

APPEAL NO. 011066
FILED JUNE 27, 2001

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 2, 2001. With respect to the issue before her, the hearing officer determined that the appellant (claimant) is not entitled to lifetime income benefits (LIBs) based either on an injury to the spine that resulted in the permanent and complete paralysis of both legs or total loss of use of both legs. On appeal, the claimant urges that he is entitled to LIBs because he has a total loss of use of his legs due to his compensable injury. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

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 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 those members.
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 failed to provide sufficient evidence to satisfy the requirements of Texas Labor Code Ann. § 408.161 to be eligible for LIBS.

CONCLUSION OF LAW

3. Claimant is not entitled to LIBS based on an injury to the spine that resulted in the permanent and complete paralysis of both legs as of this date.

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

- (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.

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 of both legs, and given the lack of any evidence that the claimant's legs are paralyzed, we find no error in his not awarding LIBs pursuant to Section 408.161(a)(5).

Although the parties agreed that the disputed issue at the hearing was whether the claimant was entitled to LIBs under the provisions of Section 408.161(a)(5), the claimant's theory of recovery both at the hearing and on appeal is that he is entitled to LIBs under the "total loss of use" provision of Section 408.161(a)(2). In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes; took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468; and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body, or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, the test set forth in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962). See also Texas Workers' Compensation Commission Appeal No. 941065, decided September 21,

1994. We have 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 Appeal No. 941065.

The hearing officer's consideration of the "total loss of use" issue is reflected in Finding of Fact No. 4. 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. See Appeal No. 941065. 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). 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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge