BRB No. 99-0463

FRANK FLOWERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Permanent Partial Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Kelly Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Permanent Partial Disability (94-LHC-1991, 1992) 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 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).

This case is before the Board for the third time. In its decision issued November 19, 1996, the Board reversed the administrative law judge's finding that claimant failed to establish his *prima facie* case of total disability, *i.e.*, the administrative law judge erred in finding that claimant's usual employment was in the dock department, inasmuch as the work which he was performing at the time of his injury was in the paint department. As the administrative law judge found, in view of restrictions imposed by Dr. Geib, the shipyard physician, that claimant should not return to work involving the use of, or exposure to, epoxy paint which used in the paint department, the Board modified the administrative law judge's decision to reflect that claimant established his *prima facie* case of total disability. The Board remanded the case for consideration of whether employer established suitable alternate employment. *Flowers v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 96-531 (Nov. 19, 1996).

On remand, the administrative law judge again denied benefits, finding that claimant's job in the dock department constituted suitable alternate employment, and that claimant's layoff from this department on September 24, 1993, was not occasioned by claimant's work injury. Specifically, the administrative law judge reasoned that since claimant spent nearly six years working in employer's dock department as a first class painter with no evidence of epoxy poisoning, employer established suitable alternate employment.

On claimant's second appeal, the Board held that when employer laid claimant off from his job in the dock department, employer could no longer meet its burden of establishing suitable alternate employment in its facility, because a position was no longer available to claimant within his restrictions, citing *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988) (in order for a job in the employer's facility to constitute suitable alternate employment, the job must be actually available to claimant). The Board therefore vacated the denial of disability benefits and remanded the case for the administrative law judge to consider whether employer established the availability of suitable alternate employment after the layoff. *Flowers v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 97-1139 (May 12, 1998).

On remand, claimant conceded that he is able to earn $8.00 per hour as residential house painter. The administrative law judge rejected employer's attempt to establish that claimant could earn $12.00 per hour as a shipyard painter because employer did not establish that any shipyards

could provide claimant with the clothing necessary to protect him from epoxy exposure. The administrative law judge thus found that claimant has a post-injury wage-earning capacity of $320 per week ($8.00/hour times 40 hours/week), and awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21).

Employer now appeals the administrative law judge's finding that claimant's post-injury wage-earning capacity is $8.00 per hour, contending that it established the availability of higher paying jobs.[1] Claimant responds, urging affirmance.

We reject employer's first contention that the administrative law judge erred in finding that claimant could earn only $8.00 per hour as a residential house painter. Barbara Byers, employer's vocational expert, identified positions as a residential house painter that paid between $6.00 and $10.00 per hour. EX F; Tr. at 64-65. She stated, however, that claimant's wage-earning capacity in 1993 was $8.00 per hour in jobs that did not use epoxy paint. EX F; Tr. at 66. As claimant is restricted from using epoxy paint, the administrative law judge's finding regarding claimant's wage-earning capacity as a residential house painter is rational and supported by substantial evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

We also reject employer's contention that claimant could earn $12.00 per hour as a shipyard painter if he were provided with protective clothing to prevent exposure to epoxy. The administrative law judge properly found that employer did not demonstrate that such clothing was available to claimant. The administrative law judge cited Dr. Geib's testimony that there was no evidence in his records that employer was able to provide protective clothing which would enable claimant to continue working with epoxy paint. Tr. at 54. The administrative law judge then rationally found that in addition to employer's not having protective clothing for painters using epoxy-based paints, the record did not contain any evidence that any other shipyard in claimant's geographic area used such protective clothing either. Thus, the administrative law judge determined that employer did not meet its burden of establishing the availability of suitable alternate employment at a higher rate of pay.

[1] Employer states that it is not challenging the Board's prior decision that employer did not establish the availability of suitable alternate employment once claimant was laid off from the dock department, but that it is preserving its right to challenge this decision in the court of appeals. We note that the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held in the intervening period that a claimant is entitled to total disability benefits when he is laid off from a light duty job at employer's facility absent evidence of other suitable alternate employment. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999).

Inasmuch as this finding is rational, supported by substantial evidence and in accordance with law, we affirm the finding that claimant's wage-earning capacity after the layoff is $8.00 an hour as residential house painter. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT)(4th Cir. 1994); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989). Moreover, employer's contention that claimant failed to demonstrate due diligence in seeking alternate employment is without merit, as claimant concedes that he can earn $8 an hour as a residential house painter.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge