

APPEAL NO. 031460
FILED JULY 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 22, 2003. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to lifetime income benefits (LIBs). The claimant appealed, arguing that the determination of the hearing officer is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury. The disputed issue is whether the claimant is entitled to LIBs based on the loss of use of both feet at or above the ankles. Section 408.161(a)(2) provides that LIBs are paid until the death of the employee for the loss of both feet at or above the ankle. In Texas Workers' Compensation Commission Appeal No. 010124, decided March 6, 2001, citing Travelers Ins. Co. v. Seabolt, 361 S.W.2d 204, 206 (Tex. 1962), we noted that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the claimant from getting and keeping employment requiring the use of the member. In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, we 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. There was really no evidence that the claimant had lost the use of both feet at or above the ankle and the claimant testified that he was able to drive and was able to walk short distances with the use of a cane and stand for a short period of time. The hearing officer noted that he observed that the claimant was able to ambulate with a cane, sit, open doors, and move chairs with his hands. The claimant contended at the CCH and on appeal that he is entitled to LIBs because he could not obtain or retain employment requiring the use of the affected members.

The claimant had the burden of proving entitlement to LIBs. Whether the claimant possessed substantial utility of his feet or could obtain and keep employment requiring the use of his feet at or above the ankles thus entitling him to LIBs were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 960768, decided April 24, 1996, and Texas Workers' Compensation Commission Appeal No. 941618, decided January 17, 1995. The hearing officer considered the medical evidence as well as the testimony and demeanor of the claimant and was not persuaded that the claimant sustained his burden of proving that he was entitled to LIBs under either prong of Seabolt. 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 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 (Tex. Civ. App.-Amarillo 1974, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Finally, we briefly address the claimant's assertions that he was not given the opportunity to cross-examine the hearing officer regarding the issues in dispute and that the hearing officer was essentially biased. Rather, we believe that his determinations were the result of his resolving the conflicts and inconsistencies in the evidence and assessing credibility. We perceive no error.

We affirm the decision and order of the hearing officer.

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

**CINDY GHALIBAF
7610 STEMMONS FREEWAY, SUITE 350
DALLAS, TEXAS 75247-4216.**

Margaret L. Turner
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Veronica Lopez-Ruberto
Appeals Judge