

APPEAL NO. 001862

Following a contested case hearing held on July 6, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by concluding that the appellant (claimant) is not entitled to lifetime income benefits (LIBs). The claimant has appealed this conclusion and two underlying findings of fact, asserting that the hearing officer gave too much weight to certain of the medical reports and not enough to others and that his testimony together with the records of his treating doctor, Dr. D, constitute the great weight of the evidence that he has lost the use of both hands. The claimant also mentions that while the hearing officer stated that he appeared telephonically, he was physically present at the hearing. The respondent (carrier) urges in response the sufficiency of the evidence to support the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury to the cervical and lumbar regions of his spine and to the right shoulder. The claimant, who was present at the hearing, testified that soon after sustaining his compensable injuries (when he jerked on the steering wheel of the 18-wheel truck he was driving to avoid an oncoming loose wheel which struck the front of his truck), he began to experience some numbness and tingling in his hands; that he has been diagnosed with herniated discs in the cervical and lumbar spine regions; that he declined surgery on his cervical spine because the surgeon could not guarantee improvement in his condition; and that he currently receives chiropractic treatments from Dr. D. He said that he claims total paralysis of his hands from his cervical spine injury. The claimant further stated that his wife assists him with his activities of daily living and that he drops objects when attempting to pick them up because his hands are "paralyzed." He conceded that he does drive a car but said he does not grip the steering wheel and that his driving is limited.

The claimant introduced the records of Dr. K, who treated him in 1992 and 1993 and assigned him an impairment rating (IR) of nine percent. Dr. K's January 30, 1997, report to the Texas Workers' Compensation Commission states that he was asked to review the claimant's file for reevaluation; that after his release the claimant was "able to perpetuate his claim through a series of subjective complaints"; and that on his functional capacity evaluation most of the functions which would limit the claimant's employment were "self-limited in nature and there is no evidence of physiological breakdown." Dr. K further stated that his IR remains at nine percent and he suggested that the claimant be placed under surveillance to document his true abilities because he, Dr. K has "a strong suspicion that the patient and other family members are very adept at working the Workmen's Compensation and personal injury systems."

On December 9, 1999, Dr. C, who examined the claimant for the carrier, wrote that the claimant has constant neck pain and that there is radiation with numbness into both arms. Dr. C further stated that the claimant has degenerative disc disease at C5-6 and C6-7, which has progressed since 1992 x-rays were taken and that he has a herniated disc at L4-5. Dr. C concluded that no additional treatment is recommended and that "it is felt that this patient exaggerates his symptoms."

Dr. D wrote on May 10, 2000, that over the past several years, the claimant "has lost any significant use of both hands" because of the escalating degenerative joint disease. Dr. D wrote on June 27, 2000, that the claimant's cervical spine injuries are damaging the nerves going from the neck to the hands and that, as a result, the claimant "has experienced pain, numbness, weakness into both arms and hands." Dr. D further stated that "because of the above injuries, [the claimant] has weakness and reduced capabilities of his upper extremities."

The claimant called Dr. L for testimony indicating he had previously been seen by Dr. L and saw him again on June 20, 2000. In his June 22, 2000, report, Dr. L stated that he found no objective evidence of anesthetics and paresthesias in the upper extremities. Dr. L testified that he is an orthopedic surgeon and that he has diagnosed the claimant with spondylosis of his cervical and lumbar spinal regions and herniated discs in those regions. Dr. L further stated that the claimant "has use of his hands" and that "he does not have any significant neurological deficits that cause him inability to use his hands." Dr. L indicated that any difficulty that the claimant is having with his hands would be attributable to pain and muscle weakness and iterated that the claimant has no objective motor or neurological deficits that would be a basis for the loss of the use of his hands. Dr. L also commented that he looked out the window when the claimant left his office and "saw him drive off in the car."

In addition to the conclusion that he is not entitled to LIBs, the claimant challenges the hearing officer's findings that his upper extremity numbness and progressive weakness is not a result of the compensable injury of _____, and that while the claimant's ability to work is limited, his injury is not such that it keeps him from getting and keeping employment requiring the use of his hands.

The claimant had the burden to prove by a preponderance of the evidence that he is entitled to LIBs. Section 408.161(a)(3) provides in part 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 total and permanent loss of use of a body part is the loss of that body part. Texas Workers' Compensation Commission Appeal No. 960563, decided May 2, 1996, is a LIBs case involving a truck driver who hit a bump and struck his head on the cab roof, who later underwent cervical spine surgery, and who said he developed numbness in both upper extremities, along with loss of strength and grip strength. The hearing officer in that case determined that the injured employee was not entitled to LIBs and the Appeals Panel affirmed that decision. Our opinion, citing Travelers Ins. Co. v. Seabolt, 361 S. W. 2d 204, 206 (Tex. 1962), stated 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." Our opinion went on to say that a claimant need only satisfy one prong of the Seabolt test to establish entitlement to LIBs and that whether an employee has suffered the total loss of use of a member is, generally, a question of fact for the hearing officer to resolve.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's discussion reflects that she applied the proper legal standard in her evaluation of the evidence and she could conclude from all the evidence that the claimant failed to prove that he has lost the use of his hands.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Judy L. Stephens
Appeals Judge