APPEAL NO. 001380

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 May 30, 2000. The hearing officer determined that the appellant (claimant herein) is not entitled to lifetime income benefits (LIBs). The claimant appeals, challenging the adverse findings of the hearing officer as being contrary to the evidence. The respondent (self-insured herein) responds that the decision of the hearing officer was sufficiently supported by the evidence and should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that his injury took place when he was lifting a mower. He also stated in his testimony that he was able to ambulate with special shoes and a cane. The claimant has undergone surgery and was assigned a 26% impairment rating. The claimant testified that he has not worked since his injury and has not been released to return to work; there is medical evidence indicating the claimant is unable to work. There is also a functional capacity evaluation performed on January 6, 1998, which indicates the claimant is capable of sedentary work.

The hearing officer's findings of fact include the following:

FINDINGS OF FACT

2. Claimant has some use of both of his legs.

3. Claimant has the ability to perform work at the sedentary physical demand level.

4. The condition of his legs, as a result of his compensable spinal injury, is not such that he has lost substantial use of his legs and is not such that he cannot get and keep employment requiring the use of his legs.

5. Claimant failed to provide sufficient evidence to satisfy the requirements of Texas Labor Code Ann. §408.161 to be eligible for LIBs.

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. Section 408.161(a)(5) provides that LIBs will be paid for an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg. 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 legs 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 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.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the decision of the hearing officer.

The hearing officer's decision and order are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge