BRB No. 05-0495

LEO FERGUSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NABORS OFFSHORE CORPORATION	)	DATE ISSUED: 03/07/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Robert L. Beck, Jr. (Rivers, Beck, Dalrymple & Ledet), Alexandria, Louisiana, for claimant.

Kevin A. Marks and Jessie Schott Haynes (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-00576) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

On July 2, 2000, claimant fell off the side of a rig floor and broke his neck in four places. He initially was paralyzed from the neck down. Claimant regained mobility, but has right-sided hemiparesis. Claimant is able to walk with the assistance of an ankle fixation orthotic (AFO). The parties agree that claimant is permanently totally disabled. Decision and Order at 2. Employer voluntarily paid for six hours per day of home health

care assistance, which claimant's family members provided. Claimant contended that he requires paid home assistance 12 hours per day.

In his decision, the administrative law judge found that claimant failed to establish that 12 hours per day of paid home health care assistance is reasonable and necessary. Decision and Order at 43. The administrative law judge found the evidence establishes that claimant requires, on average, six hours per day of paid attendant care. *Id*. at 44. The administrative law judge also found claimant entitled to paid care for an additional one hour per day, three days per week, for transportation to and from his medical appointments. *Id*. at 43.

On appeal, claimant challenges the administrative law judge's award of only six hours per day of paid home care assistance, as well as the limited award of paid assistance for travel time. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

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., Inc.*, 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd on recon. en banc*, 38 BRBS 53 (2004) (Dolder, C.J., and Smith, J., dissenting). Thus, an employer is liable for reasonable and necessary home care related to a claimant's work injury. *Id*.; *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988); 20 C.F.R. §702.412(b). The issue before the administrative law judge and on appeal involves the specific number of hours of care for which employer must pay.

Claimant argues that the administrative law judge erred by focusing on the actual number of hours per day he requires assistance and ignoring that such assistance must be available at all times. Specifically, claimant argues the evidence shows that due to his incontinence he can require assistance at any time. Claimant further contends that he needs help engaging in his hobbies of welding, woodworking, and driving a tractor, and that he is subject to falling, which may require assistance when he is unable to pull himself up.

In his decision, the administrative law judge addressed these specific contentions. The administrative law judge found that Dr. Lindeman, employer's consulting physician,

and claimant's treating physician, Dr. Leglue, agreed that claimant requires four hours per day of actual assistance. Decision and Order at 41; Tr. at 138; EXs 1 at 3-4, 2 at 14-16. Dr. Leglue later opined that claimant may need six hours of actual daily assistance. CX 1. The administrative law judge found, based on claimant's testimony and that of his wife, that claimant requires no more than an hour of help to get ready in the morning and an hour in the evening to prepare for bed. Tr. at 31-37, 47-51, 75-77, 89-95, 101-102, 116-117. Regarding claimant's incontinence, the administrative law judge credited evidence that such incidents are infrequent. Tr. at 51-54, 77-81, 104-105. The administrative law judge found that claimant never cooked for himself before his injury and, therefore, cannot request that time expended preparing meals be added to the hours allowed for attendant care. Decision and Order at 42; Tr. at 40, 54, 102. The administrative law judge rejected Dr. Leglue's opinion that claimant requires 24-hour stand-by assistance. *See* CX 1. The administrative law judge stated he is unable to find that claimant requires such care in view of claimant's testimony as to his actual daily needs and the absence of an explanation for such a requirement by Dr. Leglue. Decision and Order at 42-43. The administrative law judge found that claimant's mental health mandates his participation in hobbies; however, the administrative law judge credited Dr. Lindeman's opinion that claimant's chosen hobbies of welding, woodworking, and driving a tractor are unsafe given his disabilities, and therefore cannot support additional attendant care benefits. Decision and Order at 42; EXs 1 at 3, 2 at 38, 41; *see* Tr. at 107-108, 124. The administrative law judge found that on-call assistance is not necessary, as he credited claimant's testimony that he last fell about three weeks prior to the hearing date and that he is often able to pull himself upright. Tr. at 54-56, 72, 96-97. The administrative law judge found that claimant has a cell phone he can use on the rare occasion when he requires help after a fall. *See* Tr. at 37, 40-41. Finally, the administrative law judge found that claimant's wife prepares his daily medications, and that this task takes only 15 to 20 minutes a week; thereafter, claimant can open and take the medications himself. Tr. at 42-43, 84-87, 108-111. In sum, the administrative law judge found that claimant can be classified as a modified independent who can care for himself; claimant needs assistance dressing and ambulating when he is not wearing the AFO, but he can perform all other daily activities independent of on-site caregiver assistance. Decision and Order at 43.

In adjudicating a claim, it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It was within the administrative law judge's discretion to reject Dr. Leglue's later opinion that claimant requires 24 hour stand-by assistance, and to credit Dr. Leglue's opinion that claimant requires no more than six hours per day of actual assistance, the opinion of Dr. Lindeman that claimant

needs only four hours of such assistance, and the testimony of claimant and his wife, to find that claimant failed to establish that 12 hours per day of home health care assistance are reasonable and necessary. *Id.* Therefore, we affirm the administrative law judge's conclusion limiting employer's liability to six hours per day of home health care assistance. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002) (table).

Claimant next challenges the administrative law judge's award of one hour per day of paid assistance, three times a week, to transport claimant to and from his home for massage therapy. Claimant contends that three hours per week are insufficient since the time required by claimant's wife to drive him to massage therapy, including waiting time, exceeds seven hours per week. Claimant also contends he must be examined by physicians on a regular basis, and that the administrative law judge did not award any attendant care for that.

In his decision, the administrative law judge found that claimant's wife runs errands while claimant receives massage therapy three days per week in Alexandria. The administrative law judge thus found that allowing one hour for travel time is reasonable. Decision and Order at 43. The administrative law judge also found that claimant goes to his treatment only three times a week. *Id*. at 44.

It is undisputed that claimant's wife often runs errands while claimant receives massage therapy. *See* Claimant's Memorandum in Support of Petition for Appeal at 3, 15. Accordingly, we affirm the administrative law judge's limiting the time awarded to the actual driving time expended as this conclusion is rational and supported by substantial evidence. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *see also Calbeck*, 306 F.2d 693.

However, the record establishes that the distance from claimant's home, near Bunkie, to Alexandria, Louisiana, where claimant receives massage therapy, is approximately 37 miles. EX 1 at 1. Claimant testified that, in addition to massage therapy, he is transported to Dr. Glue, who monitors claimant's medication regimen, to Dr. Webb in Alexandria, for sinus problems, and to Hangar, as needed, to adjust the AFO. Tr. at 26-28. Claimant also testified that every three months he sees Dr. Irby, a psychiatrist, and Dr. Burlot for Botox injections to relax his muscles. *Id*. Claimant's wife testified that claimant sees Dr. Snyder every week or two, and that the distance to his office is 25 miles. Tr. at 87-88; *see also* Tr. at 26. Given this evidence which could establish that claimant's need for paid assistance to transport him to medical appointments exceeds three hours per week, we are unable to affirm the administrative law judge's award of paid travel time as the administrative law judge did not fully address the evidence in this regard. Therefore, we vacate the administrative law judge's findings with respect to the number of hours per week claimant is entitled to paid care for

transportation assistance, and we remand this case to the administrative law judge for further findings on this issue. *See James J. Flanagan Stevedores, Inc.*, 219 F.3d 426, 34 BRBS 35(CRT); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Accordingly, the administrative law judge's finding regarding the number of hours to which claimant is entitled to paid care for transportation assistance is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge