APPEAL NO. 951886

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 July 6, 1995. The record in the case was held open and closed on August 31, 1995. The issue to be determined was whether the claimant was entitled to lifetime income benefits (LIBS), due to total loss of use of both feet, or one hand and one foot.

The hearing officer rendered a conclusion of law that the claimant was not eligible for LIBS on the date of the hearing. From what can be determined from the sparse discussion and findings of fact, the hearing officer's conclusion from the medical records was that claimant's condition fluctuates, and his filing of a claim for LIBS was "premature."

The claimant has appealed the determinations, arguing that his claim is not premature and he has demonstrated through the preponderance of the evidence that he has total loss of use of both feet at or above the ankle, or, alternatively, total loss of use of one foot and one hand, as that concept has been developed in the case law, and is eligible for LIBS. Claimant argues the facts that he believes are in favor of his claim. There is no response from the carrier.

DECISION

We affirm, as reformed, the hearing officer's conclusion of law that the claimant is not eligible for LIBS.

It was undisputed that the claimant was severely injured in a broadside motor vehicle collision, in which the left side of his vehicle took the force of the collision, on _____, while employed by (employer). He was 24 years old at the time of the accident. His injuries included closed head trauma, neck and jaw injuries, fractured ribs, left shoulder injuries (there is a difference of opinion in the evidence as to whether he fractured his shoulder or not), bilateral fractured femurs (thighs), tibial plateau fractures, bilateral knee injuries, and back, neck, and left wrist injuries. Claimant testified that he had multiple surgeries, including insertion of support rods into his femurs, screws in his left knee, arthroscopic surgery on his knees, left wrist surgery, and surgery to remove metal parts (including the rods) because he had an adverse reaction to them. Claimant said that after his first femur rod was put into his left thigh in Texas, he was urged to walk prematurely, resulting in his leg collapsing and twisting. His left leg ended up three inches shorter as a result, and he had further surgery to straighten out and lengthen his leg (including bone grafting). Claimant moved to (state) a few weeks after the accident and this is where he still resided at the time of the CCH. Claimant's treating doctor at the time of the CCH was Dr. H, an orthopedic surgeon. Claimant had not had surgery on his left shoulder, although he said it had been considered, claimant said he did not want to have any more surgery.

Of most relevance to claimant's claim for benefits was his testimony and medical evidence most recent to the hearing, upon which we will focus for purposes of this decision. Claimant stated that his left shoulder tended to spontaneously dislocate around seven to eight times a week. He stated that his left knee continued to be unstable and he had been told that there was little that could be done for it. Claimant said that because of his left knee instability, his right knee had become worse through altered gait. Claimant's self assessment of his ability to stand, walk, or sit for eight hours, or engage in any combination of those activities for eight hours a day, was bleak. He experienced bad pain, and muscular tensing, in his legs. He agreed that he was able to use his feet in order to drive a car. He said that he usually went barefoot because shoes hurt his feet. Claimant agreed that he built model cars using both hands, although he asserted that he did this no more than one hour a week. He did not think he could walk around for more than half an hour. When asked by the hearing officer how he spent his day, he stated that he lived near the beach and sat on the beach or in the water a lot, or paddled around on a "boogie" board. While most of claimant's work experience had been in auto glass installation, he stated that he had obtained his high school equivalency two years after his accident.

Dr. H, in a deposition given June 26, 1995, stated that claimant's present primary problems involved his left knee, and he said that the left leg was unstable as a result. He agreed that the anterior and posterior cruciate ligaments were intact. What claimant had was a comparatively less commonly-encountered damage to his posterior lateral corner complex of ligaments, for which there was no easy replacement option. Dr. H stated that claimant had "posterior rotatory instability." Dr. H agreed that this caused a characteristic altered gait. Dr. H stated that bracing would not alleviate this type of instability.

Dr. H stated that while the right knee was not normal, and claimant had intermittent problems with it, that claimant's right leg was a "good, reliable leg" which claimant could use almost as well as a normal person could. The right and left femural and tibial fractures were basically healed and "without real event." Dr. H said that he was a knee specialist and was not that familiar with the status of claimant's left shoulder, although he had evaluated the upper extremities. Dr. H agreed that claimant's left shoulder was loose and subject to easy dislocation. Because claimant had had so many surgeries in the past, Dr. H indicated that he preferred to wait before undertaking arthroscopic surgery on his shoulder. Dr. H said that the condition of claimant's left shoulder had been basically "status quo" since 1991. He said that claimant was right-handed.

Dr. H was aware that Dr. T had performed surgery to alleviate compression of the median nerve in claimant's left wrist, but that claimant still had weakness and an abnormal grip. He indicated that he had not been primarily responsible for treatment of that problem. Dr. H said that claimant had not complained to him about his right arm.

Dr. H, asked to comment about claimant's abilities given his injuries, said that claimant could stand with no problem; walk limited distances on even ground (limited primarily to his left, and not right, knee); would have no problem sitting; could engage in only limited stair climbing; could alternately sit, stand, and walk; would not be able to climb ladders; could operate accelerator and brake pedals on cars or equivalent pedals on foot-activated machinery; and could probably lift up to 20 lbs frequently, and only occasionally to 40-50 lbs. Dr. H doubted that claimant could ever run, or throw a baseball or golf (as the latter activities would require pivoting). Claimant could not crawl, stoop, or bend. He assessed that claimant could do assembly line work in a seated position, and that his fine motor skills and ability to work with his hands had not been affected. Dr. H felt that he could use a phone, type, or operate a cash register. Asked specifically if claimant could operate as an estimator, Dr. H said he would be at risk walking around on uneven ground. He agreed that claimant had more function of his legs than a quadriplegic would have.

Ms. F, a vocational consultant for an adjusting company, testified by telephone at the hearing; a copy of her report was in evidence. She stated that she had interviewed claimant, reviewed his medical reports, and discussed his physical capabilities with Dr. H (who she said was her primary source of information for what claimant was able to do physically). She stated that when she attempted to discuss with claimant his day-to-day functions or subjective complaints, he declined to answer, citing that he was so advised by his attorney. Ms. F noted that claimant took Advil for pain. She noted that as of June 23, 1995, Dr. H had released claimant to work full time in a sedentary-medium status. She observed weight lifting apparatus in the dwelling that claimant shared with his mother. Ms. F's report lists numerous jobs in the geographical area of claimant's residence that were within his capabilities, which capabilities included ability to use his feet and legs. Claimant disputed his ability to do these jobs; he noted, for example, that to the extent a security guard job might encounter physical confrontation with intruders, he would be unable to do this. He also noted that a parking lot attendant (another of the recommended jobs) would be confined in a small booth and he could not be so confined.

Claimant presented a report dated June 27, 1995, from Mr. R, Ph.D., a consultant, who stated that claimant had a capacity prior to his accident to perform 33% of available Texas jobs, and a capacity to perform 3.5% after his accident. Some of the assumptions made by Mr. R include (in addition to knee problems and upper left extremity) that claimant had a permanent disability to the right femur, that claimant had received an impairment rating (IR) of 40%, that he had a herniated disc with possible radiculopathy, and reduced effectiveness due to chronic pain, susceptibility to psychological depression affecting coping skills, and inability to transfer skills to sedentary work from his previous work, Mr. R considered the employment practices of employer to hire those without physical problems and potential for reinjury. The report does not indicate that Mr. R interviewed claimant. The medical reports reviewed by Mr. R, with the exception of an early 1995 report by Dr. H, all preceded claimant's certification of maximum medical improvement (MMI) and IR of 40% which had been done July 6, 1994.

On June 26, 1995, Dr. L, an orthopedic surgeon who performed an independent medical examination (IME), stated that he would restrict claimant from lifting over 10 pounds or doing repetitive twisting movements with his left wrist. He stated that claimant should be able to operate a gas pedal and drive up to four hours a day.

Claimant submitted a pattern jury charge under old law concerning the definition of total loss of use:

> "TOTAL LOSS OF USE" of a particular member of the body exists whenever such member no longer possesses any substantial utility in the practical performance of its functions in the usual tasks of a workman, not merely in the usual tasks of any particular trade or occupation, or the condition of the injured member is such that the person cannot get and keep employment requiring the use of such member.

The Appeals Panel held in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, that the 1989 Act did not change the old law concept of "total loss of use." However, that decision adopted as the correct statement of the law the following:

> "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.

We disassociate ourselves from the hearing officer's observation that claimant's request for LIBS is "premature." The hearing officer had before him an issue to decide on eligibility for LIBS based upon the facts existent when the claimant chose to assert his claim. Claimant, having chosen this point in his injury to assert entitlement, asked that his claim be evaluated on facts as they existed by the time of the CCH. Given that every case is determined on the basis of facts that developed at the CCH, it was unnecessary for the hearing officer to qualify his finding that claimant was not eligible for LIBS "on the date of this hearing." There is nothing in the record to indicate that the decision of the hearing officer is not subject to ordinary principles of *res judicata*.

While reasonable minds could differ as to whether claimant's condition can accurately be described as "fluctuating," given the dispositive conclusion, we may imply the finding that claimant did not demonstrate to the satisfaction of the hearing officer that he had "total and permanent loss of use" of the requisite components of his body. *See* Texas Workers' Compensation Commission Appeal No. 931179, decided February 11, 1994. We can therefore affirm the decision that claimant is not entitled to LIBS, finding sufficient support in the record for this conclusion.

Claimant argued at the CCH that the analysis of whether claimant can get and obtain employment requiring the use of such member should not include analysis of whether claimant could do sedentary labor, because such weren't the occupations of workmen, or involve use of the legs. The carrier, for its part, argued that if there were any jobs claimant could do, then he did not have permanent and total loss of use that would qualify for LIBS. Both analyses appear to us to be extremes. More to the point in this case is that there is sufficient evidence, especially through the deposition given by Dr. H, that claimant has not sustained a total loss of use of either combination of extremities that would entitle him to LIBS, and that he is able to perform jobs which involve use of the affected limbs. We note that neither vocational consultant assessed claimant's job prospects as nonexistent.

Even if claimant had proven that he lost the use of his left leg, Dr. H assessed the soundness of the right leg as nearly normal. Notwithstanding left shoulder dislocation problems, claimant maintains his manual dexterity in both hands. We note that much of claimant's testimony concerned the fact that he experienced pain when he moved. While we do not trivialize the pain that has resulted from claimant's severe injuries, we cannot construe Section 408.161 as requiring a finding that one has lost the use of an extremity if such use is not pain free. (This is not to say that a case may not exist where severe pain impedes any use, just that this was not the case here). The hearing officer could consider that Ms. F's assessment of claimant's employability was based on more recent information than Mr. R's, as well as a personal interview.

Further, Section 408.161 clearly indicates that each limb must be evaluated on its own. If loss of use of one foot equated to loss of use of both, then there would be no need for a separate statutory category providing for LIBS if a combination of one foot and one hand were lost, as set forth in Section 408.161(a)(4).

For these reasons, applying the statute as interpreted by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, we affirm the hearing officer's decision and order that claimant is not eligible for LIBS; however, we reform the decision by striking the qualification "on the date of this hearing."

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge