

APPEAL NO. 001359

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 April 26, 2000. The hearing officer made a finding of fact that the respondent's (claimant) spinal injury is such that it keeps him from getting and keeping employment requiring the use of his legs and concluded that the claimant is entitled to lifetime income benefits (LIBs). The appellant (carrier) appealed, stated its opinion of the intent of the legislature in enacting Section 408.161, urged that the evidence is not sufficient to support a determination that the claimant is entitled to LIBs, and requested that the Appeals Panel reverse the decision of the hearing officer. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse the decision of the hearing officer and render a decision that the claimant is not entitled to LIBs.

Section 408.161 provides in part:

(a) [LIBs] are paid until the death of the employee for:

* * * *

(2) loss of both feet at or above the ankle;

* * * *

(5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg[.]

* * * *

(b) For purposes of Subsection (a), the total and permanent loss of use of a part is the loss of that body part.

In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, and Texas Workers' Compensation Commission Appeal No. 941065, decided September 21, 1994, the decision after the remand in Appeal No. 94689, *supra*, the Appeals Panel stated that the view that the legislature in enacting the 1989 Act did not intend to charge the prior law regarding LIBs was supported in I JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM (1991); cited Travelers Insurance Co. v. Seabolt, 361 S.W.2d 204 (Tex. 1962); and held that total loss of use of a member of the body exists whenever by reason of injury such member no longer possesses any

substantial utility as a member of the body or the condition of the injured member is such that the worker cannot get and keep employment requiring the use of such member.

The claimant testified that he was injured on _____; that he had a lumbar fusion and three other surgeries, including the placement of a morphine pump in January 2000; that his legs are not stable and that he cannot walk for a block; and that he is not able to work. In a note dated January 28, 1999, Dr. S, a pain management specialist, reported that the claimant had constant, severe pain in his legs; that the left leg feels numb intermittently; and that the claimant has severe pain in the mid lumbar and the cervical area. In a letter dated March 17, 1999, Dr. S said that after the placement of the temporary epidural catheter at the lumbar level there had been a remarkable improvement in the claimant's mood, functionality at home, ambulation, and level of comfort and recommended that a morphine pump be installed. In a brief letter dated July 27, 1999, Dr. S wrote "[Claimant] is unable to return to any type of work at this time. He will continue disable [sic] until further notice." On August 25, 1999, Dr. S said that the claimant was complaining of considerable weakness in the left lower extremity and experienced numbness in the right upper extremity. In a report dated November 8, 1999, Dr. S indicated that the claimant had severe pain in the lumbar spine, radiating to both lower extremities, more on the left than on the right; that he was unable to sit for more than ten minutes comfortably; and that he must stand up and start ambulating in order to relieve some of his symptoms. In a letter dated April 24, 2000, Dr. S wrote:

I have been treating [claimant] since 1-28-99 for Post laminectomy failed back syndrome. Arachnoiditis, Lumbar degenerative disc disease with radiculopathy, and Neuropathic pain to the lower extremities. His primary complaint was severe pain to legs bilaterally accompanied by low back pain. At this point, he has undergone permanent placement of a Medtronic Synchromed Drug Infusion System which provides him continuous pain medication to his lumbar spine area.

[Claimant] has obtained moderate pain relief from the above system. This patient has been disabled since the unfortunate results of a lumbar spine intervention, that have caused progressive worsening of the current debilitating pain symptoms. It has been very difficult to control the pain symptoms, since it has taken too long for workers' compensation insurance to provide the required treatments. Indeed he will ultimately need continuous medical care for control and management of his chronic pain symptoms, and other ailments that might develop in the future.

In my point of view, this patient is totally incapacitated of performing any job duties.

The carrier had Dr. T, an orthopaedic surgeon, review medical records. In a letter dated April 13, 2000, Dr. T summarized medical records; referred to and quoted some of the provisions of Section 408.161 concerning LIBs; and wrote:

It is my professional opinion regarding the Peer Review of records that the patient is not able to participate in gainful employment for the above stated reasons. It is my professional opinion the patient is not eligible for [LIBs].

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). She made one finding of fact stating “[t]he Claimant’s spinal injury is such that it keeps the Claimant from getting and keeping employment requiring the use of his legs” and a conclusion of law stating “[t]he Claimant is entitled to [LIBs] pursuant to Sec. 408.161 of the Texas Labor Code.” The finding of fact uses the language used in Appeals Panel decisions and Seabolt, *supra*. We note that the Seabolt case involved Article 8307, Section 12 of the prior workers’ compensation act and the loss of use of the right hand; that Article 8307, Section 11 concerned injuries constituting total and permanent incapacity; and that both sections contained the language that the permanent loss of the use of the member is equivalent to the loss of that member. In the case before us, the medical evidence mentions the condition of the claimant’s lower extremities; states that he can ambulate and that he is unable to return to any type of work; and does not specifically address his ability to use his legs. The claimant testified that he can walk for about a block. The test under Section 408.161(a)(2) is not whether the claimant could use his legs, but whether he could get and keep employment requiring the use of both legs. The finding of fact that the claimant’s spinal injury is such that it keeps him from getting and keeping employment requiring the use of his legs is not supported by sufficient evidence and is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We reverse that finding of fact and the conclusion of law that the claimant is entitled to LIBs and render a decision that the claimant is not entitled to LIBs.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge