

## APPEAL NO. 991951

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 August 10, 1999. She (hearing officer) determined that the appellant (claimant) was not entitled to lifetime income benefits (LIBS). The claimant appeals this determination, contending that it is unjust and against the great weight and preponderance of the evidence and that the hearing officer denied the claimant "the right to go through the medical records." The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

### DECISION

Reversed and remanded.

We address the procedural objection first. During the ombudsman's examination of the claimant about the history and treatment of the claimant's injury, the hearing officer asked the ombudsman if most of the information being elicited from the claimant was in the medical records. The ombudsman responded that it was. The hearing officer then suggested that it would be easier for the claimant if she did not have to undergo so much questioning, but then pointed out to the ombudsman that "if you feel it's necessary, I'm also not going to stop you." Later, the hearing officer made the same comment, but assured the ombudsman that she was not going to stop the examination. The examination continued and the claimant, through her husband, made extensive comments on the evidence in the closing statement. Under these circumstances, we cannot agree that the claimant's ability to present her case was compromised by the hearing officer.

In her appeal, the claimant also argues that the hearing officer overlooked key documents on which the claimant relied leaving the claimant to question whether the ombudsman included in the exhibits all the documents sent to him by the claimant. As more fully set out below, we cannot accept the claimant's assertion that the hearing officer overlooked documents in evidence. The claimant was assisted by the ombudsman and had the responsibility to insure that the documents offered into evidence on her behalf were complete. She bore the consequences of any such inattention. We find no merit in this assertion of error.

With regard to the substantive issue of LIBS entitlement, Section 408.161 provides for purposes of this case that LIBS are payable for loss of both feet at or above the ankle, or loss of both hands at or above the wrist, or the loss of one foot at or above the ankle and the loss of one hand at or above the wrist. The loss of the use of a foot or hand is the equivalent of the loss of that body part. 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 hand or foot 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, who was 59 years old at the time of the CCH, sustained a compensable cervical spine herniation injury on \_\_\_\_\_, when struck on the forehead by a falling box. She underwent a cervical fusion on March 1, 1993, which included the implantation of a titanium plate and titanium screws. She said that she woke from the surgery with double vision, dizziness, and difficulty in swallowing. She later developed swelling in the neck and face, balance problems and erratic high blood pressure. These problems have been attributed to the metal plate or to brain stem damage possibly occurring during the surgery. She later fell and injured her right knee. This subsequent injury is considered part of the compensable injury. The claimant also testified that she has difficulty dressing and performing most of the activities of daily living and obtains some relief by maintaining a supine position. In addition, the claimant has been diagnosed with thoracic outlet syndrome and bilateral carpal tunnel syndrome(BCTS).

In her discussion of the evidence, the hearing officer noted that this was "a very complicated case with voluminous medical records" and recognized the "catastrophic effect" of the claimant's problems on her life. She also commented that there was clearly evidence of loss of strength and motion, and numbness and tingling in the upper extremities, but that the evidence did not establish loss of use of the upper or lower extremities. The following findings of fact of the hearing officer supporting the determination that the claimant was not entitled to LIBS have been appealed:

#### **FINDINGS OF FACT**

5. The double vision has been treated with glasses inserted with prisms. Claimant's vision is limited to straight in front of her. The double vision also affects Claimant's balance.

The claimant appeals this finding, contending that it does not include a further finding that the claimant cannot wear corrective lenses "full time" because the weight of the lenses causes headaches and sinus pressures. Even when wearing the glasses, the claimant is very limited in what she can see around her. Without the glasses the claimant experiences

double vision. Accepting these comments as true and established by the evidence, we must stress, as did the hearing officer, that entitlement to LIBS is based on narrowly drawn criteria. These include loss of use of the hands or feet because of an injury inherent in or residing in these body parts. This does not include a lessening of the practical ability to use the hands or feet for extrinsic reasons such as poor eyesight.<sup>1</sup> The claimant has not established loss of vision or the total inability to wear these glasses. Under these circumstances, we find no error in the omission from this finding of fact a further statement that the claimant cannot wear glasses full time.

7. The swallowing problems have been linked to the metal plate used to fuse the cervical vertebrae. The metal plate has been found to contribute to intermittent swelling of Claimant's neck up and into her face.
8. Claimant has been diagnosed with [BCTS] and thoracic outlet which affects both upper extremities. EMG testing in 1998 indicated normal muscle tone and mass in all extremities with no evidence of atrophy. Claimant was noted to be capable of manipulating objects normally in both upper extremities.
9. Claimant has intermittent swelling in her lower extremities making it extremely difficult to walk at times

The claimant appeals these findings on the basis that the swelling in the extremities is not intermittent, but constant. She further argues that this constant swelling puts pressure on the nerves innervating the upper extremities. This has caused BCTS and thoracic outlet syndrome with resulting constant "loss of substantial utility of both arms." With regard to the legs, the claimant argues that the swelling is constant and "causes the skin to become so tight the capillaries burst and creates a lot of pain and discomfort." In partial support of this position, the claimant submitted photographs of her legs. We question whether photographs themselves can be the basis for the conclusion sought by the claimant. In any case, our review of the numerous medical reports reflects that they consistently show some loss of function in the extremities, but do not characterize this loss as total or substantial. Because the claimant had the burden of proving entitlement to LIBS and relied on this evidence, it was up to the hearing officer to weigh it and determine whether it satisfied the claimant's burden of proof. The claimant clearly believes that her evidence established that she had no substantial utility of either the hands or the feet. The hearing officer concluded that the evidence did not establish this. We do not believe that the evidence compelled a finding one way or the other.

What does concern us are the comments in Finding of Fact No. 8 about the EMG testing in 1998. In evidence is a report of August 14, 1998, of Dr. S in which he states the

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<sup>1</sup>The 1989 Act provides as an additional basis for LIBS the total and permanent loss of sight in both eyes. Section 408.161(a)(1).

results of his neurological examination, including EMG and nerve conduction testing, as follows:

The patient had normal muscle tone and mass in all extremities with 5/5 strength in proximal and distal muscles bilaterally. There was no drift. There was no evidence of atrophy or fasciculation noted. There were no tremors. The patient is capable of manipulating objects normally in both upper extremities.

After correspondence from the claimant's husband which challenged this conclusion, Dr. S wrote on July 28, 1999, that "I decided to withdraw the neurological consultation performed for EMG/NCV tests in its entirety . . . ." He also directed a refund of any money collected from the carrier for this consultation. It is not clear what Dr. S meant by withdraw, that is, whether he was just withdrawing his evaluation of the data or considered the test data invalid. The hearing officer does not comment on this "withdrawal" and appears to rely heavily and, perhaps, conclusively on the withdrawn report for reaching critical findings. In her appeal, the claimant asserts that the hearing officer erred in "completely overlooking this July 28, 1999, letter." We recognize that the hearing officer is the sole judge of the weight and credibility of the evidence pursuant to Section 410.165(a), and in her role as fact finder could accept or reject in whole or in part any of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. Findings of fact are subject to reversal on appeal only if they are against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Because there is no indication why she accepted Dr. S's evaluation in light of this later letter or what weight she gave the withdrawal, we reverse Finding of Fact No. 8 and the conclusion of law that the claimant is not entitled to LIBS, which appears to be substantially based on this finding, and remand this case for further consideration of the impact of Dr. S's "withdrawal" on the credibility of his initial report. On remand, the hearing officer should state whether she continues to rely on this report to support her conclusion of law on the issue of LIBS.

The claimant also asserts on appeal that the hearing officer improperly applied the law regarding entitlement to LIBS, that is, that she failed to recognize that a claimant need prove either loss of substantial utility or inability to get and keep employment using the foot or hand. Claimant argues that had the hearing officer applied the correct test, she would have concluded that the claimant proved loss of substantial utility. In her decision and order, the hearing officer stated the correct legal standard. Thus, we cannot agree that she has misapplied the law of LIBS entitlement in this case. We do, however, observe that that issue, as stated in the report of the benefit review conference (BRC), was: "Is the Claimant entitled to [LIBS] based on the total permanent loss of use of her right side, that is, her right hand and leg." The claimant's position in the BRC report was that she "lost the use of her hands and feet." This formulation of the issue was restated in the decision and order. Finding of Fact No. 10 is: "There is insufficient evidence that Claimant has a total loss of use of her upper and lower extremity." Conclusion of Law No. 3 is: "Claimant is not entitled

to [LIBS] based on the loss of use of her hands and feet."<sup>2</sup> As stated above, the statutory entitlement to LIBS is in the disjunctive and requires the loss of both feet or both hands or the loss of one foot and one hand. The formulation of the issue and the pertinent findings of fact and conclusion of law suggest that the hearing officer was applying a conjunctive standard of proving the loss of both feet and both hands. For this reason, we also reverse the decision of nonentitlement to LIBS and remand to insure that the proper standard was applied. On remand, substantial clarification would result from the claimant articulating whether she is proceeding on the basis of loss of substantial use of both hands, or both feet, or of one hand and one foot, or some combination of these. No further evidence should be taken, but the parties should be invited to comment on the matters addressed in this opinion.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Susan M. Kelley  
Appeals Judge

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<sup>2</sup>This formulation is also carried into the decision portion of the decision and order.