BRB No. 04-0641

JOSEPH H. SUMMERLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN SHIPBUILDING, INCORPORATED	)	DATE ISSUED:Mar 11, 2005
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Saxe, P.A.), Titusville, Florida, for claimant.

Christopher P. Boyd (Taylor, Day & Currie), Jacksonville, Florida, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2002-LHC-2789) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a pipefitter's helper, passed out during the course of his employment with employer on July 4, 1991. Claimant was taken to Bay Medical Center where he was diagnosed as suffering from heat stroke. On or about July 7, 1991, claimant returned to work for employer in a light-duty capacity. On July 16, 1991, claimant returned to full-duty work; however, while working in the galley of a vessel, claimant experienced another episode involving loss of consciousness, and he was once again transported to the hospital. Claimant subsequently experienced memory difficulties, auditory hallucinations, explosive and volatile behavior characteristics, and an inability to perform or organize basic daily tasks. On December 28, 1992, claimant commenced treatment with Dr. Brodsky, a psychiatrist. In April 1993, claimant was admitted to Peachtree Learning Services in order to learn personal hygiene, cognitive, reading and arithmetic skills, but he was discharged from this facility after an altercation with another patient. In 1995, claimant was admitted to the Homestead Transitional Living Facility, a residential treatment facility; however, claimant was asked to leave this center after he struck another patient. Claimant presently resides with his parents, and his mother cares for him.[1] Employer has voluntarily paid claimant temporary total disability benefits since July 16, 1991, medical benefits, and attendant care benefits for 12 hours per day since June 13, 1994. JX 1.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer established rebuttal of that presumption, and that, based on the record as a whole, claimant established a causal relationship between his employment with employer and his current mental deficiencies. Further, the administrative law judge determined that claimant's condition became permanent on July 25, 1995, that claimant was unable to return to his usual job with employer, and that employer did not establish the availability of suitable alternate employment that claimant is capable of performing. Accordingly, the administrative law judge awarded claimant temporary total disability compensation for the three days of work that claimant missed after July 4, 1991, and for the period from July 16, 1991, through July 24, 1995, and permanent total disability compensation from July 25, 1995 and continuing. 33 U.S.C. §908(a), (b). Based upon the testimony of claimant, his mother, and Dr. Brodsky, the administrative law judge found that claimant is barely able to perform daily functions and is not capable of managing his own life and

[1] Claimant was married at the time of his second work-incident, however, his wife at that time apparently declined to assist him upon his release from the hospital. EX 1 at 19-21. For a period of time prior to 1997, claimant was cared for by a nurse, Ms. Beebe. Claimant married Ms. Beebe in approximately July 1997, and she cared for him until approximately July 2000, at which time that marriage ended because of claimant's temper. *Id.* at 73.

awarded claimant medical benefits for his work-related injuries and 24-hour care from a professional attendant. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's findings regarding claimant's entitlement to attendant care, arguing that the administrative law judge erred in awarding claimant professional attendant care on a 24-hour basis. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 7(a) of the Act, 33 U.S.C. §907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

The phrase "other attendance" in Section 7(a) has been held to encompass certain essential domestic services that the claimant, due to his injury, can no longer perform. *Carroll v. M. Cutter Co.*, 37 BRBS 134 (2003)(Smith, J., concurring and dissenting on other grounds), *aff'd on recon. en banc*, 38 BRBS 53 (2004)(Dolder, C.J., and Smith, J., dissenting on other grounds); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978). Thus, an employer is liable for reasonable and necessary home care related to a claimant's work injury. *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975); *see also Edwards v. Zapata Offshore Co.*, 5 BRBS 429 (1977); *Director, OWCP v. Gibbs Corp. [Elliott]*, 1 BRBS 40 (1974); 20 C.F.R. §702.412(b).

Employer initially challenges the administrative law judge's award of 24-hour per day attendant care to claimant. In support of its position, employer, while acknowledging that claimant currently takes approximately eight different medications on a daily basis, avers that the evidence of record establishing that claimant purchased an automobile, briefly married and fathered a child, takes the aforementioned medication on his own, engages in the performance of daily living activities, and has recently both driven an automobile and stayed at home alone without incident supports a finding that claimant presently functions at a high cognitive level and is thus not in need of ongoing supervision. Alternatively, employer avers that claimant's attendant care should be limited to a period of 18 hours per day. Regarding his present mental condition, claimant testified that he fears being alone and taking care of himself. Claimant also stated that he has auditory hallucinations and temper flare-ups or outbursts several times a day, but that he has not had a seizure for quite some time.[2] EX 1 at 51-59. Claimant further stated

[2] Claimant did not testify at the formal hearing, but his October 4, 2002, deposition was admitted into the record. *See* EX 1.

that his hallucinations or delusions have brought about sleep apnea for which he has been provided medication and a breathing machine; claimant noted that he only sleeps between two and six hours per night. *Id.* at 56-58, 69. Claimant testified that post-injury, except for a period when he was married, his mother has assisted him with his daily living activities since the occurrence of his second work-incident. *Id.* at 63, 67. Claimant remains on multiple medications and has difficulty reading and writing. *Id.* at 5, 21-25. Claimant acknowledged during his deposition that he drives an automobile by himself, but that his mother drives in a car behind him when he does so.[3] *Id.* at 69.

Mrs. Summerlin, claimant's mother, testified that following his second work-incident claimant was enrolled in the Peachtree facility in order to learn to use a fork and knife, as well as bathe and dress himself. Tr. at 68-69. Similarly, claimant subsequently was unsuccessfully enrolled at the Homestead facility in Pensacola, Florida, in an attempt to learn rehabilitative skills. *Id.* at 70-71. Mrs. Summerlin conceded that claimant had driven an automobile post-injury, but stated that claimant has not driven since she became aware that his treating physician restricted him from that activity.[4] *Id.* at 79-80. Mrs. Summerlin stated that she performs claimant's daily living activities, that she prohibited claimant from cooking after he started a stove fire, and that she monitors his multiple medications. *Id.* at 76-79. Mrs. Summerlin related claimant's emotional and physically aggressive outbursts, but conceded that claimant's physical altercations did not require medical attention. *Id.* at 82, 188. Although she has regularly taken claimant to her place of employment, Mrs. Summerlin stated that at times she has left claimant alone at home.[5] *Id.* at 78-79, 112-113, 117.

Dr. Brodsky, claimant's treating psychiatrist, first examined claimant in December 1992, at which time he diagnosed claimant with, *inter alia*, chronic traumatic stress disorder and a highly suspect closed head injury with organic mood and personality disorder. EX 11. In a report dated November 5, 1993, Dr. Brodsky stated that claimant

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[3] Claimant's mother testified that, as she was of the opinion that claimant would not be able to pass a driver's examination, she renewed claimant's driver's license over the telephone with a credit card. *See* Tr. at 79.

[4] Mrs. Summerlin acknowledged that claimant, in 2003 and without her knowledge, signed a financing agreement in order to purchase a new automobile. Tr. at 90-94. The record is unclear precisely how this financial transaction was accomplished, as claimant's deposition pre-dated this transaction and claimant deposed that his mother controls his checking account and pays his bills. EX 1 at 24.

[5] Mrs Summerlin and her husband operate a car dealership, at which Mrs Summerlin performs financing and title work. Tr. at 92-93, 109-113.

has required attendant care since the date of his work-injury and that claimant is not capable of living independently without this kind of support. CX 10; *see also* CXS 11, 12. In a deposition taken on September 19, 2003, Dr. Brodsky testified that claimant's work-incidents resulted in the onset of cognitive deficiencies from brain damage, that claimant's present condition includes memory lapses and judgment difficulties, temperament, hallucinations, and emotional explosiveness and volatility. EX 16 at 13-15, 24-26, 33, 37, 58-60. Dr. Brodsky stated that claimant was presently taking at least eight prescription medications.[6] *Id.* at 51-54. In this regard, Dr. Brodsky noted that while claimant's cognitive functions improved in late 2001 and early 2002 when he was placed on a full dose of Excelon, his psychotic episodes increased with his use of this prescriptive medication, and his medication dosages were changed. *Id.* at 30-37. While acknowledging claimant's ability to perform daily tasks and activities on a piecemeal basis, Dr. Brodsky opined, based upon claimant's mental condition as well as claimant's intolerance for being left alone, that claimant would be at risk if he were not under supervision. Accordingly, Dr. Brodsky concluded that if claimant did not have the care presently provided to him by his mother, either someone would have to be hired on a full-time basis to look after claimant or claimant would require institutionalization. *Id.* at 14-17, 36-38. Regarding Mrs. Summerlin's having left claimant alone on occasion, Dr. Brodsky stated that she was "taking a chance" when she did so, and he reiterated his prior opinion that claimant should not be allowed to operate a motor vehicle. *Id.* at 11, 17-23, 27-28, 43-44.

Contrary to employer's evaluation of claimant's post-injury activities, the evidence the administrative law judge relied upon supports his decision that claimant requires 24-hour supervision. Dr. Brodsky acknowledged that claimant has improved cognitively and is capable of performing some basic daily activities, but he testified that claimant's performance in this regard is on a mechanical, piecemeal basis and that claimant requires someone to oversee and organize his daily living activities. EX 16 at 37-38. Regarding claimant's driving activities, Dr. Brodsky unequivocally stated on multiple occasions that claimant should not be allowed to drive an automobile, *id.* at 11, 17-21, and that claimant should not be left alone. *Id.* at 16-17, 43-44. Accordingly, taking into consideration claimant's cognitive and psychiatric limitations, specifically his difficulties regarding memory and judgment, his explosive behavior and volatility, Dr. Brodsky opined that claimant requires either full-time supervision or institutionalization. *Id.* at 14-15.

[6] Specifically, Dr. Brodsky stated that claimant currently takes Exelon and Reminyl, which are anti-Alzheimer medications, Abilify and Seroquil, which are anti-psychotic medications, Neurontin, an anti-convulsant with mood stabilizing properties, Prevacid, Synthroid and Viagra. EX 16 at 51-54

In his decision, the administrative law judge credited the testimony of claimant, Mrs. Summerlin and Dr. Brodsky in finding that claimant is barely able to perform basic daily functions and is not capable of managing his own life and concluding that claimant therefore requires attendant care to organize his daily tasks and carry out day-to-day life management decision-making.[7] Decision and Order at 33, 35. Additionally, the administrative law judge, based upon claimant's testimony that he sleeps between two and six hours per night and suffers from sleep apnea, as well as Mrs. Summerlin's testimony that claimant experiences difficulties at night and that she checks on him every two hours, concluded that attendant care during claimant's sleeping hours is both reasonable and necessary. Decision and Order at 35.

Employer's disagreement with the administrative law judge's evaluation of the evidence before him, and his ultimate conclusion that claimant needs full-time supervision, is not a sufficient reason to overturn his award of attendant care to claimant, as it is axiomatic that the Board is not permitted to reweigh the evidence but may only ascertain whether substantial evidence supports the administrative law judge's decision. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). In this case, the administrative law judge's findings regarding claimant's need for around-the-clock attendant care are rational, supported by substantial evidence, and will not be disturbed. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997). *See also Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Accordingly, we affirm the administrative law judge's award of paid, 24-hour attendant care to claimant.[8] *Carroll*, 37 BRBS 134; *Falcone*, 21 BRBS 145.

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[7] In addition, the administrative law judge found that Dr. Edwards, who evaluated claimant at employer's request on March 14, 2003, EX 17, opined that claimant requires someone to manage his life, medication and finances. Dr. Edwards opined that claimant suffers from a severe mixed personality disorder, including dependency, passive aggressiveness and histrionic qualities, which was not associated with any type of brain injury and thus not work-related. *Id.* at 48-50, 61-63, 74, 80-85. Dr. Edwards further stated that claimant would benefit from anxiety and depressant medications and that, due to his personality disorder, claimant requires positive reinforcement and thus someone to be around him. *Id.* at 70-74, 89.

[8] In affirming the administrative law judge's award of continuing attendant care to claimant, we reject employer's assertion that claimant's cognitive ability "to court and marry . . . and father a child" post-injury renders such ongoing supervision unnecessary. *See* Employer's br. at 18, 23. To the contrary, claimant's testimony that his wife looked

Employer next challenges the administrative law judge's award of past attendant care costs to claimant beyond those that it has already voluntarily paid. Employer specifically argues that the issue of *past* attendant care costs was not before the administrative law judge; alternatively, employer contends that Mrs. Summerlin, claimant's primary attendant care provider, should not be entitled to collect attendant care benefits during the period of time that she was away from claimant. We reject employer's initial contention of error, as the issue of claimant's care was raised before the administrative law judge, JX 1, and employer is responsible for all reasonable and necessary medical care related to claimant's work injury, including attendant and domestic services. 33 U.S.C. §907(a); 20 C.F.R. §§702.412(b), 702.413. Additionally, we reject employer's implied allegation that Mrs. Summerlin's "lucrative position in the family business" somehow disqualifies her from receiving attendant care benefits for the assistance rendered to claimant. *See* Employer's br. at 25. To the contrary, Mrs. Summerlin is entitled, pursuant to the administrative law judge's award, to request reimbursement for the time during which she assumed the responsibility for claimant's supervision as she, during that period of time, is providing the care for which employer has been held liable.[9] *See Carroll*, 37 BRBS 134. Accordingly, employer is liable for those attendant care services previously rendered by claimant's family. We hold, however, that the case must be remanded for the administrative law judge to determine the date on which employer's liability for 24-hour attendant care commences. In this regard, the record contains only Dr. Brodsky's opinion on November 5, 1993, that claimant "has required attendant care since his injury," CX 10, employer's stipulation that it has voluntarily paid 12 hours per day of attendant care benefits since June 13, 1994, JX 1, and Mrs. Summerlin's acknowledgement that she received these payments. Tr. at 105-107. Thus, on remand, the administrative must determine a commencement date for the onset of claimant's full-time attendant care, and claimant's family may request payment for past services that they actually performed in addition to the hours voluntarily paid by employer.

Lastly, employer contends that the administrative law judge erred in awarding claimant professional attendant care; in this regard, employer contends that Dr. Brodsky's reference to *professional* attendant care was preconditioned on the unavailability of claimant's mother, Mrs. Summerlin, to provide the attendant care services required by claimant. In his decision holding employer liable for 24-hour care, the administrative law judge, without adequate discussion or consideration of claimant's mother's ongoing

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after him as his mother had previously, and that his marriage failed due to his temper, is uncontradicted. EX 1 at 73.

[9] We note, however, that the record contains no evidence regarding the hourly rate paid to Mrs. Summerlin by employer.

supervision of claimant, summarily awarded claimant professional attendant care. Decision and Order at 35. In this regard, since leaving residential treatment, claimant has been cared for by either his mother or, for approximately a three year period of time, his wife.[10] There is no evidence that claimant's mother is presently incapable of continuing to provide, at least on a part-time basis, some of the attendant supervision of claimant which employer is obligated to provide. Moreover, Dr. Brodsky's hypothetical answer when addressing this issue presupposed that claimant's mother was no longer capable of caring for him. *See* EX 16 at 36-37. Accordingly, while the administrative law judge may, based upon his discretionary authority, draw reasonable inferences from the evidence and award paid professional attendant care to claimant, he must set forth his rationale for doing so. *See generally Carroll*, 37 BRBS 134. (24-hour paid supervision divided between family members and professional attendant). Accordingly, we vacate the administrative law judge's award of professional attendant care to claimant; on remand, the administrative law judge must reconsider claimant's need for a professional attendant as opposed to supervision by family members and award benefits consistent with his need for 24-hour care.[11]

[10] However, his wife was a nurse who previously cared for him. *See* n. 1, *supra.*

[11] Pursuant to our affirmance of the administrative law judge's award of 24-hour care to claimant, employer will thus be liable for claimant's mother's services, as well as the services rendered by another, whether a licensed professional or not, for a total of 24-hours per day.

Accordingly, the administrative law judge's award of 24-hour paid attendant care is affirmed. The case is remanded for the administrative law judge to determine the date on which such supervision commences, as well for reconsideration of the issue of whether claimant is entitled to professional attendant care.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge