

APPEAL NO. 000508

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 February 14, 2000. The issue at the CCH was whether the appellant (claimant) is entitled to draw lifetime income benefits (LIBs) and impairment income benefits (IIBs) concurrently. The hearing officer noted that claimant is entitled to LIBs, effective October 1, 1992, but determined that he is not entitled to draw LIBs and IIBs at the same time. Claimant appeals, contending that respondent (carrier) is not entitled to what amounts to a credit against IIBs already paid. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends that claimant's appeal was due on March 8, 2000, and was not timely because it is date-stamped received on March 9, 2000. However, the appeal was mailed March 8, 2000, and arrived timely. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)). Therefore, we will consider it.

Claimant contends the hearing officer erred in determining that he is not "entitled to concurrently draw [LIBs] and [IIBs]." At the CCH, carrier argued that payments of IIBs and LIBs would "overlap for time periods after the date of [maximum medical improvement (MMI)]," causing a "double recovery" for claimant. Claimant contends on appeal that carrier is actually seeking a credit against IIBs already paid and that it has not established entitlement to such a credit.

The parties stipulated that: (1) on _____, claimant sustained a compensable cervical spinal injury, "that led to his being entitled to [LIBs] pursuant to Section 408.161 of the [1989 Act] as of October 1, 1992"; (2) both claimant's treating doctor and the designated doctor determined that claimant reached MMI by operation of law and that he had an impairment rating IR of 94%. There was no testimony at the CCH and only one record was admitted, a medical record. There was no evidence regarding the date of claimant's surgery, the date of statutory MMI, the accrual date of disability, the amounts and dates regarding any benefits paid, the date and terms of any agreement regarding LIBs, or the date or result of any court action regarding compensability. On appeal, claimant's attorney stated that temporary income benefits had been paid and that IIBs had been paid in a lump sum. The hearing officer stated in the decision and order that IIBs had been "paid." Claimant's attorney indicated that the statutory MMI date was September 17, 1994. It appears undisputed that claimant underwent spinal surgery on

October 1, 1992, and the resulting effects caused claimant to meet entitlement requirements for LIBs, based on the loss of use of his hands.¹

Although there was no evidence of this at the CCH, claimant stated in his brief that “claimant did not receive any benefits from the date of his disability in 1992 until 1999.” The record does not show it, but it appears that carrier had contested compensability in this case and that claimant had eventually prevailed on this issue in the courts. The hearing officer also stated that the agreement that claimant is entitled to LIBs was signed in September 1999.

The hearing officer determined that: (1) carrier paid claimant “all [LIBs] that had accrued and were owing” as of the date of the CCH; (2) no claimant is entitled to a double recovery of “income benefits” for a single compensable injury; (3) there is no provision in the 1989 Act or rules “that would allow a claimant injured after January 1, 1991, to be entitled to two or more types of workers’ compensation benefits at the same time for the same injury from the same carrier”; and (4) claimant is “not entitled to concurrently draw [LIBs] and [IIBs].”

IIBs are paid at 70% of the employee’s average weekly wage (AWW), three weeks for every percentage point of impairment, and accrue the day after the employee reached MMI. See Section 408.121(a)(1); Section 408.126. LIBs are payable at the rate of 75 % of the employee's AWW. Lifetime benefits may not exceed the maximum weekly benefit, except that benefits being paid shall be increased three percent a year not withstanding the maximum weekly benefit. Section 401.161(c). Regarding claimant’s case, LIBs accrued from the date of disability. Rule 131.1(a).

The hearing officer’s determination that injured workers are not entitled to concurrently draw LIBs and IIBs appears to be a correct statement under the law and we perceive no error with that general conclusion. However, the evidence was not developed at the CCH and the facts of this case were not stipulated or undisputed. The issue of whether the carrier in this case is entitled to a credit has not yet been specifically determined. We note that if an injured worker who received a lump sum IIBs payment is later determined to be entitled to LIBs for the same injury, then the insurance carrier involved would generally be entitled to a credit and the IIBs already paid would likely be credited as an underpayment of accrued LIBs. In such a case, the parties would need to agree on the amount of accrued LIBs that is still due to the injured worker after the carrier’s offset for the amount of the IIBs the carrier had already paid. This is because LIBs are paid at a higher rate and there is also a three percent yearly increase to consider. If no agreement could be reached, then the dispute resolution process could be utilized to resolve the issue. We note that in a case involving such an offset, there would be no gap in benefits and LIBs would continue to be payable to the claimant. See *generally* Texas Workers’ Compensation Commission Appeal No. 94134, decided March 16, 1994. Given the issues, appeal, and record before us, we affirm.

¹It is not clear whether claimant lost the use of his hands only, or whether he also lost the use of his feet.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judges

Tommy W. Lueders
Appeals Judge