APPEAL NO. 952100

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 10, 1995, a contested case hearing (CCH) was held with (hearing officer) presiding as hearing officer. Regarding the only issue before him, the hearing officer determined that as a result of a compensable injury the claimant has suffered the total and permanent loss of the use of both feet at or above the ankle and is entitled to lifetime income benefits (LIBS).

Appellant, carrier, appeals certain of the hearing officer's determinations contending they are against the great weight and preponderance of the evidence, alleging that claimant failed to prove that both feet no longer possess substantial utility and alleging that claimant failed to prove the condition of both feet precludes the ability to "get and keep employment." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant, a six-foot three-inch, 245-pound male, was employed by a company which makes railroad cars. On _____, claimant apparently was uncoupling a railroad car and the car rolled backward over his legs causing "severe multiple level crush injuries." Basically, claimant sustained an amputation of his right leg (as described by the hearing officer) midway between the knee and the ankle. The accident also amputated three of claimant's toes on his left foot and doctor's subsequently amputated all the toes on the left foot and performed extensive surgery (apparently four surgeries) on the left leg. Claimant testified to the extent of surgery, his pain, and what he could and could not do. The hearing officer was able to observe the injuries first hand. Claimant has a prosthesis on his right leg. Claimant testified that he has a limited ability to walk and stand, can only drive a car with an automatic transmission and has problems with his balance due to injuries to his left leg. Claimant uses a cane or wheel chair and does household work sitting on a type of bar stool.

Claimant's treating doctor is Dr. C and Dr. C's records and reports are in evidence. In a report of October 24, 1994, Dr. C states that he does not anticipate any additional surgery "because of his damage to the hind foot on the left . . . ." Dr. C assesses claimant with a 43% IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Maximum medical improvement (MMI) and the IR are not at issue. Dr. C's report of July 28, 1995, indicates claimant continues to have problems, has a brace, "had some socket trouble and is already back up to ten socks." In an affidavit of October 4, 1994, Dr. C, after being given the definition of "total loss of use," certified that claimant has the permanent and total loss of use of both feet.

Dr. F was a designated doctor who evaluated claimant. Dr. F, in a report dated March 27, 1995, commented as follows:

> I was asked to review [claimant] in reference to Subchapter I, [LIBS], Section 408.161 (2.) loss of both feet at or above the ankle; (b) for purposes of Subsection (a), the total and permanent loss of a body part is the loss of that body part.
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> Clearly, [claimant] qualifies for the loss of the right extremity above the ankle by the fact of the amputation below the right knee. The Chopart's amputation of the left foot, in combination with loss of range of motion [ROM] and ankylosis present, exceeds the AMA guides Value for amputation at or above the ankle. Therefore, it would be my opinion that the left foot would be considered "Permanent Loss of that Body Part."
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> Therefore, it would be my opinion that [claimant] qualifies, under Section 408.161, [LIBS] for the loss of both feet at or above the ankle.

Claimant was also examined by Dr. R, carrier's independent medical examination (IME) doctor who in a June 6, 1995, report comments:

> At the time with patient's left foot with amount of pain that he is in patient would probably actually do better with that of a BKA [an amputation through the tibia] on the left side. Indicated that this was something to be considered by the patient but at that time frame both the patient and his wife nearly broke down in tears.
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> As far as the [IR] patient [IR] would be at least that of 43% and [ROM] should be actually higher. However I do concur with [Dr. F] that patient should strongly be considered for that of lifetime benefits secondary to loss of both lower extremities, of both the ankle [sic]. Secondary to the right ankle is amputated, BKA amputation. The left leg would actually do better with an amputation I believe through the tibia and I think would actually [sic] the situation he is in now is worse than an amputation.

Section 408.161(a)(2) states that LIBS are paid for "(2) loss of both feet at or above the ankle." Section 408.161(b) provides that "For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part." Both parties, and the hearing officer for that matter, refer to Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, as being the authoritative Appeals Panel decision in this area. We agree. Appeal No. 94689 discusses the case law prior to the 1989 Act and the current provisions, noting the "two provisions are very similar." Appeal No. 94689 cites 1

MONTFORD ET AL., A GUIDE TO TEXAS WORKERS' COMP REFORM § 4B.31 AT 4-134-5 & n.468 (1991) and Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204 (Tex. 1962). The parties and the hearing officer have applied the law as establishing a "two prong" test that in order to sustain the burden of proof on the "total loss of use" of a body part for purposes of Section 408.161, a claimant must demonstrate that either (1) the body part no longer possesses any substantial utility as a member of the body, or (2) the body part's condition is such that the claimant cannot procure or retain employment requiring the use of that body part even if the injured part retains some utility. The Appeals Panel has held, in Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994, applying Seabolt that the test is "disjunctive" and a claimant need meet only one or the other prong of the test to be entitled to LIBS.

Carrier argues that claimant has not met the "substantial utility" prong because he is able to walk (with a cane), drive a car (with an automatic transmission), and engage in certain other activities. Carrier appears to contend that because claimant wears a prosthesis on his right leg which "enables him to undertake . . . [certain] tasks" that member still possesses substantial utility and in any event claimant still has utility of his left foot. Carrier argues that to meet the "substantial utility" prong one must "be permanently confined to a wheelchair." The Appeals Panel rejected that same argument in Appeal No. 941065, *supra*. (which incidently was the appeal on remand from Appeal No. 94689, *supra*), when the carrier in those cases argued that a claimant who is not totally and permanently paralyzed cannot be entitled to LIBS under Section 408.161. The Appeals Panel said that it was only necessary that the claimant prove "total loss of use." We similarly reject carrier's inferred argument that because claimant uses a prosthesis he does not have total loss of use just as we would in an analogy of a blind man who has a seeing eye dog to assist him as not really being blind because he can still function. Claimant clearly has the loss of his right foot above the ankle. In a somewhat unusual situation in the instant case, three doctors, including the carrier's IME doctor, have in essence stated that claimant has the total loss of use of both feet. In fact, the carrier's IME doctor even states the "left leg would actually do better with an amputation . . . through the tibia and . . . the situation he is in now is worse than an amputation." It is unusual to see such unanimity of opinion among a treating doctor, a designated doctor and a carrier IME doctor. Nonetheless, whether claimant has suffered the total loss of both feet at or above the ankle is largely a factual determination for the hearing officer, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We find that the hearing officer applied the correct standard in this case and that the hearing officer's determinations are supported by sufficient evidence.

Although our affirmation of the hearing officer on even one prong of the test is dispositive of the issue of whether claimant is entitled to LIBS, we nonetheless address the "employment" prong of the test as an appealed issue. Carrier contends that because claimant admittedly made no attempt to seek or obtain employment since the date of injury

he does not meet the requirement that claimant's condition is such that claimant cannot procure or retain employment requiring the use of that body part even if the body part retains some utility (which we affirmed above was not the case regarding the retention of some utility). The standard the Appeals Panel applied is stated in Appeal No. 941065, *supra*, as being:

> Under prior law "total loss of use" of a member of the body exists whenever . . . the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member. [*Citing* Seabolt.]

We would note that there is no statutory requirement of a "good faith" job search to meet this requirement as there is for the entitlement to supplemental income benefits (Section 408.142(a)(4)). Claimant can meet the requirement that he cannot "get and keep employment requiring the use of [his feet]" by his testimony and/or medical evidence. The fact that claimant did not actually seek employment requiring the use of his feet is only a fact that the hearing officer may consider in making his determination on this point. Probably of greater import to the hearing officer, as indicated in his discussion, was the fact that all the doctors seemed to agree that claimant had the total loss of use of both his feet. The hearing officer determined that claimant had also met the "employment" prong, finding that the condition of the remaining part of the left foot and ankle is such that the claimant cannot procure and retain employment requiring the use of that body part. We find sufficient evidence to support that determination in the claimant's own testimony and the doctors' medical reports. We would also note that an injured employee's "total loss of use" of both feet was established by the treating physician's testimony in a deposition in City of Austin v. Miller, 767 S.W.2d 284 (Tex. App.-Austin 1989, writ denied). In Navarette v. Temple Independent School District 706 S.W.2d 308 (Tex 1986) the Texas Supreme Court applied the standard it laid out in Seabolt and further held the fact that the injured employee in Navarette had returned to work "is not conclusive on her total loss of use."

Only were we to conclude that the hearing officer's determinations were wrong as a matter of law or were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb the hearing officer's determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and, consequently, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCLUDE:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge