APPEAL NO. 000412

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 December 13, 1999, and February 4, 2000. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBS) based on a total loss of both feet at or above the ankle. In its appeal, the appellant (carrier) asserts that the hearing officer's determinations that the claimant has total loss of both feet and that he is entitled to LIBS are against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant, who is 56 years old, sustained a compensable injury on _____, in the course and scope of his employment as a carpenter. The claimant testified that he shattered both heels and injured his ankles. The claimant has treated with Dr. L, an orthopedic surgeon, since the date of his injury. The claimant testified that he was paid 401 weeks of workers' compensation benefits and that the carrier did not dispute his entitlement to those benefits or ask him to try to find a job. The claimant stated that he is not able to work and that he has not worked since the date of his injury. He explained that he has constant pain in his feet; that he sits or lays around the house most of the time; that he is able to walk with a cane; that he is able to drive; that he tends the chickens in his back yard; that he has to keep his feet elevated most of the time; and that he wears special shoes and ankle braces. The claimant further testified that Dr. L has told him that the only remaining treatment is an operation to shave his bones in order to relieve some of his pain. However, the claimant explained that Dr. L has advised him that the procedure will further weaken his bones and that he will not be able to do much of what he is able to do now after that treatment.

In a letter dated June 11, 1995, Dr. L stated that the claimant's diagnoses are "status post bilateral comminuted calcaneus fracture along with bilateral subtalar arthrodesis and chronic synovitis and early degenerative arthritis involving the right ankle." Dr. L noted that the claimant's "long term prognosis for any improvement in the feet is poor at this time" and that the claimant has "significant disability related to both lower extremities, secondary to his previous fractures." Finally, Dr. L opined that the claimant "is unable to return to any type of job that would be [sic] involve any type of standing or walking. His only alternative would be a completely sedentary type of job." In a June 24, 1999, progress report, Dr. L noted that the claimant has "minimal dorsiflexion past neutral on both feet" and a "good solid subtalar arthrodesis and some joint space narrowing on the right ankle." Dr. L stated that the claimant's prognosis is "guarded" and opined that the claimant could not return to his previous employment as a carpenter. Dr. L concluded that "[t]he only position that

would be feasible at this stage would be a sedentary type job." In a September 8, 1999, progress report, Dr. L noted that the claimant's condition was essentially unchanged and that he continues to have pain and swelling in both feet and ankles. In a September 9, 1999, letter to the claimant's attorney, Dr. L stated:

> After my most recent exam, I do feel that [claimant] has suffered the total loss of his right foot secondary to the injury which occurred on _____. This is based on the fact that he has a subtalar arthrodesis present, but has persistent swelling and pain along with decreased range of motion of the ankle which would markedly limit his ability to use the foot and ankle in any type of constructive way. He also has marked difficulty with walking even for short distances. This also is true for the injuries which occurred to his left foot.
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> Again, [claimant] has limitation of range of motion in both ankles and recurrent swelling and pain that occurs even with ambulating for short distances. He is unable to climb stairs without assistance. I do feel that the injury to [claimant's] right and left foot has extended to the ankle joint and these specific joints were injured at the time of the accident which occurred on _____.

The claimant also introduced a vocational analysis of the claimant by Mr. H, a licensed professional counselor and certified rehabilitation counselor. In his October 14, 1999, letter, Mr. H noted that the claimant had dropped out of school in the 10th grade; however, Mr. H stated that the claimant's testing revealed that "his academic ability for reading, spelling, and arithmetic is at approximately the third grade level." Mr. H concluded:

> Vocationally, [claimant] has held employment as a carpenter and has been unable to work since 1991. He has very limited ability to transfer his skills given the fact that he is unable to stand and/or walk for very long periods of time. He does not have skills that could academically be used because of his reading, spelling and arithmetic performance at the third grade level. For all practical purposes, I believe this man is totally disabled from the labor market given his age, education, work history and functional limitations.

The carrier introduced a surveillance videotape. The investigation report accompanying the videotape describes the claimant's activities on the tape, as follows:

> The claimant was observed to exit the church. He was using a cane with his right hand. He appeared to have difficulty going down the church steps. Once on the ground the claimant placed his left [hand] at the small of his back as if his back was bothering him. He walked to his truck with a noticeable limp.

Finally, the carrier introduced a letter from Dr. S, a neurologist, who reviewed Mr. H's letter of October 14, 1999, and the surveillance videotape. Dr. S stated:

> Based on my review of the above items, it is my opinion that [claimant] has not lost total use of his right foot as alleged by [Dr. L]. It is obvious that [claimant] is capable of ambulating with minimal use of a cane in his right hand. He is seen walking down two or three steps and ambulating approximately 10 to 15 feet. He is seen climbing into his truck. He is also capable of driving his truck presumably using his right foot on the accelerator.
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> In conclusion, it is my opinion that [claimant] has not lost the use of his legs and is capable of ambulating and operating a motor vehicle.

Section 408.161(a)(2) provides that LIBS are paid until the death of the employee for the loss of both feet at or above the ankle.[1] 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 feet as a result of his compensable injury. 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 feet) 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. That is, evidence supporting either of the definitions of total loss of use will support recovery. 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 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer, as the fact finder, considers the evidence before him and determines what facts the evidence has established. 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. Pool v. Ford Motor

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[1] In this case, the carrier's challenge to the hearing officer's decision is premised upon the argument that the claimant has not established total loss of use, as opposed to arguing that the claimant does not satisfy the requirement because the injuries consisted of comminuted fractures to the calcaneus bones in both heels and did not involve his ankles or legs. *See* Elliott v. American Motorists Ins. Co., 734 S.W.2d 717 (Tex. App.-Tyler 1987, writ ref'd n.r.e.).

Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In Seabolt, the Texas Supreme Court discussed the second prong of the test for establishing total loss of use and noted that it represents a "broader concept" than the first prong and "one which will in most instances be more favorable to the injured workman." 361 S.W.2d at 206. The court further stated:

> Although a member may possess some utility as a part of the body, if its condition be such as to prevent the workman from procuring and retaining employment requiring the use of the injured member, it may be said that a total loss of use has taken place.

Id. In Navarette v. Temple Independent Sch. Dist., 706 S.W.2d 308 (Tex. 1986), the Supreme Court reaffirmed the two-prong Seabolt test as the standard for determining total loss of use. *See also* INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ) and City of Austin v. Miller, 767 S.W.2d 284 (Tex. App.-Austin 1989, writ denied), which apply the Seabolt test to determine total loss of use.

In this instance, although Finding of Fact No. 3 could be interpreted as determining that the claimant has satisfied the first prong of the Seabolt analysis, it appears from the hearing officer's discussion, that he found that the claimant is entitled to LIBS based upon his determination that "[a]s a result of the compensable injury, the Claimant is not able to get or keep employment which would require the use of his feet." Finding of Fact No. 4. That is, from a full reading of the hearing officer's decision, it seems that his conclusion that the claimant is entitled to LIBS is premised upon his determination that the claimant had satisfied the second prong of Seabolt. The claimant's testimony and the evidence from Dr. L support the hearing officer's determination in that regard. In various reports as noted above, Dr. L stated that the claimant was limited to sedentary work, which is by definition work that does not require the use of the claimant's feet. In addition, in his September 9, 1999, letter, Dr. L stated that the claimant has a subtalar arthrodesis present along with "persistent swelling and pain" and "decreased range of motion of the ankle which would markedly limit his ability to use the foot and ankle in any type of constructive way." The hearing officer could reasonably interpret Dr. L's statement that the claimant was "marked limited" in his ability to his feet and ankles in a "constructive way" as being broad enough to encompass the opinion that the claimant could not procure and retain employment requiring the use of his feet. The carrier's videotape and Dr. S's letter are evidence that the claimant's feet retain "substantial utility as a part of the body." Dr. S's opinion does not address the issue of whether the claimant could get and keep employment requiring the use of his feet. We are similarly unprepared to state that, as a matter of law, the videotape defeats the claimant's LIBS. The activities on the videotape do not establish that the claimant could get or keep work requiring the use of his feet. Rather, they show him going down three steps slowly, walking 10 to 15 feet with a marked limp, and driving. Those activities seem to more readily demonstrate that the claimant's feet continue to possess utility as a part of his body, as opposed to showing that the claimant could get and keep

work requiring the use of his feet. In this case, there is sufficient evidence in the record to support the hearing officer's determination that the condition of the claimant's feet as a result of the compensable injury is such that he cannot procure and retain employment requiring the use of his feet. Our review of the record does not reveal that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination or the determination that the claimant is entitled to LIBS under the second prong of the Seabolt analysis. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

Aside from my agreement with the majority that the hearing officer's finding that the claimant has "minimal" but not "substantial" use of his feet is somewhat confusing with regard to whether he is thus finding neither prong of Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962) has been met, I conclude that the second prong of Seabolt has been given what seems to me to be an overly broad and somewhat illogical reading given the overall workers' compensation scheme. In Seabolt, a pre-lifetime income benefits and 1989 Act case, the Texas Supreme Court in reversing an award of benefits for total loss of use of a member, stated a two-prong test, this is, a total loss of use exists by reason of an injury where a member no longer possesses any substantial utility as a member of the body, or the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member. (Emphasis added.) To me the evidence shows that the claimant is ambulatory and able to walk with the use of a cane, and drive, and, according to his doctor, is capable of sedentary-type work. It is apparent that he cannot return to carpentry work, at least work that would require him to be on his feet for prolonged periods or to do considerable climbing or even considerable walking. However, the phrase in the second prong, "requiring the use of" in evaluating the

procurement and retention of employment require the use of the member is being given an overly broad interpretation in my opinion. It is apparent to me from the evidence that he has the use of his feet to the degree needed for a job that does not require considerable periods of standing, walking, or climbing. Although not specifically required, there is no evidence that the claimant ever sought any type of employment since his injury in _____, or attempted any type of retraining to somewhat minimize the use of the feet in a job setting. While there are job search requirements for supplemental income benefits, even with the restrictions that the claimant has in the use of his feet, there is no like specific requirement under the lifetime income benefits provisions. However, it seems to me that the broad reading given the phrase "requiring the use of" in a case such as this where there is a demonstrated ability to use the feet for the usual activity of walking and driving, runs counter to the objective of returning an injured worker to the workforce in a position that he is capable of performing. I do not think that has been established by the evidence here.

Stark O. Sanders, Jr.
Chief Appeals Judge