the hearing officer could determine that this contributed to claimant's underemployment. See Texas Workers' Compensation Commission Appeal No. 961291, decided August 15, 1996. The claimant's testimony, the FCE results, and the evidence from Dr. C support the hearing officer's determination in that regard. The hearing officer's direct result determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge