APPEAL NO. 941065

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994. In that decision we remanded the issue of entitlement to lifetime income benefits (LIBS). The remand was predicated on our uncertainty as to whether the hearing officer had applied the correct legal standard in determining whether the respondent (claimant herein) had suffered total loss of use of her legs. We asked on remand for specific findings by the hearing officer as to whether the claimant's legs by reason of her injury no longer possessed any substantial utility and whether by reason of her injury the condition of her legs are such that the claimant can get and keep employment requiring the use of her legs.

The hearing officer, determined that as there was ample evidence presented at the original contested case hearing (CCH) regarding the question posed by the Appeals Panel on remand, and as the remand only required the application of the evidence to a legal standard, there was no need for a hearing on remand. The hearing officer closed the record on July 21, 1994, and issued a decision on remand on July 25, 1994. The hearing officer found that the condition of the claimant's legs as a result of her injury is such that she cannot get and keep employment that requires the use of legs and concludes that the claimant is entitled to LIBS.

The appellant (carrier herein) files a request for review arguing that the claimant does not meet the statutory criteria for entitlement to LIBS, that some of the findings of the hearing officer are against the great weight and preponderance of the evidence and that the Appeals Panel was incorrect in remanding the case in the first place. The claimant replies that there is sufficient evidence to support the findings of the hearing officer and that he applied the correct legal standard under the 1989 Act.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The facts of this case are set out in our decision in Appeal No. 94689, *supra*. We will not rehash all the facts at this point, but merely summarize those that are important in the present appeal. The claimant, who spoke limited English and had a sixth grade education, had worked for the employer for 15 years in the janitorial department when she slipped and fell on a wet floor injuring her back and left wrist on _____. She originally underwent back surgery on December 26, 1991, after which she was unable to stand. After a second surgery and extensive rehabilitation, the claimant has only very limited use of lower extremities. The claimant testified that she also suffers from incontinence and sexual dysfunction. The partial loss of use of leg muscles has also led to the progressive turning in of her toes and rotation of her feet due to the imbalance of the muscle pull in her legs. The claimant has been fitted with ankle foot orthoses and testified

that with these she can walk short distances on level surfaces with crutches.

The claimant's treating doctor certified on a Report of Medical Evaluation (TWCC-69) dated December 31, 1992, that the claimant reached maximum medical improvement (MMI) on December 30, 1992, with an impairment rating (IR) of 75%. The carrier disputed this IR and a the Texas Workers' Compensation Commission (Commission) appointed Dr. O as the designated doctor. On a TWCC-69, Dr. O certified that the claimant had reached MMI on December 30, 1992, with a 47% IR.

Dr. V, a rehabilitation specialist, has expressed the opinion that the claimant cannot perform jobs that require carrying, lifting, pushing or pulling, or that require long standing or walking. He has stated that she cannot handle stairs, public transportation or uneven ground, and will be severely limited in her ability to walk even a few feet on even ground.

On remand the hearing officer's Findings of Fact and Conclusions of Law include the following:

FINDINGS OF FACT

6. Claimant suffered denervation in the muscles served by the right L5 and S1 nerve roots which resulted in loss of function in those muscles as well as sensory loss in her bowel and bladder functions.

7. Although Claimant's L5 and S1 nerve root denervation does not cause total loss of function in her lower extremities, such denervation severely limits her ability to perform most normal employment functions such as carrying, lifting, pushing, pulling, standing for long periods and walking.

8. Claimant has not suffered permanent and complete paralysis of both legs and her legs still possess some substantial utility as members of her body.

9. However, the condition of Claimant's legs as the result of her injury is such that she cannot get and keep employment that requires the use of her legs.

CONCLUSIONS OF LAW

3. Claimant's injury entitles her to lifetime income benefits because she cannot get and keep employment that requires the use of her legs as the result of the injury.

The carrier argues that the hearing officer's Findings of Fact Nos. 6, 7, and 9 are against the great weight and preponderance of the evidence. In determining any attack on the factual sufficiency of findings by the hearing officer we must be careful to apply the correct appellate standard. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard we cannot say that there was insufficient evidence to support the hearing officer's Finding of Fact No. 6. There is evidence in the record to indicate that the claimant suffers from sensory loss in her bowel and bladder functions. The hearing officer as the finder of fact can choose to believe this over any contrary evidence in the record. Further, by doing so the hearing officer is not failing to give presumptive weight to the opinion of the designated doctor as required by the 1989 Act. The hearing officer is only required to give presumptive weight to the opinion of the designated doctor regarding MMI and IR. *See* Section 408.122(b); Section 408.125(e). We have held that the opinion of the designated doctor is not given presumptive weight on the question of the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94105, decided March 7, 1994. We have in fact held that the extent of injury is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Nor does the designated doctor definitely state that the claimant had no sensory loss in her bowel and bladder functions, but states that any such loss was subsumed in his IR. Further, we note that the hearing officer's Finding of Fact No. 6 on remand is the exact Finding of Fact No. 6 which the hearing officer made in his original decision and which the carrier did not appeal prior to remand.

Nor can we say that the hearing officer's Finding of Fact No. 7 was against the great weight and preponderance of the evidence. There is certainly support for it in the testimony of the claimant as well as Dr. V, not to mention the hearing officer's ability to personally view the claimant's physical state at the CCH. The carrier attacks Dr. V's

credibility in its appeal. Under the proper standard of appellate review discussed *supra*, this is an issue for the hearing officer. Nor do we find that the hearing officer's Finding of Fact No. 8 contradicts his Finding of Fact No. 9. The hearing officer in Finding of Fact No. 8 states that the claimant's legs possess some substantial utility as members of her body as they are not completely paralyzed. Lack of complete paralysis certainly does not preclude a state of severe limitations. In other words one need not be completely paralyzed to have severe limitations.

The carrier's attack on the hearing officer's Finding of Fact No. 9 is very similar to its attack on Finding of Fact No. 7. Essentially the carrier argues that Dr. V cannot be believed and that Finding of Fact No. 9 contradicts Finding of Fact No. 8. Again it is the province of the hearing officer as finder of fact to judge Dr. V's credibility. Nor does a finding of lack of complete paralysis contradict a finding that the condition of the claimant's legs preclude her from working.

The carrier argues that it is totally beyond its comprehension that a claimant who is not totally and permanently paralyzed can be entitled to lifetime income benefits under Section 408.161. Perhaps a closer reading of our original decision remanding this case, Appeal No. 94689, *supra*, and the authority cited therein would prove enlightening. We basically stated in Appeal No. 94689 that Section 408.161 is virtually identical to pre-1989 law regarding LIBS. Applying the rule of statutory construction that it can be implied from the fact that the legislature chose not to change this language that the legislature did not desire to overturn prior court interpretations of this language, we interpreted Section 408.161 exactly the way that previous Texas courts had always interpreted the same language. We also pointed out that this view that the legislature did not intend in 1989 to change the prior law regarding lifetime income benefits was supported in a commentary on the 1989 Act. *See* 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 at 4-134, 5 (1991).

Under prior law "total loss of use" of a member of the body exists whenever by reason of injury such member no longer possesses any substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member. Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204,206 (Tex. 1962). In the present case the hearing officer found that the claimant did not meet the first prong of this disjunctive test, but that the claimant did meet the second prong. This was sufficient to support a decision that the claimant is entitled to LIBS.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge