

D.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEW SHIPBUILDING AND	)	DATE ISSUED:
DRY DOCK COMPANY	)	03/13/2009 <u>2009</u>
	)	
Self-Insured	)	
Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-1991) of Administrative Law Judge Richard K. Malamphy 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, whose usual job is as a fitter, was loaned to a different department in April 2007 to install fiberglass insulation. Claimant alleged he suffered an allergic reaction to the fiberglass, and that he missed work on May 3, 4, 7, 8, 15, and 16, 2007, due to this reaction. Claimant sought medical treatment on May 15, 2007, for itching and swelling of his throat. Dr. Skinner reported that claimant cannot have any exposure to

fiberglass “due to a potentially fatal allergic reaction.” CX 3. Thereafter, claimant reported his injury to employer’s clinic, and he sought compensation for the six days he alleges he missed work due to his allergic reaction. CX 2.

In his Decision and Order, the administrative law judge found that claimant sustained a work-related allergic reaction to fiberglass. He found, however, that claimant failed to establish that the time he missed from work was due to this allergic reaction. Therefore, he denied the claim for benefits.

On appeal, claimant challenges this finding, contending that the only reasonable inference from the facts presented is that claimant was disabled due to his allergic reaction on the days in question. Employer responds, urging affirmance.

We reject claimant’s contention of error, as the administrative law judge was not required to draw the inference urged by claimant. Claimant took annual leave for the days he claimed he was disabled. EX 1. Claimant also took annual leave for periods surrounding the days claimed, specifically for May 2 and May 17-June 7, sick leave for Friday, June 8, and annual leave for Monday, June 11. *Id.* Dr. Skinner stated that claimant was disabled from work on May 15, 2007, and could return to work on May 16. CX 3. The administrative law judge discussed Dr. Skinner’s findings and concluded that he did not excuse claimant from all forms of work at any time. The administrative law judge also found that it would be “speculation and conjecture” to state that time lost prior to May 15 was due to fiberglass exposure. Decision and Order at 3. In this regard, claimant did not visit employer’s clinic or report an injury until May 17 after he had seen Dr. Skinner, CX 2, and the administrative law judge noted the absence of evidence that claimant had visited the clinic at the shipyard at any time between April 9 and May 15, 2007. Claimant did not testify at the formal hearing.

Claimant bears the burden of proving that he is disabled due to his work injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4<sup>th</sup> Cir. 1979). We reject claimant’s contention that the administrative law judge erred in failing to infer that claimant was disabled due to fiberglass exposure on the days claimed.<sup>1</sup> Such an inference is not the only logical conclusion to be drawn from the record. *See Ennis v. O’Hearne*, 223 F.2d 755 (4<sup>th</sup> Cir. 1955). In this case, the administrative law judge properly relied on the absence of evidence that claimant was in

---

<sup>1</sup> Dr. Skinner stated claimant was disabled on May 15, 2007. CX 3. However, even assuming claimant was disabled for this single day, no compensation is payable for the first three days of disability if the entire disability lasts fewer than 14 days. 33 U.S.C. §906(a).

fact disabled by his fiberglass allergy on the days he was off from work. As the administrative law judge's finding that claimant failed to prove his claim for disability benefits is rational and supported by the record, the denial of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge