APPEAL NO. 001940

Following a contested case hearing held on August 3, 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 determining that the appellant (claimant herein) was not entitled to lifetime income benefits (LIBs). The claimant appeals, contending that the hearing officer erred in finding that the claimant was not entitled to LIBs. The respondent (carrier herein) replies that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he had a spinal injury which included an injury to both his legs. The claimant put medical evidence into the record. The claimant testified under cross-examination that he did not suffer from paralysis as a result of his injury and did not use a wheelchair. The claimant testified that he is able to both walk and drive.

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

FINDINGS OF FACT

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

3. The evidence is insufficient to establish that the claimant has no ability to work due to his compensable injury.

4. The condition of Claimant's 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's injury to his spine did not result in permanent and complete paralysis of both arms, both legs, or one arm and one leg.

6. Claimant has failed to provide sufficient evidence to satisfy the requirements of [Section 408.161] to be eligible for LIBS.

CONCLUSION OF LAW

3. Claimant is not entitled to [LIBs].

The provisions of the 1989 Act controlling LIBs is Section 408.161 which provides, in relevant part, as follows:

Sec. 408.161. [LIBs]. (a) [LIBs] 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, or 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 our decision in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, we held that the legal test for total loss of use had not changed from prior law and that the proper standard is as follows:

> "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.

We note that Section 408.161(a)(5) differs from several of the other provisions of Section 408.161(a) in that it requires that a spinal injury result in complete paralysis of either both legs, both arms or one arm and one leg. This requires more than proof of the loss of use as is required by other provisions of Section 408.161(a). In the present case, the hearing officer found that the claimant's back injury did not result in paralysis, and under these circumstances, we find no error in his not granting LIBs pursuant to Section 408.161(a)(5). Whether the claimant suffered loss of use of both legs was a factual matter for the hearing officer.

Section 410.165(a) provides that the 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 finding of the hearing officer that the claimant has not lost substantial use of both legs and that the condition of the claimant's legs is not such that he cannot get and keep employment requiring the use of his legs.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge