

BRB Nos. 03-0189
and 03-0189A

LARRY G. CARROLL)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
M. CUTTER COMPANY,) DATE ISSUED: July 8, 2004
INCORPORATED)
)
and)
)
LIBERTY NORTHWEST)
INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents) ORDER on MOTION FOR
Cross-Petitioners) RECONSIDERATION *EN BANC*

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

McGRANERY, Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Carroll v. M. Cutter Co., Inc.*, 37 BRBS 134 (2003) (Smith, J., dissenting in part), requesting *en banc* review. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds, urging that the Board deny the motion. Employer's request for *en banc* review is granted; however, by virtue of a split decision, the motion for reconsideration is denied, and the prior decision is affirmed. 20 C.F.R. §801.301(c).

The facts of this case are not in dispute, and they have been set forth in full in the Board's previous decision. *Carroll*, 37 BRBS at 135. To reiterate briefly, claimant was severely injured on December 4, 1998, when he fell from a crane boom walkway. He is permanently totally disabled. The administrative law judge found that claimant is in need of 24-hour attendant care, which employer conceded. Decision and Order at 3. The administrative law judge held that claimant is entitled to paid attendant care, specifying

the number of hours of care to be provided by paid professionals and supervision provided by paid non-professionals, at specified rates, and awarding fewer hours than required for full coverage of 24 hours per day. Both parties appealed various aspects of the administrative law judge's decision to the Board. The Board affirmed the administrative law judge's award of paid professional care at a rate of \$20.50 per hour for specified periods of time and his decision that additional hours specified for non-professionals, including claimant's family members, should be paid at a reduced rate of \$10 per hour. A majority of the Board's panel reversed the administrative law judge's determination that employer is liable for fewer than 24 hours of paid supervision and modified the decision to hold employer liable for additional hours of non-professional supervised care at the specified rate, in accordance with the uncontradicted evidence that 24-hour care was necessary. *Carroll*, 37 BRBS at 138-139.

The only issue employer asks us to review is the Board majority's holding that it must pay for supervision of claimant totaling 24 hours per day. That is, employer asserts that family members or other responsible persons should assume some responsibility without pay for watching claimant for portions of the day when they would be with him anyway. For example, employer asserts that it should not have to pay claimant's wife for supervision during the night when claimant is asleep. Employer contends that the Board erred in reaching its own factual determinations and reversing the administrative law judge's decision based on those findings, and asserts that, on the facts found by the administrative law judge, it is not liable for 24-hour paid supervision.

We reject employer's assertion that the majority reached improper factual conclusions or substituted its findings for those of the administrative law judge. Consistent with the unanimous medical opinions of record, the administrative law judge stated, "claimant's need for 24-hour attendant care is no longer an issue," Decision and Order at 3, and he proceeded to address the disputed issues regarding how that care was to be provided. Based on this factual conclusion that claimant's need for 24-hour care is undisputed, the Board reviewed the legal issue of employer's liability under the standard of Section 7(a), 33 U.S.C. §907(a), which requires that employer furnish "medical, surgical, and other attendance or treatment" as is required by claimant's injury. As the Board did not rely on new findings of fact, the cases cited by employer regarding the Board's limited scope of review of factual findings are inapposite; deciding a legal issue based upon facts which are undisputed and found by the administrative law judge is well within the Board's authority. See *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).

In this case, as the administrative law judge recognized, it is undisputed that the medical opinions of record unanimously state that claimant should have 24-hour supervision, not necessarily for assistance with daily needs, but for safety, redirection,

and prevention of injuries. The administrative law judge specifically found that claimant is not always aware of his surroundings, as he becomes obsessed or distracted and may put himself in harm's way. Decision and Order at 3. An employer is liable under Section 7 of the Act for attendant care "for such period as the nature of the injury . . . may require." 33 U.S.C. §907(a); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978). Although acknowledging that all of the medical experts in this case advised that claimant be supervised 24 hours a day, Cl. Ex. 5 at 9, 26; Cl. Exs. 12, 15-16, 35, 37, 40-41, and that employer did not dispute this evidence, the administrative law judge nonetheless failed to hold employer liable for this care, in full, concluding that claimant's family could provide some of the needed care without recompense. While the administrative law judge could properly find that care by non-professionals, including family members, was appropriate for some of the time, he failed to properly apply Section 7(a) in determining that family members could be required to provide a portion of the necessary care for free. The majority's decision to modify the award to reflect employer's liability for 24 hours of paid supervision merely applied the law under Section 7 to the undisputed facts by holding employer liable for payment for the full number of necessary hours of care. Because there is no dispute over the number of hours claimant must be watched, and because the recommended supervision is necessitated by the work-related accident, the responsibility for paying for such supervision lies with employer under Section 7(a). *Carroll*, 37 BRBS at 138-139.

Ms. Bellerive, the life-care planner credited by the administrative law judge, stated that claimant required 24-hour care but she opined he did not require 24 hours of professional care; care by family members would be adequate for a portion of the time. While the administrative law judge rationally relied on Ms. Bellerive's opinion to find that employer need not supply 24 hours of paid *professional* care, and that family members could provide some care, her opinion cannot support a legal conclusion that the existence of family members capable of providing some of the requisite attendant care relieves employer of its responsibility to provide 24-hour care. The effect of the administrative law judge's decision is to authorize employer to commandeer the services of family members without compensation. *Gilliam*, 8 BRBS 278; see *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), 702.413. Once the administrative law judge credited the undisputed evidence that as a result of his work injury claimant needs 24-hour care provided in part by professionals and in part by non-professionals, Section 7 established employer's liability for all of the required care.

By ignoring his own finding that claimant's need for 24-hour care is not in dispute and then holding employer liable for a lesser number of hours, the administrative law judge departed from the mandate of Section 7(a), which bases the extent of liability exclusively on a determination of the care necessitated by the injury. As the medical

experts all agreed that claimant needs 24-hour supervision, the only legal conclusion that may be reached is that employer is fully liable for the prescribed 24-hour care pursuant to Section 7.

Accordingly, we deny employer's motion for reconsideration, and we reaffirm the panel decision in this case.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I agree with employer's assertion that the issue herein is a *factual* one, and I would grant employer's motion for reconsideration, reverse the panel's decision and reinstate the administrative law judge's decision on this matter. The administrative law judge found that while claimant needs 24-hour *supervision*, he does not need 24-hour *paid attendant care*, as he rationally found that claimant's condition is different from someone suffering total incompetence. In light of this finding, the administrative law judge rationally concluded that employer must pay for care for only a portion of the time and claimant's family should take responsibility for the remainder. Ms. Bellerive's opinion supports the administrative law judge's determination that claimant's family members or other astute individuals, who would be with claimant at various times anyway, could observe and supervise claimant part of the time. It is within the administrative law judge's discretion to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *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); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Ms. Bellerive's opinion, credited by the administrative law judge, and the facts pertaining to claimant's abilities constitute substantial evidence supporting the administrative law judge's decision that claimant

does not need paid supervision 24 hours per day. Thus, for the reasons stated in my dissenting opinion, *Carroll*, 37 BRBS at 139, I would grant employer's motion for reconsideration as well as the relief requested.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER, Chief
Administrative Appeals Judge