BRB No. 96-531

FRANK R. FLOWERS, SR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
	)	
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.

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

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1991, 94-LHC-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).

Claimant worked for employer as a painter from 1977 until 1987, when he was transferred to employer's dock department after developing epoxy poisoning due to a sensitivity to epoxy paints. In June or July of 1993, claimant was sent back to the paint shop when extra painters where needed there. He once again developed epoxy poisoning, and accordingly was returned to work in the dock department where his condition cleared up with medication within five days. On September 24, 1993, claimant was laid-off from his job in the dock department due to a lack of available work in that department. Claimant, who has only been able to secure sporadic temporary work with other employers since being laid off, sought temporary total and temporary partial disability compensation under the Act.

The administrative law judge denied the claim, finding that while Dr. Geib had imposed

restrictions which would preclude claimant from returning to work in the paint department, CX-3, because claimant's "usual work" was in the dock department where he remained capable of working and he had been laid off for reasons unrelated to his work injury, claimant failed to establish his *prima facie* case of total disability. Claimant appeals the denial of benefits, contending that because he was working in the paint department at the time of his injury, this job was his usual employment for purposes of his *prima facie* case. Claimant maintains that as he is physically unable to return to this work and employer failed to meet its burden of establishing the availability of suitable alternate employment, he is entitled to temporary total disability benefits for the periods after his lay-off when he had no employment, and temporary partial disability benefits for the post-lay-off periods when he was employed at a lesser wage. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

After review of the administrative law judge's Decision and Order in light of the evidence of record, we are unable to affirm his denial of benefits. In order to establish a *prima facie* case of total disability, claimant must initially establish that he cannot return to his usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Claimant correctly avers that, in denying his claim, the administrative law judge erred in finding that his work in the dock department was his "usual work" for purposes of establishing his *prima facie* case. Claimant's usual work is that which he was performing at the time of his injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Because claimant was working in the paint department when his epoxy poisoning became manifest, this employment, not his work in the dock department, was his usual employment for purposes of establishing his *prima facie* case. Inasmuch as the administrative law judge specifically found that in view of Dr. Geib's restrictions it is clear that claimant should not return to work involving the use of or exposure to epoxy paints, we reverse his finding that claimant's usual work was in the dock department, and modify his decision to reflect that claimant met his burden of establishing his *prima facie* case of total disability. *See Manigault*, 22 BRBS at 333; *Elliot v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984).

Once claimant establishes that he is physically unable to return to his pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT) (4th Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Trans-State Dredging, [Tarner]*, 731 F.2d at 199, 16 BRBS at 74 (CRT). Although employer sought to establish the availability of suitable alternate employment through the testimony of its vocational rehabilitation specialist, Barbara Byers, the administrative law judge did not reach this issue in light of his determination that claimant failed to establish his *prima facie* case. In light of reversal of this determination on appeal, the case must be remanded to allow the administrative law judge to consider the suitable alternate employment issue in light of all relevant evidence consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A).[1]

[1]Even if employer shows the availability of suitable alternate employment, claimant nevertheless can prevail in establishing entitlement to total disability if he demonstrates that he diligently tried and was unable to secure alternate work. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Accordingly, the administrative law judge's finding regarding claimant's usual work is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge