BRB No. 92-2558

ILEY MACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN MARINE CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Douglas T. Curet, Hammond Louisiana, and Charles W. Dittmer, Metairie, Louisiana, for claimant.

Mary L. Grier Holmes (Milling, Benson, Woodward, Hillyer, Pierson & Miller), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (88-LHC-2382) of Administrative Law Judge James W. Kerr, 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 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

This case is before the Board for the second time. To recapitulate, claimant, while employed by employer as a laborer on October 14, 1975, developed a rash and swelling of his feet after pumping out a barge filled with mud and asphalt. He was sent by employer to Dr. Bernhard who diagnosed severe contact dermatitis and treated claimant with various medications including steroids. Allergy tests performed at Louisiana State University Medical Center indicated that claimant was allergic to various chemical and plant derivatives. In 1977, claimant began testing and treatment at Ochsner Clinic where he was diagnosed as a persistent light reactor which caused him to have a very high probability of airborne contact dermatitis. Claimant was advised to avoid exposure to sun and fluorescent lighting. Claimant attempted to return to work for employer which

caused his condition to flare up. After leaving employer's employ, claimant began working on a dairy farm where he would pick up feed and clean the barn, working up to 6 to 7 hours per day and as many as 3 or 4 days per week. Employer voluntarily paid claimant total disability compensation from October 14, 1975 until June 30, 1986.

In his initial Decision and Order, the administrative law judge determined that claimant ceased working on the dairy farm in 1981, and thereafter awarded claimant permanent total disability compensation commencing June 2, 1986. Employer appealed this decision to the Board. *See Mack v. American Marine Corp.*, BRB No. 89-3837 (Oct. 4, 1991) (unpublished). In its Decision and Order, the Board affirmed the administrative law judge's finding that claimant's current condition is causally related to his October 14, 1975 work injury. Additionally, the Board affirmed the administrative law judge's finding that claimant established a *prima facie* case of total disability, and that employer failed to establish the availability of suitable alternate employment at its facilities. However, the Board vacated the administrative law judge's determination that claimant stopped working at the dairy farm in 1981, and remanded the case for reconsideration of this issue in light of Dr. Bernhard's August 31, 1988 report and testimony. The Board further vacated the administrative law judge's award of permanent total disability, and instructed the administrative law judge on remand to determine whether claimant's post-injury farm work constitutes suitable alternate employment, whether claimant sustained a loss in wage-earning capacity during this employment, and the date claimant reached maximum medical improvement.

In his Decision and Order on Remand, the administrative law judge found, based on Dr. Bernhard's report, that claimant reached maximum medical improvement on July 28, 1977. The administrative law judge then reconsidered the issue of when claimant worked on the dairy farm and concluded that claimant was employed at that farm from 1978 through 1981. Lastly, the administrative law judge determined that claimant worked at the dairy farm in spite of excruciating pain and diminishing strength, and thus found that claimant was entitled to an award of permanent total disability compensation commencing on July 28, 1977, and continuing.

On appeal, employer contends that the administrative law judge erred in finding that claimant worked at the dairy farm through 1981, and not through 1988, as it maintains. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

Initially, we affirm the administrative law judge's finding that claimant worked at the dairy farm from 1978 through 1981. On remand, the administrative law judge specifically noted that Dr. Bernhard, in his August 31, 1988 report, stated: "Mr. Mack was not seen again until May 20, 1987, since he had no money to return, and his company was no longer paying the bills. At the time of this visit he had a marked flare of his condition for several months, making it impossible for him to work on *his farm*." Cl. Ex. 8 (emphasis added). Based on the testimony of claimant's wife, the administrative law judge concluded that this reference, as well as the allusion Dr. Bernhard made in his testimony regarding claimant's "farming," concerned any farming claimant may have done on his own quarter-acre lot, and not to work performed on the dairy farm. With regard to this issue, the administrative law judge refused to credit claimant's testimony due to claimant's low intelligence and poor memory.[1] Rather, the administrative law judge credited the testimony of claimant's wife, who

[1]At the hearing, claimant initially testified several times that he worked on the dairy farm only

stated that claimant worked on the dairy farm only through 1981. *See* Tr. at 125-126. Additionally, the administrative law judge found that the Social Security Administration records introduced by employer failed to support its assertion that claimant worked at the dairy farm through 1988.[2] *See* Emp. Exs. 7, 8. Lastly, the administrative law judge rejected as unsubstantiated employer's assertion that Mr. Herman Slade, claimant's boss at the dairy farm, made claimant's checks out to claimant's step-son.[3] Based upon the foregoing, we affirm the administrative law judge's finding that claimant worked at the dairy farm from 1978 through 1981, as that finding is rational and supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Consequently, as employer raises no other issues challenging the administrative law judge's findings, we affirm the administrative law judge's award of permanent total disability benefits to claimant commencing on July 28, 1977 and continuing. 33 U.S.C. §908(a). In so doing, we note that claimant did work at the dairy farm from 1978 to 1981. The administrative law judge applied the rule that an award of total disability while claimant is working may be made where the evidence establishes that the claimant can no longer perform his usual employment and is working in a different job in a state of excruciating pain. *See Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978); *see generally Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). In the instant case, it is uncontested that claimant can no longer perform his usual work for employer as a result of his 1975 work-related injury. The administrative law judge, after stating that claimant was already an elderly man while performing work at the dairy farm, that claimant was subjected to constant itching and inflamed skin which was exacerbated by his work whenever he was exposed to sunlight, and that during this work claimant was forced to visit his doctor more than 50 times, concluded that claimant worked at the dairy farm in spite of excruciating pain and diminishing strength. Decision and Order at 8; *see* Cl. Exs. 8-9. These findings are not contested on appeal. We therefore affirm the administrative law judge's award of permanent total disability benefits commencing on July 28, 1977 and continuing as it is rational and supported by substantial evidence.

Accordingly, the Decision and Order on Remand Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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through 1981, *see* Tr. at 37, 50, 101, but later stated that he worked there five or six months prior to the hearing in 1988. *See* Tr. at 109-111.

[2]Specifically, a document from the Social Security Administration dated October 27, 1988, indicates that claimant had no reportable earnings credited to his social security number subsequent to 1981. *See* Emp. Ex. 7.

[3]The administrative law judge noted that employer had asserted that it would depose Mr. Slade on these issues, but that employer never scheduled the deposition. It is well-established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to it. *See Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge