

APPEAL NO. 991580

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 July 2, 1999. She determined that the appellant (claimant) was not entitled to lifetime income benefits (LIBS); that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving a change of treating doctors to Dr. B; and that good cause existed to relieve the claimant of the effects of an agreement regarding travel expenses to see Dr. B. The claimant appeals the denial of LIBS, contending that this determination is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determinations regarding the change of treating doctors and reimbursement of mileage expenses have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

We address a procedural matter first. The carrier requested a continuance pending an examination of the claimant as approved by the Commission on June 22, 1999. The purpose of the examination was to provide medical evidence on the LIBS issue. After some discussion, the claimant, through his attorney, opposed the motion for a continuance and an alternate motion to keep the record open pending receipt of the report of the examination. The hearing officer then refused to grant either motion and, without objection from the parties, commented that she would decide the disputed issues "on what you came to the table with." Despite his objection at the CCH to the proposal of the carrier to allow additional evidence to be obtained, the claimant's attorney, nonetheless, submitted a reply to the carrier's response to the appeal to which was attached a report styled "Texas Rehabilitation Commission Assessment of Residual Functional Capacity" and signed by Dr. B on July 27, 1999. The 1989 Act does not authorize replies to responses to appeals. In addition, we generally do not consider evidence not presented at the CCH. Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992.¹

Section 408.161(a)(3) provides that LIBS are paid until the death of the employee for the loss of both hands at or above the wrist. Section 408.161(b) provides that the loss of use 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 hands 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

¹While we decline to consider this report on the substantive merits of the appeal, we note that Dr. B, in this report, indicates a functional limitation of the right hand, but provides no statement of any functional limitations of the left hand.

test for total loss of use is whether the member (here the claimant's hands) 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. The claimant has the burden of proving entitlement to LIBS. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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.

The claimant attempted to establish the loss of use of both hands through his testimony, that of his wife, and primarily the report of the designated doctor in this case.² The claimant testified that as a result of a fall on _____, he fractured both elbows and his right wrist. Apparently, he also sustained at least a compensable low back injury in the fall. He has undergone eight operations. He testified that he did not have "much movement" in his right hand; that he cannot do "anything" with it, and cannot fully extend either arm at the elbow. To a limited degree, he said, he can use his left hand, but it is "weak" and can only lift the equivalent of a glass of water. He also said he has very limited ability to perform basic hygiene. His wife testified that he can do little to nothing around the house because he lacks the use of his hands.

Dr. R, the designated doctor, completed a Report of Medical Evaluation (TWCC-69) on April 17, 1998. He noted from his examination of the claimant that claimant's right hand "constantly shakes at rest," his wrists have good range of motion (ROM) "in all planes," and that he has limited extension, but good flexion of both elbows. He believed that ROM measurements "gave a very inadequate impairment rating [IR] for his condition, and there are no tables that truly depict his condition." For this reason, he declined to base an IR on loss of ROM, but based it on loss of function of the right hand (90% upper extremity, 25% whole body), of the right elbow (70% upper extremity, 35% whole body), and of the left elbow (70% upper extremity, 20% whole body), which yielded a 37% whole body IR.³ Dr. B addressed no other comments to the loss of the use of the hands. In an undated statement, Dr. B wrote that while the claimant was unable to do any type of construction work, "[h]opefully he can be retrained to do something that is sedentary and to really determine this probably a functional capacity evaluation would be helpful." On March 1, 1995, Dr. F wrote that the claimant was doing "extremely well" with both elbows.

In her discussion of the evidence, the hearing officer accurately stated the law with regard to establishing entitlement to LIBS and it is not asserted otherwise by the claimant.

²The designated doctor was not appointed to address a LIBS issue.

³No challenge was made to the accuracy of the conversion to a whole body IR.

She considered the evidence and concluded that the claimant did not prove either loss of substantial utility of the hands or that his condition prevents him from obtaining and keeping employment. As noted above, whether either prong of the test for LIBS entitlement has been established was a question of fact for the hearing officer to decide. In her role as fact finder she could accept or reject in whole or in part any of 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). She was not persuaded by the claimant's evidence that he established entitlement to LIBS. In reaching this conclusion, she was not willing to infer from Dr. R's report that his IR was tantamount to a finding of no utility of the hands, particularly when Dr. R gave no supporting rationale for such a conclusion and, in all fairness, was never asked to. Claimant elected to rely on this evidence and was not successful in doing so. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant was not entitled to LIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge