

APPEAL NO. 021601
FILED AUGUST 15, 2002

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 28, 2002. The hearing officer held that the appellant (claimant) was not entitled to lifetime income benefits (LIBs) for his _____, compensable injury because of the total and permanent loss of use of both feet.

The claimant has appealed, asserting that he proved his case through medical evidence and doctor opinions in his favor. The respondent (carrier) requests that the fact findings of the hearing officer be upheld.

DECISION

We affirm the hearing officer's decision.

The claimant's case is compelling. At a fairly young age, he has had at least one failed back surgery and several hernia repairs and has suffered intractable pain and depression. There are no psychological records that suggest he is faking, although there are some comments of heightened pain behavior. The claimant's own doctors and a required medical examination (RME) doctor have opined that he has a total loss of use of his lower extremities. He ambulates with double canes or uses a motorized vehicle, even around his house.

On the other hand, the claimant has had two EMG nerve conduction tests on his lower extremities, one in January 2000, the other in February 2002, which were reported as normal. The RME doctor commented that the claimant has no atrophy of his lower extremity muscles. An MRI shows the claimant's most recent lumbar surgery to have resulted in a solid fusion. There is evidence that the claimant did not qualify for Social Security disability benefits, although this was in 1997.

The hearing officer based his decision on two grounds: that paralysis of the limbs has to result from a spinal injury under Section 408.161 in order to qualify for LIBs, but also that the evidence did not persuade him that the claimant had a total and permanent loss of use of his lower extremities, under the claimant's statutory interpretation that he could still qualify for a finding of total and permanent loss of use even though he sustained no direct injury to his legs.

The hearing officer's interpretation of language of the predecessor statute to Section 408.161(a) was expressly overruled in Hartford Underwriters Insurance Co. v. Burdine, 34 S.W.3d 700 (Tex. App.-Fort Worth 2001, no writ). As to the claimant's argument that he may qualify for LIBs if he can show that he sustained a total loss of use of his legs due to his spinal injury, we have noted that, consistent with the case law reviewed in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962), the

claimant has the burden of showing either that his legs no longer possess any substantial utility as part of the body or that the condition of his legs is such that it prevents him from procuring and retaining employment requiring the use of his legs.

While the hearing officer's articulation of these standards for recovery of LIBs could have been clearer, we cannot say that these factors were not considered. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record, as here, contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The record in this case presented conflicting evidence for the hearing officer to resolve. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We therefore affirm the decision and order.

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

**C T CORPORATION
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge