APPEAL NO. 990702

Following a contested case hearing (CCH) held on March 5, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant (claimant) is not entitled to lifetime income benefits (LIBS). Claimant has appealed, asserting that the medical evidence supported claimant's entitlement and that the hearing officer used an incorrect "standard of proof." The respondent (carrier) urges in response that the evidence sufficiently supports the challenged findings.

DECISION

Affirmed as reformed.

Claimant testified that on _____, while employed by (employer), he started to climb down from a punch press, slipped and fell on his right foot, twisting it and fracturing a bone; that he sought medical treatment, his foot was placed in a half cast, and he was referred to a specialist; that he continued to work at light duty but after about three months his employment was terminated because he could not do the work; that he has not since worked nor sought work; and that both he and his wife draw Social Security disability benefits. He further stated that his fractured foot bone healed but that he developed reflex sympathetic dystrophy (RSD) which he said is now called Complex Regional Pain Syndrome (CRPS); that Dr. D is his treating doctor for the CRPS and that he also sees Dr. M for that condition; that he sees a psychiatrist for depression; that he takes approximately 12 types of medications daily and wears two TENS units; that he exercises his feet by wearing two-pound weights around his ankles; that he does very little around the house and very little driving; that he cannot walk very far without stopping and resting; and that his wife pushes him in a wheelchair when he accompanies her shopping. Claimant also said that he is able to get in and out of bed without assistance; that he can usually shower and shave without assistance; that he sometimes needs help from his wife pulling on his trousers; and that he fixes his coffee, feeds the dogs, and gets his breakfast cereal.

Claimant further testified that he lives near a lake; that he has a pickup truck with oversized tires and running boards that he uses to pull his outboard boat and trailer; that he is "leery" about letting others drive the truck; that getting in and out of the truck is easier than getting in and out of an automobile; and that fishing has always been important to him and is his only hobby. As claimant put it, "I love the sport." He said that when he goes fishing, which he does at night to avoid the sun, he has a son or stepson along to help launch the boat at the ramp; that the boat has a trolling motor operated by foot pedals in addition to the steering wheel for the outboard motor; and that one of the sons operates the trolling motor. Claimant said he had not been fishing by himself since shortly after the accident. Dr. M's record of October 10, 1997, states that claimant went fishing the previous night and that "he is an avid fisherman when his physical condition permits."

Dr. M's extensive records reflect that commencing on September 21, 1993, he treated claimant with an implanted spinal cord stimulator (SCS), a back corset, and injections, and that claimant underwent numerous surgical procedures for replacement of leads and batteries and the reprogramming of the SCS.

Dr. K, who was apparently a designated doctor, signed a Report of Medical Evaluation (TWCC-69) on January 25, 1994, certifying that claimant reached maximum medical improvement in "February 1993" with a 52% impairment rating (IR). Dr. K's accompanying narrative report stated that following the foot bone fracture, claimant developed symptoms of increased tenderness to touch and pain of a burning nature which advanced in the right leg; that he was diagnosed with RSD in August 1991; and that his current activity level was sedentary and he was unable to walk more than 100 yards. Dr. K assigned a four percent rating for abnormal motion of the right foot and 50% for the RSD which combined to the 52% IR.

In an August 11, 1998, letter, Dr. M stated that claimant has extensive RSD and has required multiple SCS placement procedures and various revisions. Dr. M further stated: "He has pain in both lower extremities to the point where I believe that he has lost a substantial utility of his lower extremities as it relates to being able to procure an [sic] retain employment." Dr. M also stated that claimant has very believable pain patterns and requires multiple injections and many medications in addition to the SCS; that claimant's gait pattern is always antalgic and heavily guarded; and that he has "extreme problems in moving from one position to another."

Dr. D wrote on January 28, 1998, that claimant has CRPS which gives him severe pain with hypersensitivity in all four extremities and that he also has back pain and spasm and has had multiple procedures for the SCS. Dr. D further stated that he considers claimant totally disabled and incapable of performing any type of work including sitting, lifting, bending, or walking, and can think of no occupation in which claimant could be actively engaged. In a letter of November 12, 1998, Dr. D wrote that after recovery from the fractured metatarsal bone, claimant developed CRPS; that he is skeptical of any possibility of claimant's returning to work; that claimant has severe pain in his entire back and all four extremities and would not be able to carry out any function such as driving, sitting at a desk, or any type of physical labor; that claimant cannot take care of his house and can barely do the required activities of daily living which allow him to maintain hygiene; and that he considers claimant permanently and totally disabled and qualified for LIBS.

Dr. B, who, following a benefit review conference, was apparently directed to perform a required medical examination, reported on December 28, 1998, that claimant, then 43 years of age, complains of pain from his "head to toes," that his legs hurt the most but that his arms hurt also, and that he reports spending 90% of his days in bed. Dr. B stated that a functional capacity evaluation (FCE) was performed on December 23, 1998; that the report reflected that claimant was unable to complete all testing activities secondary to pain behavior as well as mechanical and strength deficits; and that it was felt that claimant was unable to perform any type of physical activity related to work, both in a

restricted work plane as well as an unrestricted work plane. Dr. B's assessment was CRPS with a severe psychological component. Dr. B further stated that it appears that claimant has CRPS which is the cause of his inability to work; that "it does not appear that the patient has lost a substantial use of his lower extremities as he is able to walk"; and that he "does not feel that [claimant] has any ability to work, both based on his pain as well as psychological component."

Dr. D wrote on February 23, 1999, that he reviewed Dr. B's report and the FCE report; that he disagrees with Dr. B's statement that the CRPS does not include claimant's legs since it started in the right leg and now involves all four extremities; that he agrees that claimant is totally disabled; and that claimant "cannot procure or retain any employment requiring the use of his legs." Dr. D also stated that CRPS commonly causes severe depression and anxiety disorders; that claimant manifests symptoms of both; and that these conditions should be seen as part of claimant's disease.

Section 408.161(a)(2) provides, in part, that LIBS are paid until the death of the employee for "loss of both feet at or above the ankle" and 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." In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, a case involving bilateral leg paralysis, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes, took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468, and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member. *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994, and Travelers Insurance Company v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). We cannot agree with claimant that the hearing officer applied an incorrect legal standard. In Finding of Fact No. 13, which is not appealed, the hearing officer states that "[u]nder the 1989 Act '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." Though not appealed, we note that in Finding of Fact No. 14, which essentially applies the definition in Finding of Fact No. 13 to claimant's legs, the hearing officer states the definition in the conjunctive rather than the disjunctive. Accordingly, we reform that finding to substitute "or" for "and."

Claimant has the burden to prove by a preponderance of the evidence that he is entitled to the relief sought. Texas Workers' Compensation Commission Appeal No. 92044, decided March 23, 1992. Claimant appeals findings that during the CCH he sat for over 70 minutes without evidence of discomfort, was able to rise from the chair, and ambulated in the building using a cane; that he admitted in cross-examination that he drives a big truck, needs to climb up in order to get in it, and does not allow anyone else to drive it; that he failed to meet his burden of proof and did not establish the requisite "total loss of

use" of both feet at or above the ankles, or both hands at or above the wrist, or any combination of the extremities; and that the credible medical evidence did not establish that claimant could not procure or retain employment requiring the use of his legs. Claimant did not appeal the finding that he owns a fishing boat, that fishing is his only hobby, that he goes fishing every now and then, and that he uses both feet to control the boat motor.

Whether the condition of claimant's extremities are such that he cannot get and keep employment requiring the use of his hands and/or feet is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941190, decided October 17, 1994, citing Appeal No. 941065, *supra.* The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer may believe all, part, or none of the testimony of any witness and the testimony of a claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). A hearing officer need not accept a claimant's testimony at face value. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Claimant relies on the reports of Dr. D and Dr. M and characterizes the report of Dr. B as "ambiguous." With regard to those reports, however, the Appeals Panel has often noted the general rule regarding expert medical witnesses, that is, that "[t]he opinion evidence of expert medical witnesses is but evidentiary and is never binding on the trier of fact" and that "[t]he trier of fact may accept or reject such testimony in whole or in part." Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer could consider the extent to which the reports of Dr. D and Dr. M were dependent upon the matters claimant reported as well as the subjective nature of his symptoms and conclude from all the evidence that claimant failed to prove by a preponderance of the evidence that he had permanently and totally lost the use of any of his extremities consistent with the definition of that term as discussed above.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge