APPEAL NO. 000226

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 20, 2000. The hearing officer determined that the appellant (claimant) is not entitled to lifetime income benefits (LIBS). The claimant appeals, urging that the hearing officer's findings of fact are insufficient because they fail to address the issue of whether the claimant can procure or retain employment requiring the use of her hands and that the evidence clearly demonstrates that the claimant, because of her compensable injury, cannot procure and retain employment requiring the use of her hands. The respondent (carrier) replies that the hearing officer's findings of fact are sufficient and that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable injury to both upper extremities on _____, as a result of repetitive packing on an assembly line. The claimant was diagnosed with carpal tunnel syndrome and subsequently had approximately 12 surgeries--seven surgeries on her right upper extremity and five surgeries on her left upper extremity. The surgeries included a right carpal tunnel release, right pronator release of the median nerve, right supinator release of the radial nerve, a cubital tunnel release with transposition of the ulnar nerves, a left pronator release, left cubital tunnel release on two occasions, and a left carpal tunnel release. At issue in this case is the claimant's entitlement to LIBS based upon her assertion that she has total loss of use of both hands at or above the wrists. The claimant testified that she is unable to hold or grip things with either hand; that she has constant numbness, swelling, and burning pain in both arms; that she requires help at times to wash her hair; that there are days that she cannot open a door; that she smokes and can sometimes light her own cigarettes; and that she is able to dress herself and tie her shoes. The claimant argues that her hands no longer possess any substantial utility as members of the body and that she cannot get and keep employment requiring the use of her hands.

The claimant's treating doctor, Dr. W, testified that the claimant has developed recurrent entrapment of the median nerve at the wrist bilaterally, entrapment of the ulnar nerve at the elbow bilaterally, radial tunnel entrapment bilaterally with radiosensory nerve entrapment on the top of the hands bilaterally, and brachial plexus entrapment at the thoracic outlet bilaterally. According to Dr. W, the claimant can perform minimal gripping, but if she gets pain in her hand, she drops any object that she is trying to hold. Dr. W testified that the claimant has difficulty recognizing heat and cold; she cannot write well; she cannot hold a book well with her left hand; and she has difficulty turning doorknobs. Dr. W admitted that the claimant can turn the pages of a book with her left hand, is able to use a lighter and pick up a cigarette, is able to bathe and wash herself, and is able to wash

clothes. Dr. W opines that the claimant would not be able to get employment and maintain employment for any length of time that would require the use of her hands. According to Dr. W, the claimant is not a candidate for retraining because she cannot do gripping and grasping repeatedly, and almost any kind of light-duty or sedentary job would require gripping and grasping of the hands.

The carrier argues that the claimant has the ability to perform work with both hands, despite a limitation that it be nonrepetitive use. The carrier had the claimant examined by Dr. O on May 4, 1999, who performed a functional capacity evaluation (FCE). Dr. O states that the claimant's "primary problem is iatrogenic and that she has had excessive surgery" and that the claimant has evidence of a reflex sympathetic dystrophy. The FCE indicated that the claimant could do a maximum lift of 50 pounds from the floor, only approximately 18 pounds from the shoulder above her head, and could do 16 pounds frequent lifting; she could sit for at least two hours at a time; and she could stand for at least two hours at a time. Dr. O states that the claimant demonstrated an ability to perform a "light duty job without repetitious use of the upper extremities."

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). In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, we stated 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 noted that the 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. 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. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The claimant argued both prongs of the Seabolt test to establish entitlement to LIBS. The hearing officer, in reaching his determination that the claimant is not entitled to LIBS, made the following findings of fact:

FINDINGS OF FACT

2. Claimant does not have the total and permanent loss of use of both hands as a result of the compensable injury which occurred on _____ [sic].

3. Claimant did not lose the substantial utility of both hands as a result of the compensable injury which occurred on _____ [sic].

It appears that the hearing officer only applied the "substantial utility" prong in finding a total loss of use of both of the claimant's hands. While the hearing officer may have considered the other prong, whether the claimant could get and keep employment requiring the use of her hands, the hearing officer's findings do not address such an issue. The hearing officer states in his abbreviated discussion of the evidence that the claimant asserts that "she cannot procure and retain employment requiring the use of the hands," but he does not indicate that he applied such a standard in reaching his determination that the claimant is not entitled to LIBS. We refused to infer such a standard in Texas Workers' Compensation Commission Appeal No. 961269, decided August 14, 1996. Because we cannot determine if the hearing officer applied the correct standard in determining whether the claimant is entitled to LIBS, we reverse the hearing officer's decision and order and remand for the hearing officer to make findings of fact, based on the existing record, which address whether the conditions of the claimant's hands, at or above the wrists, are such that she cannot get and keep employment requiring the use of such members.

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.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge