

APPEAL NO. 990673

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 February 22, 1999. The issues at the CCH were whether the appellant (claimant) was entitled to lifetime income benefits (LIBS) "based on the total and permanent loss of use of both hands and [sic] both feet"; whether the claimant sustained a compensable injury to her left knee, gastritis, and hyperthyroidism, in addition to the injury to her right knee, neck, and back on _____; and whether the respondent (carrier) waived its right to dispute injury to the left knee, hyperthyroidism, and gastritis by failing to timely contest compensability. The hearing officer determined that claimant is not entitled to LIBS based on the total and permanent loss of use of both arms and both feet, that she did not sustain a compensable injury to her left knee, gastritis, hyperthyroidism, and that the carrier timely disputed the injury to the left knee, the hyperthyroidism and gastritis. The claimant appeals asserting error in the hearing officer's findings of fact and conclusions of law that she was not entitled to LIBS and in his finding of fact and conclusion of law that she did not sustain a compensable injury to her left knee on _____. Claimant urges that the medical and other evidence established that her lower legs no longer possess any substantial utility as a member of the body or the condition of the lower legs is such that she cannot get and keep employment requiring the use of such member, and that the medical evidence shows continuing problems with her left knee and that it was caused by the _____, incident. No appeal is taken to the determinations that the claimant did not sustain injuries of gastritis and hyperthyroidism or that the carrier did not waive its right to contest the injury to the left knee, gastritis, and hyperthyroidism. The carrier urges that there is sufficient evidence to support the appealed determinations of the hearing officer and that the basis of the claim of loss of use of the hands and feet is her spinal and cervical injuries that resulted in surgery, and further, that the chronic pain claimant asserts in her extremities does not support an award of LIBS.

DECISION

Affirmed.

The claimant testified that on _____, she "ran her right knee into the edge of a wooden bench" and eventually went down on the floor on her knees. The sequella of this incident is somewhat unusual as over the ensuing months and years, the claimant had a number of surgeries on her right knee, her lower back, and the cervical area, and it is well-documented that she continues to have chronic pain in her extremities, particularly her legs, resulting from the spinal injury and surgeries. The carrier accepted compensability for the right knee, low back, and neck. The claimant stated that her current treating doctor is Dr. W. Regarding the injury now being claimed to her left knee, a medical report dated May 20, 1996, states the claimant is being seen on referral "for evaluation of a problem with her left knee" and goes on to state that "she has been walking four miles daily" and that "eleven days ago she experienced spontaneous onset of pain at the anterior medial joint line of the knee." A medical note of September 23, 1998, indicates that the claimant had a left knee

replacement, the diagnosis being "degenerative arthritis left knee." The first notice of a left knee injury was given by the claimant on July 12, 1996, when she noted left knee surgery on a July 12, 1996, Statement of Employment Status (TWCC-52) and the carrier timely disputed compensability of any left knee condition or injury on July 15, 1996.

The claimant described her multiple surgeries and testified that she did not believe she was able to work in any job requiring the use of her arms and legs, that she experiences pain in these extremities every day, and that she has many physical limitations. She stated she can only walk a limited distance, she cannot type or write as she used to, she can do some household activities but cannot do many household chores that she used to be able to do, and frequently cannot hold things, as her hands go numb. She acknowledged that she can drive a car and that she drove a distance of some eight miles to the hearing, that she lives in a two-story apartment which requires her to climb stairs, that she does some "hunt and peck" activity on a computer, that she does therapy when she can, and that she can move her fingers and toes and is able to dress herself. She stated that the knee, back and neck surgeries are the reason she cannot work; indicated that she never had any surgery to her hands or feet; and stated that she has been diagnosed with chronic pain syndrome, fibromyalgia, and reflex sympathetic dystrophy. She is 63 years old, currently receives Social Security disability benefits, and has received 401 weeks of workers' compensation benefits. Section 408.083 provides that an employee's eligibility for temporary income, impairment income, and supplemental income benefits terminates on the expiration of 401 weeks after the date of injury.

In November 1996, a Dr. S stated that the claimant would have permanent restrictions of no lifting over 10 pounds and not constantly, and restrictions on stooping, bending, crawling or climbing. A Dr. D opined in a report of December 12, 1996, that the claimant was not able to work since her lumbar fusion is unstable, she has loosening of her hardware and she has chronic pain. Dr. W, in an April 14, 1998, report states that the claimant "remains totally incapacitated so far as returning to work is concerned based on physical limitations and her need for constant use of narcotic pain medications." He pointed out she has very limited sitting tolerance. A Dr. WI reports an impression of chronic back pain/failed back syndrome and states in a note of April 8, 1998, that the claimant is unable to work due to pain and that this is not likely to change in the future.

The hearing officer determined that the claimant did not sustain a compensable injury to her left knee on _____. From our review of the evidence, we cannot conclude that this determination was 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). There was no complaint of any injury to the left knee until some five years after the incident of _____, and the medical records indicate it had a sudden onset during the time the claimant was walking some four miles a day. The condition was diagnosed as degenerative arthritis. This evidence is sufficient to support a reasonable inference, as made by the hearing officer, that the left knee injury or condition disclosed in 1996, was not causally connected to the incident of _____.

The hearing officer also determined that the claimant was capable of performing activities using her hands and feet that discounted a total loss of use and that the credible medical evidence did not support a total loss of use of both arms, both legs or any combination of the extremities. In this regard, he found that she could do such things as dress, groom, and feed herself; that she could walk (about a block); and that she could perform various household chores, climb stairs, and write (although she was not necessarily able to perform these various functions as well as she could preinjury).

Section 408.161, in setting out the requirements for LIBS, lists specific categories, e.g., the "loss of both feet at or above the ankle, loss of both hands at or above the wrist," or a combination thereof. A specific category is set out for spinal injuries and provides that LIBS are payable for "an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg." The hearing officer, in arriving at his decision, clearly set out the appropriate standard to be applied in the concept of "total loss of use" of a member of the body as existing "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." Pacific Employers Insurance Company v. Dayton, 958 S.W.2d 452 (Tex. App.-Fort Worth 1998, pet. denied), *citing* Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex.1962); Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994. Whether a claimant has established an entitlement to LIBS is generally a factual question for the hearing officer to decide. Dayton, *supra*; Texas Workers' Compensation Commission Appeal No. 960768, decided April 24, 1996. In Texas Workers' Compensation Commission Appeal No. 982890, decided January 1, 1999 (Unpublished), the Appeals Panel upheld the hearing officer's award of LIBS where the claimant suffered a compensable stroke injury and which, according to his doctor, resulted in right hemiparesis and the loss of use of one foot and one hand, although there was conflicting medical evidence as to the permanent and total loss of use of the members. The Appeals Panel noted that although a different fact finder may have reached a different result on the conflicting evidence, that was not a sound basis to reverse where the factual determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, the standard applied in reviewing factual determinations, and *citing* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) and Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 982995, decided February 4, 1999, and Texas Workers' Compensation Commission Appeal No. 972689, decided February 11, 1998.

The evidence indicates that the primary injury involved here related to the claimant's spine and its effect on the extremities. Regarding the claimant's spinal injury, there was no evidence that the spinal injury resulted in the permanent and complete paralysis of both arms, both legs, or one arm and one leg. Section 408.161(a)(5). The hearing officer further found from the evidence before him that the claimant "failed to meet her burden of proof and did not establish the requisite 'total loss of use' of any combination of extremities" and concluded that the claimant was not entitled to LIBS. We have reviewed the evidence and cannot conclude that the hearing officer's findings and conclusions are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Accordingly, we affirm the decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge