APPEAL NO. 991085

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 March 22, 1999. The issue concerned whether the appellant, who is the claimant, was entitled to lifetime income benefits (LIBS) based on the total and permanent loss of use of his legs.

The hearing officer held that the claimant had reflex sympathetic dystrophy (RSD) in both legs but that this had not, at the time of the CCH, resulted in the permanent loss of use of both legs, and that the claimant was not therefore entitled to LIBS.

The claimant has appealed, arguing that the hearing officer failed to take into account the great weight of evidence in favor of loss of use of both legs. The claimant argues that the standard is whether he could hold down an eight-hour a day job that requires him to use his legs, not whether he has been able to obtain any employment in general. Although the carrier questioned the diagnosis of RSD during the CCH , it has not appealed the threshold finding of the hearing officer that the claimant has developed RSD. The respondent (carrier) simply responds that the determination of lack of LIBS entitlement involves fact determinations by the hearing officer that, in this case, are supported by the record.

DECISION

Affirmed.

The claimant developed RSD as the result of a back injury that occurred on _____. The issue concerned the extent to which the RSD resulted in total and permanent loss of use of both legs. The hearing officer's statement of the evidence is incorporated herein. We will only briefly summarize.

The claimant's treating doctor, Dr. H, testified as to the development and treatment of the RSD. The claimant's RSD was definitely diagnosed in May 1997 by a referral doctor. He stated that it was his opinion that the claimant was completely unemployable due to the effects of the RSD, and, speaking as a former company doctor, he would not certify such a person for employment. He said that it was not probable that the claimant would pass any pre-company physical. Dr. H agrees that there was no objective evidence of impingement in the claimant's spine.

Dr. H performed a functional capacity evaluation (FCE) on September 15, 1998. He agreed that the claimant had "some" ability to sit, stand, and walk, but that there was no FCE that would ever be able to predict an ability to work an eight-hour day. He noted that the claimant's pain level in this assessment was severe. Dr. H thus qualified his conclusion in this FCE that the claimant could work at a sedentary level. He pointed out that the claimant had a sedentary job and had been unable to tolerate it or was unable to perform

work as required by his employer, based upon his personal contact with "at least half" of the companies that the claimant had worked for over the years. Asked to identify the job he was talking about, Dr. H said it was the mail room job. There was evidence developed that the claimant may have exceeded his lifting restrictions in this job which brought on the onset of his symptoms. Dr. H said that the claimant's condition was permanent and that rehabilitation was unlikely "further than its already gone." He agreed that the claimant was going to school and going through retraining.

Dr. H agreed that the claimant had never been a surgical candidate. Dr. H described a "domino" effect in which the claimant's back pain became chronic pain and depression, and that antidepressants had further side effects. He said that he based his opinion of total loss of use on the fact that the claimant's bilateral RSD was such that he could not perform significant or meaningful work.

The claimant said he could walk, but not very far. He could groom and dress himself, and drive for about 30 minutes. His wife, however, had driven him to the CCH, and he had had two wrecks, due to the effects of his medication. The claimant said that his pain was getting worse, and that he was having mental and psychological problems, notably being around people, again due to medication. He said he was always in pain and did not feel he would ever get better. The claimant testified that he had gone for additional course work through Texas Rehabilitation Commission for one or two years, and that his physical condition while handling this was terrible. He said he may have put three years of training on his resumes in order to get the job. The claimant likewise indicated on his applications that he was capable of working full time because he needed a job.

Evidence was presented as to various jobs that the claimant had, as detailed in the hearing officer's decision. The claimant submitted copies of his job search contacts being made pursuant to claims for supplemental income benefits. There was evidence that the claimant either did not return from a layoff for one job, or that he voluntarily resigned from others, although it was his contention that he resigned for reasons relating to his chronic RSD pain.

Section 408.161(a)(2) states that LIBS are payable for "loss of both feet at or above the ankle." Section 408.161(b) states: "For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part." As set forth in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, and Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, either one of two "prongs" must be proven to establish total loss of use of a body part. The claimant must demonstrate that either (1) the body part no longer poses 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. Whether a claimant has proven that either fact is true is generally a factual determination for the hearing officer to make as the sole judge of the weight and credibility of the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Campos, *supra.* An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

For these reasons, we affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Alan C. Ernst
Appeals Judge