APPEAL NO. 990639

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 commenced on September 22, 1998. The hearing officer reopened the record in order to obtain additional medical evidence. On September 30, 1998, the hearing officer, with the participation of the parties, requested that an independent doctor evaluate appellant/cross-respondent (claimant), giving both parties opportunity to pose questions to the doctor. A second session of the CCH was convened on February 2, 1999. The record was closed on March 1, 1999. With regard to the only issue before him, the hearing officer determined that claimant was not entitled to lifetime income benefits (LIBS) because the loss of use, or substantial utility, of the right lower extremity was "probably not permanent."

Claimant appeals, contending that the reports and testimony of his expert, Dr. W, establish that he is not "employable in any occupation that requires the use of his feet." Claimant urges that the opinion of the independent doctor appointed by the hearing officer, Dr. G, be read together with the questions posed by claimant's counsel and that the medical evidence does not support the hearing officer's decision. Claimant requests that we reverse the hearing officer's decision and render that he be awarded LIBS. Respondent/cross-appellant (carrier) appeals a portion of the hearing officer's order which orders carrier to pay benefits in accordance with his decision, arguing that the hearing officer only had authority to decide issues before him. Claimant responds to carrier's appeal, pointing out that the hearing officer's order was "boilerplate" that ensures that carriers do not assume they can stop all benefits (including medical benefits) when a single non-related issue is decided in their favor. Carrier responds to claimant's appeal with a reply brief, urging affirmance on the issue before the hearing officer.

DECISION

Affirmed.

The background facts are not in dispute. Claimant was a then 40-year-old electrician who sustained a compensable injury when he fell 20 or more feet off a crane, landing on the concrete pavement, on _____. Claimant sustained multiple injuries, including fractured wrists and back injuries, not at issue here, and fractures of both ankles. Claimant's treating doctor is Dr. S. Among other treatment, claimant had an open reduction of the left distal tibia-fibula fracture with screws fixing the bones in place. Complications developed, an infection set in, claimant developed osteomyelitis and eventually claimant's left foot was amputated in November 1996. There is no dispute that claimant has total loss of use of his left lower extremity. Claimant has a prosthetic left foot. Claimant also sustained severe injuries to his right lower extremity, which is the issue in this case. Claimant was assessed as having a 39% impairment rating (IR), 21% of which was due to the right leg/ankle. Carrier contends that claimant has not lost the "total use of" his right lower extremity or, in the alternative, the condition is not permanent and, therefore, claimant is not entitled to LIBS. In dispute is whether further surgery on the right ankle

would benefit claimant and to what extent. Claimant testified that he does not want further surgery on his right leg for fear of infection which would require amputation of his right foot.

Section 408.161(a)(2) provides that LIBS are paid until the death of the employee for the loss of both feet at or above the ankle. Section 408.161(b) provides that the total and permanent loss of a body part is the loss of that body part for purposes of Subsection (a). The claimant maintains that he is eligible for LIBS because he has lost the use of both of his feet as a result of his compensable injury. In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, we held that the standard for determining whether a claimant is entitled to LIBS under the 1989 Act is the same as it was under the old law. Citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), we stated that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, we noted that the Seabolt test is disjunctive and that a claimant need only satisfy one prong of the test in order to establish entitlement to LIBS. *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994. Texas Workers' Compensation Commission Appeal No. 951886, decided December 22, 1995, defined total loss of use under the 1989 Act as: "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. Finally, we have stated that the question of whether a claimant has suffered a total loss of use of a member is generally a question of fact for the hearing officer to resolve. Appeal No. 952100, *supra*; Texas Workers' Compensation Commission Appeal No. 952099, decided January 24, 1996; Texas Workers' Compensation Commission Appeal No. 941618, decided January 17, 1995.

Dr. W examined claimant and both submitted reports and testified at the CCH. In a report dated April 15, 1998, Dr. W stated "it can be said that for practical purposes he has a total loss of use of both lower extremities . . . ." In another report dated April 22, 1998, Dr. W opined that claimant's "injuries prevent him from procuring and retaining employment requiring the use of his feet." At the CCH, Dr. W testified that he is an orthopedic surgeon but has not done surgery since _____ and that he has only examined claimant but has not treated him. Dr. W testified that claimant "could not do work which requires him as a part of his work situation to stand or walk." Dr. W explained what he meant when he wrote that was that for practical purposes claimant has the total loss of use of both lower extremities (the amputation of the left foot is obvious) by saying that pain and instability of the right ankle and heel cause claimant to be "unable to get along without risking significant chance of falling . . . ." Dr. W, on cross-examination, stated that he was only a general orthopedist and had not specialized in treating orthopedic problems involving the feet and ankles. Dr. W also said none of the other doctors treating claimant were such specialists and that he would defer to such a foot specialist. Dr. W also testified that while surgery on the right foot was an option, he did not have an opinion regarding whether such surgery

was required. Carrier suggested, at the September 1998 CCH, that claimant be seen by an orthopedic foot specialist. Claimant elected to rely on the testimony of Dr. W.

The hearing officer, after closing the CCH on September 22, 1998, reopened the hearing in order to obtain additional medical evidence. Eventually Dr. G was selected to conduct an independent medical examination. Both parties posed questions to Dr. G. Among Dr. G's responses, admitted as Hearing Officer Exhibit No. 6, Dr. G states with reasonable medical probability:

> 1. [Claimant] is a viable candidate for a subtalar Arthrodesis, which has a 85% chance of solving the pain problem. It does not solve motion problems. He would continue to have a stiff foot, but the pain would be less and he could be on his feet more after this surgery than he is now.
>
> 2. [Claimant] would receive pain relief from this surgery where he wouldn't have excruciating pain and probably could get away from using a walking stick.
>
> 3. There is an 85% chance [claimant] would get the desired results of pain relief from this subtalar Arthrodesis.
>
> 4. [Claimant] at this time should not be considered to have a permanent condition since the surgery would be a viable alternate to the condition he now has in his right foot and ankle.

Dr. G suggested (as had Dr. W) some alternatives to surgery such as use of "an anterior/posterior shell." Dr. G also states that if claimant refuses surgery "then he would in my opinion be at a permanent condition at the present time . . . ." Dr. G goes on to comment on claimant's restrictions if he had surgery as being:

> 10. After [claimant] has undergone surgery if he elects to accept surgery he should in my opinion be able to be employed on a job where he is on his feet 30 minutes out of each hour. Carrying and lifting no more than 25 pounds ten times each hour. There are numerous employment opportunities with these type of specifications and in my opinion he would be able to obtain and retain employment with these restrictions. He would be able to use his right leg and foot in my opinion to drive motor vehicles, to climb stairs limited amount of time and to walk distances up to 100 yards two to three times per day.

On the other hand, in response to claimant's questions, Dr. G writes:

> [Claimant] has an injury at the present time which prevents him from procuring and retaining employment using his feet.

> [Claimant] has in my opinion lost the substantial use of both feet as a result of his _____ injury at the present time.

The hearing officer comments:

> According to [Dr. G], the Claimant is a viable candidate for additional surgical treatment; however, the Claimant has elected not to undergo further surgery at the present time. The Carrier contends, in large measure, that the Claimant's condition cannot be considered permanent because there is further medical treatment that could result in improvement to his right lower extremity.

Claimant, in his appeal, contends that the hearing officer, "despite a clear opinion from [Dr. W], chose to rely on an early report by [Dr. G]." Claimant points to responses from Dr. G which are, or appear to be, favorable to him. In this regard we have noted in Texas Workers' Compensation Commission Appeal No. 941190, decided _____, "it was appropriate for [the hearing officer] to consider how these opinions were procured . . . and their . . . nature against the background of more detailed medical reports . . . ." The fact that the hearing officer chose to give greater weight to the opinions of Dr. G, an orthopedic foot specialist, than those of Dr. W, who said that he would defer to a specialist, is a matter within the hearing officer's prerogative. We have frequently noted that where the evidence is in conflict, it is the hearing officer's duty to resolve those conflicts. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). That is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Claimant also refers to questions that were posed to Dr. G asking that Dr. G respond assuming that there is no reference to any prosthesis. Dr. G did so, commenting on a person's ability to "hop" around. As carrier has noted, the Appeals Panel in Appeal No. 951886, *supra*, held that:

> 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). [Emphasis in the original.]

Each limb is evaluated on its own and claimant has the burden of meeting one of the prongs of the Seabolt test to establish entitlement to LIBS. The hearing officer found that although claimant has lost "substantial utility" of his right lower extremity and has lost the "ability to procure and retain employment" using his right lower extremity, that loss is not permanent because there is additional surgery in the form of a subtalar arthordesis or other treatment "which might" reduce claimant's pain and restore some function to his right lower extremity. Those findings are supported by Dr. G's reports and the hearing officer could

certainly rely on Dr. G as opposed to Dr. W. We also affirm the hearing officer's standard language order and reject carrier's appeal that the benefits ordered paid were beyond the issues before the hearing officer for the reasons noted by claimant in his response.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur in the decision to affirm the hearing officer's determination that the claimant is not entitled to lifetime income benefits (LIBS). However, I would affirm the decision on another theory reasonably supported by the record in accordance with Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied). Specifically, I believe that the evidence is sufficient to support a determination that the claimant is not entitled to LIBS because he has not demonstrated loss of use of his right leg at or above the ankle, within the meaning of the 1989 Act and the Seabolt, *supra*, test. In my opinion, the hearing officer improperly considered the possibility that future surgery or treatment might improve the condition of the right leg in determining that the claimant did not sustain his burden of proving permanence. In the same way that the condition of the claimant's left leg is not considered taking into account the prosthesis, I do not believe that it is appropriate to attempt to evaluate the condition of the claimant's right leg based on the possibility that the condition of the leg may improve in the future. Rather, it seems to me that the condition of the leg at the time the application for LIBS is made is what must be considered in determining entitlement or non-entitlement to those benefits. However, as I stated above,

I believe that the hearing officer's decision can be affirmed because the medical evidence reasonably supports a determination that the claimant has not established loss of use of his right leg in this instance.

_____
Elaine M. Chaney
Appeals Judge