

APPEAL NO. 002328

Following a contested case hearing (CCH) held on September 21, 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) is not entitled to lifetime income benefits (LIBs). The claimant appealed, asserting that each and every finding of fact and conclusion of law against him was against the great weight and preponderance of the evidence. The respondent (carrier) responded that the hearing officer's decision was correct and requested that we affirm the hearing officer.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, when he fell from a ladder. He was certified to have reached maximum medical improvement (MMI) and the parties entered into an agreement, set forth in a decision and order dated May 1, 1995, that the date of MMI was July 31, 1994, and the claimant's impairment rating is 16%. The claimant ceased to be eligible for temporary income, impairment income, and supplemental income benefits on April 7, 2000. Section 408.043. The claimant asserts that he is entitled to LIBs.

The provision 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.

It was undisputed that the claimant has not lost the sight of either of his eyes as a result of the compensable injury. Nor did the claimant assert that he has suffered either paralysis or incurable insanity or imbecility as a result of the compensable injury.

The claimant presented evidence that he has not been released to return to work by his treating doctor and that he continues to have physical and psychological problems as a result of the compensable injury. At one point, the claimant testified that he engages in yard work, but stays "near a place where [he] can hold onto something if [he] falls." The claimant also testified that, because of his injury, he has weakness in his arms from the hands to the elbows. Medical evidence presented by the claimant indicates that the primary obstacle to the claimant's return to the workforce is his abnormal mental health.

The hearing officer made the following findings of fact:

2. Claimant has some use of both of his legs and both of his upper extremities.
3. The condition of his legs and upper extremities, as a result of his compensable injury, is not such that he has lost the substantial use of his legs and is not such that he cannot get and keep employment requiring the use of those members.

Since the claimant can, by his own admission in the record, walk and perform yard work, the hearing officer's determination that the claimant has not lost the use of either his hands or his legs is supported by the evidence. We note also that the carrier presented additional evidence from which the hearing officer could have easily concluded that the claimant is and has been able to walk, stand, grasp, and manipulate objects.

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, both upper extremities, or any combination of the two, and that the condition of the claimant's legs and hands, singly or in combination, is not such that he cannot get and keep employment requiring the use of his legs and/or upper extremities.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge