APPEAL NO. 000417

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 February 7, 2000. The hearing officer determined that the appellant (claimant) was not entitled to lifetime income benefits (LIBS). The claimant appeals this determination, expressing his disagreement with it. The respondent (carrier) replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable lumbar herniation injury on _____. He underwent six surgical procedures, including a laminectomy, infection control, implantation of a dorsal column stimulator and hardware, and a failed fusion. His supplemental income benefits (SIBS) expired after 401 weeks from the date of injury pursuant to Section 408.083. He now seeks LIBS.

Section 408.161 provides as follows in relevant part:

> LIFETIME INCOME BENEFITS. (a) Lifetime income benefits are paid until the death of the employee for:
>
> (1) total and permanent loss of sight in both eyes;
>
> (2) loss of both feet at or above the ankle;
>
> (3) loss of both hands at or above the wrist;
>
> (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
>
> (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, and one arm and one leg: or
>
> (6) an injury to the skull resulting in incurable insanity or imbecility.
>
> (b) For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part.

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 left foot and left arm) 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. 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.

On August 13, 1999, Dr. B reviewed the medical records and conducted a required medical examination of the claimant at the direction of the Texas Workers' Compensation Commission. He noted that claimant showed "considerable distress in moving" and needed a cane. His impression was failed back syndrome with active left lumbar radiculopathy, decreased sensations, strength and proprioception. He concluded:

> Technically the patient does not need a listing for [LIBS]. . . . He essentially has loss of much of the function of his left leg due to decreased sensation, proprioception and strength. Technically his hands are also intact although it should be noted that in mobility he appears to truly need a cane for mobility which makes his left hand ineffective for use for anything other than holding the cane. It would be inferred from this that in certain situations while not technically meeting a listing for [LIBS] he at least when walking in some cases equals the listing for functional loss of left arm and left leg.

The claimant testified that he had no problems with his hands or right leg and that there are times he can move his left leg. The claimant's impairment rating (IR) included a five percent impairment of the lower left extremity (two percent whole body impairment) for loss of sensation. The carrier pointed out that the permissible impairment of the lower extremity for the L-5 nerve root ranged from zero to 40%, and suggested that the selection of an IR in the lower end of the range reflects less than a total loss of the lower left extremity.

The hearing officer considered this evidence and concluded that the claimant did not come within any of the statutory provisions which would entitle a claimant to LIBS. In his appeal, the claimant stresses the long, painful course of treatment he has had with the injury and the inherent unfairness in a case such as his to end his income benefits after 401 weeks. While we are not unsympathetic to these arguments, they do not allow us to disregard the specific requirements that must be met in order to entitle him to LIBS. Similarly, we find no merit in the contention that he has suffered a loss to his left hand to the extent that he has to dedicate his left hand to a cane to enable him to walk with his numb left foot. Under the statute, the loss must be based on an injury to both the arm and

the foot from the injury, *see* Texas Workers' Compensation Commission Appeal No. 941190, decided October 17, 1994, or the resulting paralysis must reside in both the arm and the leg. The fact that the claimant is able to use his left hand with the cane reflects that there is no loss to the left hand.

Both the hearing officer and the Appeals Panel are bound by the statutory requirements of LIBS entitlement. 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 decision of the hearing officer.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge