BRB No. 93-1311

HENRY TILLMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARBORSIDE REFRIGERATION SERVICES	)	DATE ISSUED: _____
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Ray Calafell, Jr., P.A., Tampa, Florida, for claimant.

Donald S. Bennett (Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-2425) of Administrative Law Judge George A. Fath 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 sustained an injury to his back, left foot and ankle on May 31, 1989, while in the course of his employment with employer. Claimant has not returned to work since the date of this incident. Employer voluntarily paid temporary total disability compensation from June 1, 1989 until the issuance of the administrative law judge's Decision and Order in March 1993.

In his Decision and Order, the administrative law judge found that while claimant was permanently and totally disabled from performing his usual longshore work, employer established the availability of suitable alternate employment through the testimony of Robert Evanko, a vocational counselor who prepared labor market surveys in November 1990 and November 1992. Accordingly, the administrative law judge denied the claim for permanent total disability compensation, awarded claimant permanent partial disability compensation commencing November 30, 1990 and determined employer to be entitled to a credit for any voluntary temporary total disability payments made to claimant subsequent to that date.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Claimant also alleges that the administrative law judge erred in both commencing claimant's permanent partial disability award as of the date of the initial labor market survey and in awarding employer a credit toward payment of the award. Employer responds, urging affirmance.

Where, as in the instant case, it is uncontested that claimant is unable to return to his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions and which he could realistically secure with diligent effort. *Id.; see Southern v. Farmers Export Co.,* 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities; however, contrary to claimant's contention, the employer need not actually obtain a job for the claimant. *Preziosi v. Controlled Industries, Inc.,* 22 BRBS 468 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of establishing the availability of suitable alternate employment. *Southern,* 17 BRBS at 66. Contrary to claimant's assertions, however, an administrative law judge may credit a vocational expert's opinion even if the expert did not interview and test the employee, as long as the expert was aware of the above factors when exploring local job opportunities. *See Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990).

In the instant case, claimant is correct that Mr. Evanko, a vocational counselor, testified that he did not interview claimant and would have to test claimant's ability to read and write if a job, such as the security guard job identified in the 1992 labor market survey, would require claimant to fill out reports and forms. Hearing Transcript at 41. However, the security guard job is not among the job opportunities determined by the administrative law judge to constitute suitable alternate employment. Based on Dr. Batas' medical opinion regarding claimant's physical restrictions and claimant's deposition testimony, as well as consideration of claimant's lack of formal education, age, and employment history, Mr. Evanko set forth in his 1990 evaluation a number of specific employment opportunities which he determined to be appropriate for claimant, such as janitor and rental car service agent positions, which the administrative law judge found to be suitable alternate

employment.[1] Based on the record before us, the administrative law judge's determination that employer has established the availability of suitable alternate employment is supported by substantial evidence and is consistent with law. *See Southern,* 17 BRBS at 64. Accordingly, we affirm the administrative law judge's finding on this issue, and the consequent award of permanent partial disability compensation. *Dove v. Southwest Marine of San Francisco, Inc.,* 18 BRBS 139 (1986).

Lastly, claimant contends that the administrative law judge erred in ordering his permanent partial disability benefits to commence as of November 30, 1990, and in allowing employer a credit for temporary total disability payments made after that date. We disagree. An award of permanent partial disability benefits commences as of the date employer establishes the availability of suitable alternate employment. *See Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991); n.1, *supra*. Moreover, Section 14(j) of the Act, 33 U.S.C. §914(j), clearly provides for a credit of advance compensation payments made by an employer if unpaid installments of compensation remain due. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1990). The administrative law judge's decision to commence claimant's permanent partial disability award as of the date of the initial labor market survey, and his decision to allow employer to credit its overpayments of temporary total disability compensation against claimant's continuing award, is thus affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[1]Contrary to claimant's suggestions, Mr. Evanko testified that the jobs he identified in 1990 were available at that time, Hearing Transcript at 46, and a part-time job may constitute suitable alternate employment if claimant performs it satisfactorily and for pay. *Royce v. Elrich Construction Co.,* 17 BRBS 157 (1985). Further, claimant's assertion that Mr. Evanko is biased is wholly unsubstantiated by the record.