

APPEAL NO. 020786
FILED MAY 14, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on March 18, 2002, the hearing officer found that the respondent/cross-appellant (claimant) has the total and permanent loss of use of both feet and concluded that he is entitled to lifetime income benefits (LIBs) as of April 11, 2001, based on loss of use of both feet. The appellant/cross-respondent (carrier) appeals the LIBs determination on evidentiary sufficiency grounds. The carrier further seeks a remand for the hearing officer to make findings concerning whether the claimant's Parkinson's disease is the sole cause of his loss of the use of both feet, advising that judicial review of an Appeals Panel decision affirming the determination that the claimant's compensable injury extends to his Parkinson's disease is pending in court. The claimant has also filed an appeal requesting that the Appeals Panel render a new decision that his entitlement to LIBs is effective on the date his disability ended, not on April 11, 2001. Both parties filed responses.

DECISION

Affirmed in part; reversed and rendered in part.

It is undisputed that on _____, the claimant slipped on ice and fell backwards, wrenching his knee and striking his back. The extent to which the claimant struck his head in the fall is disputed. In a prior hearing held on August 24, 2000, a hearing officer determined that the claimant's Parkinson's disease was traumatic in origin and thus a part of his compensable injury. Our decision in Texas Workers' Compensation Commission Appeal No. 002116, decided October 23, 2000, sets out the evidence concerning the accidental slip and fall and a great deal of medical evidence (most of which was admitted again in the hearing we now consider) concerning the nexus between the claimant's slip-and-fall injury and his development of Parkinson's disease. The carrier's representative indicated that judicial review of our decision is pending in the Texas court system. The claimant testified that he cannot walk, falls when he tries, and also has trouble using his hands and feeding himself.

The carrier contended below and maintains on appeal that there is a failure of medical evidence to establish that the claimant has lost the use of both feet. The claimant urges that the evidence is sufficient to meet the two-prong test for entitlement to LIBs as set out in Travelers Insurance Company v. Seabolt, 361 S. W. 2d 204 (Tex. 1962). As was stated in Appeal No. 002116, on February 16, 1999, Dr. E wrote that the claimant has "severe Parkinson's syndrome, post traumatic, and requires the use of a motorized scooter." Dr. V wrote on March 24, 1999, that the claimant "has been unable to walk without some kind of aid for the last two years" and that "[h]is gait was severely disturbed, with markedly reduced stride, increased cadence, and frequent freezing." On September 23, 1999, Dr. T, a neurologist who examined the claimant, noted that the claimant is "in a

motorized wheelchair and unable to ambulate alone.” The report of a functional capacity evaluation, which the claimant underwent on December 4 and 6, 2001, states at one point that the claimant requires 25-50% assistance to stand from his wheelchair and the exercise mat; that a standing pivot transfer required 50% assistance; and that the claimant was “unable to initiate stepping and required 50-100% assistance for balance while he attempted to step/walk.” At another point, the examiner reported that the claimant’s gait was “not assessed due to safety concerns as [claimant] would have fallen, when he attempted to walk, if he had not been supported by the examiner.” Dr. S, who was appointed by the Texas Workers’ Compensation Commission (Commission) to examine the claimant, reported on April 11, 2001, that “the [claimant’s] disease has progressed to the point that he cannot return to work and should be considered disabled permanently.”

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)). We are satisfied that the evidence is sufficient to support the factual determination that the claimant has total and permanent loss of use of both feet and that this finding sufficiently supports the conclusion that the claimant is entitled to LIBs. 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).

We decline the carrier’s request to remand the case for findings as to whether the Parkinson’s disease is the sole cause of the claimant’s loss of the use of both feet. This issue was neither specified in the benefit review conference report nor litigated by consent below and is advanced for the first time on appeal.

Concerning the claimant’s appeal, the hearing officer stated in his statement of the evidence that the Commission “sent . . . the Claimant to [Dr. S] on April 11, 2001, to consider the Claimant’s Parkinson’s disease as it might relate to his disability” and in Finding of Fact No. 2 the hearing officer found that “[o]n April 11, 2001, the Claimant was examined by [Dr. S] and found to have permanent disability.” The hearing officer apparently used this April 11, 2001, date in his Conclusion of Law No. 3 and in the “Decision” which state that the claimant is entitled to LIBs “as of April 11, 2001.” The claimant correctly cites to our decision in Texas Workers’ Compensation Commission Appeal No. 012554, decided December 5, 2001. In that decision the Appeals Panel observed that in Texas Workers’ Compensation Commission Appeal No. 991293, decided July 30, 1999, we held that “LIBs begins to accrue and are payable retroactively from the date of disability” and we further stated that “under all subsections of Section 408.161(a), LIBs accrue from the date of disability.” Accordingly, we reverse so much of Conclusion of Law No. 3 and the “Decision” as refer to the date of April 11, 2001, and render a new decision that the claimant is entitled to LIBs as of the date of disability.

The true corporate name of the insurance carrier is **GULF INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CARMEN ESTRADA C/O CRAWFORD & COMPANY
505 EAST HUNTLAND DR.
AUSTIN, TEXAS 78761.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Susan M. Kelley
Appeals Judge