BRB Nos. 01-0783
and 01-0783A

MANUEL J. MARTINEZ	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BRADFORD MARINE, INCORPORATED)	)	DATE ISSUED: July 1, 2002
	)	
and	)	
	)	
ZENITH INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Jay M. Levy, Miami, Florida, for claimant.

Ben H. Cristal (Sponsler & Bennett, P.A.), Tampa, Florida, for employer/ carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (99-LHC-221) of Administrative Law Judge Richard T. Stansell-Gamm 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).

On June 9, 1996, claimant fell approximately 15 feet from a scaffold at work. Claimant lost consciousness, cut his head, and fractured his left wrist. Claimant returned to light-duty work in September 1999, but he subsequently developed headaches, fatigue, and dizziness. In January 1997, claimant was diagnosed as nervous and depressed; claimant was referred to Dr. Patino, a psychiatrist. Dr. Patino diagnosed post-traumatic stress disorder and recommended a neurological reassessment. On February 12, 1997, claimant's supervisor reported to Dr. Patino that claimant exhibited abnormal behavior, he seemed depressed and was perspiring. When Dr. Patino examined claimant on the following day, he complained of visual and auditory hallucinations. On February 26, 1997, Dr. Patino referred claimant to Columbia Behavioral Health Center (Columbia) for in-patient treatment. Claimant's hospitalization at Columbia was supervised by Dr. Casariego, who diagnosed major depression with psychosis. He evaluated claimant as severely disturbed. Claimant was discharged from Columbia on March 10, 1997, and he did not return to work thereafter. Employer terminated voluntary temporary total disability payments, 33 U.S.C. §908(b), on May 21, 1998. Claimant was readmitted to Columbia due to his psychological condition on June 5, 1998. Claimant was discharged on June 16, 1998, to reside with his sister, Frances Martinez, and his mother. Claimant sought compensation under the Act for temporary total disability from May 22, 1998, until the date of maximum medical improvement; thereafter, claimant sought continuing compensation for permanent total disability, 33 U.S.C. §908(a). Claimant also sought payment of past and future attendant care provided by his sister, Frances Martinez, 33 U.S.C. §907(a).

The administrative law judge initially found that claimant's psychological condition is related to his work injury on June 9, 1996. The administrative law judge determined that claimant is unable to return to his usual employment due to his psychological condition, and that employer failed to establish the availability of suitable alternate employment. The administrative law judge found that claimant's psychological condition reached maximum medical improvement on January 28, 1999. Claimant was therefore awarded compensation for temporary total disability from May 22, 1998, to January 27, 1999, and for continuing permanent total disability from January 28, 1999. The administrative law judge found that claimant requires attendant care to monitor his medication and activities. The administrative law judge ordered employer to provide four hours of daily attendant care, and, if such care is rendered by a family member, such care is to be recompensed at the federal hourly minimum wage. Finally, the administrative law judge found that claimant failed to establish that family members had provided attendant care since the date of injury. The administrative law judge stated he was unable to determine the exact amount of reimbursement for the attendant care that had been provided in the past by claimant's sister. The administrative law judge therefore ordered that employer commence payment for attendant care on May 31, 2001,

which is the date his decision was issued.

On appeal, employer challenges the administrative law judge's finding that claimant is unable to work due to his psychological condition. Employer also challenges the administrative law judge's finding that claimant is entitled to attendant care, and alternatively, that claimant requires fours hours of attendant care each day. On cross-appeal, claimant challenges the date the administrative law judge commenced payment for attendant care.

Employer contends that the administrative law judge's finding that claimant is unable to work is not supported by substantial evidence as the credited medical opinions fail to identify specific impediments to claimant's ability to work as a result of his psychological condition. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). Where a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. To do so, the employer must show the availability of realistic job opportunities which the claimant is capable of performing, considering his age, background, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, the administrative law judge determined that claimant must be minimally healthy psychologically to return to his usual employment. Specifically, the administrative law judge found that claimant must be able to concentrate to remain focused on his job tasks, and he must interact rationally with his co-workers. The administrative law judge credited the opinions of Drs. Patino and Casariego, and the neuropyschological test results obtained by Dr. Dergan, to find that claimant is unable to perform these tasks. The administrative law judge also credited evidence that, after claimant returned to light-duty work before his first hospitalization, claimant's supervisor expressed to Dr. Patino his concern about claimant's abnormal behavior at work. CX 3 at 10. The administrative law judge concluded from this evidence that claimant established a *prima facie* case of total disability. The administrative law judge also found that employer failed to establish the availability of suitable alternate employment. The administrative law judge determined that employer's vocational consultant, Jerry Adato, was instructed to prepare a labor market survey based solely on the work restrictions of Drs. Gran, Corin, and Diaz, who believed that claimant was capable of working with only a restriction against working at heights. Tr. at 74-75. The administrative law judge rejected employer's survey because it failed to account for his finding that claimant has a severe psychiatric impairment. Decision and Order at 27.

Dr. Patino opined at his deposition on March 3, 1999, that claimant has been unable to work during the course of his treatment from January 1997 to January 1999. Dr. Patino stated that claimant regularly went to emergency rooms with anxiety, depression, and

confusion. Dr. Patino described claimant's depression as causing claimant to become hopeless, to stop taking his medication, to become non-communicative, to have poor hygiene, and to otherwise neglect himself. CX 3 at 18-21. Dr. Patino stated that claimant is unable to work because of his low level of functioning, hallucinations, delusional and grandiose thinking, and Dr. Patino opined that claimant is brittle and fragile. Dr. Patino stated that if claimant were to return to work he would "most likely" have a flare-up and become overtly psychotic. CX 3 at 43-44. Dr. Casariego opined that claimant was totally disabled during the period between his hospitalizations at Columbia from March 1997 to June 1998, and that claimant is "handicapped" from work based on the seriousness and chronic nature of his psychological condition. CX 4 at 13-14, 25. Dr. Dergan is a clinical psychologist who administered and interpreted neuropsychological tests as revealing objective deficits in claimant's cognitive and emotional functioning. CX 4 at 9-15. Dr. Dergan diagnosed post-traumatic stress disorder, post-concussion brain syndrome, and organic affective disorder. CX 5 at 16.

We affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability as it is supported by substantial evidence. Specifically, the administrative law judge rationally credited claimant's failed attempt to return to work for employer, his two psychiatric hospitalizations, abnormal neuropsychological test results, chronic psychosis, long-term therapy with Dr. Patino, and Dr. Patino's opinion that claimant is unable to return to work. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *see also Mijangos v. Avondale Shipyards*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Marinelli v. American Stevedoring , Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Moreover, we hold that the administrative law judge rationally rejected employer's labor market survey because the survey failed to account for claimant's disabling psychological condition. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *see also White v. Peterson Boatbuilding Co*, 29 BRBS 1 (1995). Accordingly, we affirm the administrative law judge's compensation award for temporary total disability from May 22, 1998, to January 27, 1999, and for permanent total disability thereafter.

Employer next challenges the administrative law judge's finding that claimant requires fours hours of attendant care each day. Employer argues that claimant has not been declared incompetent, and he is able to engage in the routine activities of daily living. Alternatively, employer argues the evidence establishes that claimant requires no more than one hour of daily attendant care. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . ., for such period as the nature of the injury or the process of recovery may require." *See also* 20 C.F.R. §702.401. In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the injury at issue. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements

of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996); *see also Ingalls Shipbuilding, Inc., v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

In this case, the administrative law judge credited the opinions of Drs. Patino and Casariego that claimant requires attendant care. The administrative law judge also credited evidence that claimant's two hospitalizations at Columbia were precipitated by his willfully neglecting to take medications for his psychological condition. CX 4 at 9, 11, 24; *see* CX 3 at 42-43. Dr. Patino opined that claimant requires supervision to prevent him from neglecting his personal care and to insure that claimant takes his medications. CX 3 at 22-24. Dr. Casariego concurred that claimant needs attendant care. CX 4 at 23-24. Addressing the extent of this care, the administrative law judge found that claimant requires fours hours daily. The administrative law judge found that Dr. Patino, in response to a letter from employer summarizing a phone conversation, quantified claimant's attendant care as entailing about an hour of actual daily activity, EX 6; however, the administrative law judge found Dr. Patino's testimony less than clear in this regard. Decision and Order at 30. Dr. Patino testified that the duration of claimant's care will vary with claimant's daily psychological state, which is unstable. CX 3 at 51; *see also* CX 3 at 38-42, 48-50. The administrative law judge interpreted Dr. Patino's letter and testimony as establishing that claimant requires periodic monitoring of his activities during the day to insure that claimant is taking his medications. Based on this evidence, the administrative law judge determined that, while claimant may not need more than an hour of actual care, the availability of attendant care throughout the day to periodically monitor claimant's condition requires compensation for a total of four hours a day.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to draw his own inferences and conclusions from the evidence. *See Bath Iron Works Corp. v. Director, OWCP*, 244 F.2d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge considered the record as a whole, and found that claimant requires fours hours daily of attendant care. On the basis of the record before us, the administrative law judge's conclusion is rational and supported by substantial evidence. Accordingly, we affirm the administrative law judge's finding that employer is liable to claimant for four hours of daily attendant care, pursuant to Section 7(a). *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988).

In his cross-appeal, claimant challenges the administrative law judge's commencing payment for attendant care on May 31, 2001, which is the date his decision was issued. The administrative law judge determined that claimant failed to establish the specific amount of past attendant care rendered by his family. The administrative law judge found that, while Dr. Casariego suggested attendant care upon claimant's discharge from his initial

hospitalization in March 1997, claimant's subsequent hospitalization in June 1998 indicates that claimant did not receive sufficient attendant care. The administrative law judge found that claimant's sister, Frances Martinez, has been claimant's principal care provider; however, the administrative law judge concluded that he is unable to determine the exact amount of reimbursement to which she is entitled for her past attendant care. The administrative law judge therefore denied the claim for past attendant care, and he commenced reimbursement effective the date his decision was issued on May 31, 2001.

We affirm the administrative law judge's denial of reimbursement for attendant care rendered prior to the date of the formal hearing. Claimant's sister, Frances, testified at the hearing that she provides two hours of care each morning, and a total of five to six hours daily, and that her sister and mother watch claimant during the day while she is at work. Tr. at 58. She did not offer testimony, however, specifying when she or other family members began providing such care to claimant. Accordingly, the administrative law judge rationally concluded that claimant failed to establish the amount of past attendant care rendered by his sister and other family members. *See generally Schoen*, 30 BRBS 112.

We modify the administrative law judge's Decision and Order, however, to award reimbursement for fours of daily attendant care by Frances Martinez from May 12, 2000, which is the date of the formal hearing before the administrative law judge. In his decision, the administrative law judge found that Ms. Martinez has been claimant's principal care provider. Decision and Order at 30. Ms. Martinez so testified at the May 12, 2000, hearing before the administrative law judge, and the medical records and testimony of Drs. Patino and Casariego also indicate that claimant received attendant care from his family. Tr. at 49-67; CX 1; 3 at 22-25,40-41, CX 4 at 23-24, 28. Claimant thus established at the time of the formal hearing both the need for attendant care and his receiving such care from his sister and other family members. The administrative law judge's commencing reimbursement for this care over a year later on May 31, 20001, when he issued his decision is therefore arbitrary and irrational. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). Accordingly, we vacate the administrative law judge's finding that payment for claimant's attendant care commences on May 31, 2001, and we modify the administrative law judge's Decision and Order to commence reimbursement to claimant's sister, Frances, for fours hours of daily attendant care on May 12, 2000.

Accordingly, the administrative law judge's Decision and Order is modified to provide for employer's liability for payment at the minimum wage to Frances Martinez for four hours of attendant care daily to claimant from May 12, 2000, to May 30, 2001. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge