

APPEAL NO. 000044

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 991951, decided October 15, 1999, the Appeals Panel reversed the determination of the hearing officer that the appellant (claimant) was entitled to lifetime income benefits (LIBS) and remanded this issue for further consideration. A hearing on remand was held on November 30, 1999. The hearing officer again determined that the claimant was not entitled to LIBS. The claimant appeals this decision, contending that it was against the great weight and preponderance of the evidence; that essential findings were not made; and that the process was unfair. The respondent (carrier) again replies that the decision was correct and should be affirmed.

DECISION

Affirmed.

Our decision in Appeal No. 991951 contains an extensive discussion of the law and facts of this case. The purpose of our remand was to clarify the bases on which the claimant was asserting an entitlement to LIBS and the hearing officer's apparent substantial reliance on a medical report of Dr. S in light of the fact that Dr. S decided to "withdraw" that medical report. At the hearing on remand, the position of the claimant was that she was entitled to LIBS based on the loss of use of both hands and feet and the loss of use of the right hand and right foot. In her decision and order on remand, the hearing officer disavowed any reliance on Dr. S's "withdrawn" report in reaching her conclusion that the claimant was not entitled to LIBS, made additional findings, and changed some of the prior findings of fact to reflect constant, versus intermittent, swelling of the neck (Finding of Fact No. 7) and omitting the description "intermittent" in her finding of swelling of the lower extremities (Finding of Fact No. 10).

In her appeal, the claimant expresses her disagreement with numerous findings of fact, contending variously that the hearing officer ignored, distorted, or failed to grasp the meaning and significance of the medical evidence; that the findings were not sufficiently comprehensive or were "incomplete"; that the hearing officer was "unfair" in evaluating the evidence; and that the hearing officer failed to make an essential finding of whether the claimant established loss of use of the hands or feet by proving an inability to get and keep employment requiring the use of the hand or foot.

Whether the claimant established that she was entitled to LIBS was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941231, decided October 20, 1994. The claimant correctly noted that her medical evidence did not have to use so-called "magic words" of entitlement. She nonetheless had to establish that entitlement. Her position is that her medical evidence admits only one conclusion, that is, a loss of the use of both hands and both feet or the hand and foot on

the right. She especially stresses that the hearing officer failed to recognize the seriousness of the swelling in her legs, nerve loss in the upper extremities, and nodules in the finger joints of both hands. As we stated in Appeal No. 991951, *supra*, "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." The carrier introduced contrary evidence in the form of an "Extensive Peer Review" of Dr. W, dated June 24, 1999, in which he directly addressed the question of whether she had "total loss of the use of her [right] arm and [right] leg." As to the upper extremity, he concluded there was some sensory and strength function and "no documented neurological abnormalities of the right lower extremity or of the spinal cord in the area leading to the right lower extremity." In her decision and order on remand, the hearing officer commented that "the sum of the medical reports note only some loss of function in the extremities but nowhere has this loss been characterized as total or substantial by any of the doctors, not even on the right side. . . ." The hearing officer, as fact finder, is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Under our standard of review, 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). This is an admittedly complicated case with voluminous medical evidence. We cannot accept the claimant's assertion that it was beyond the ability of the hearing officer to properly consider and analyze the evidence. The hearing officer gave the weight and credibility she considered appropriate to this evidence and concluded that the claimant did not meet her burden of proof. While another hearing officer or fact finder may have found otherwise, we are unwilling to conclude that the decision of this hearing officer was against the great weight and preponderance of the evidence. Therefore, there is no basis for overturning that decision on appeal.

The claimant also alleges significant error in the failure of the hearing officer to make a formal finding, as requested by the claimant, of whether the condition of the extremities is such that it keeps the claimant from getting and keeping employment requiring the use of the extremities. In various findings, the hearing officer found that there was insufficient evidence that claimant had total or substantial loss of use of her upper and lower extremities. While the better practice would have been for the hearing officer to make a formal finding of fact on the question of getting and keeping employment, particularly when expressly requested, we cannot agree that the hearing officer was unaware of the law for determining loss of use where the meaning of this concept was clearly raised at the contested case hearing (CCH). Rather, we infer from her findings a further finding that the claimant did not establish that she met either of the tests for proving loss.

The claimant also raises a challenge to the fairness of the proceedings. In doing so, she correctly states that she asked the hearing officer how she intended to proceed in light of our instructions that no new evidence "should be taken." Apparently, the hearing officer failed to respond to this inquiry. At the CCH on remand, the claimant offered a further report into evidence. The carrier did not object and it was admitted. Now, on appeal, the claimant asserts that she "could have presented additional supporting evidence to prove

her claim had the Hearing Officer advised how she would proceed." The claimant did not attempt to present any additional evidence at the CCH on remand. It is only speculation after an adverse decision on remand that the claimant could have presented more convincing evidence beyond the voluminous amount already introduced. Based on our review of the record, we cannot conclude that the hearing officer was unfair in the conduct of the hearing on remand.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge