BRB No. 92-1470

DANIEL E. SHANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INDIANA MICHIGAN ELECTRIC COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order Denying Reconsideration of Richard D. Huddleston, Administrative Law Judge, United States Department of Labor.

Alan J. Shapiro (Shapiro, Kendis & Associates Co., L.P.A.), Cleveland, Ohio, for the claimant.

Raymond F. Keisling (Will, Keisling, Ganassi & Schmitt), Carnegie, Pennsylvania, for the employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Reconsideration (89-LHC-0173) of Administrative Law Judge Richard E. Huddleston awarding benefits 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

On February 21, 1984, claimant injured his lower back when he tripped over an open hatch while working for employer as a barge mechanic/welder. Claimant sought medical attention from Dr. Shah, who diagnosed his injury as a lumbosacral sprain. Claimant remained off work until March 2, 1984, when Dr. Shah released him to return to work. Although claimant attempted to return to work on March 2, 1984, he quit after working that one day, allegedly due to pain in his lower back. Claimant has not been gainfully employed since that time. Employer voluntarily paid claimant temporary total disability compensation from February 21, 1984 until February 29, 1984. 33 U.S.C. §908(b). Claimant sought additional temporary total and permanent total disability compensation under the Act.

Based on the medical evidence of record and claimant's subjective complaints of pain, the administrative law judge concluded that claimant established a *prima facie* case of total disability and that as employer failed to introduce any evidence of suitable alternate employment, claimant was entitled to temporary total disability compensation from March 3, 1984 until March 12, 1991 and permanent total disability compensation thereafter. Employer's motion for reconsideration was denied by the administrative law judge in a Order issued on March 26, 1992.

On appeal, employer contends that the administrative law judge erred in finding that claimant is unable to return to his usual work. Employer contends that a review of the medical evidence, in particular the office notes of Dr. Ruth Cowles (aka Dr. Ruth O'Keefe), indicates that there is little if anything wrong with the claimant and that he is merely reluctant to return to work. Employer alternatively contends that if claimant is unable to perform his usual work, it is due to the effects of his 1990 vascular accident, which is unrelated to his employment. Finally, employer contends that in the event that the Board affirms the administrative law judge's award of benefits, it is entitled to a credit pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e)(1988), for the $67,114.42 which claimant received from Aetna Insurance Company pursuant to a joint employee-company sponsored long-term disability insurance policy. Claimant responds that inasmuch as the long-term disability payments were made by Aetna rather than by employer, employer is not entitled to a Section 3(e) credit.

It is claimant's burden to establish that he is unable to return to his former employment due to his work injury. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 96 (1991). In concluding that claimant established his *prima facie* of total disability in the present case, the administrative law judge credited claimant's testimony that he has been unable to work due to constant back pain since the time of the February 1984 back injury, noting that this testimony was consistent with all of the examining physicians' reports. Claimant's credible complaints of pain may constitute substantial evidence to meet claimant's burden. *See Thompson v. Northwest Enviro Services*, 26 BRBS 53, 56 (1992). Moreover, the administrative law judge reasonably determined that the medical evidence of record supports claimant's assertion that he is unable to return to his usual work due to his back problems. Dr. Ridgeway, claimant's family physician, indicated in a report dated April 9, 1984, that claimant exhibited pain upon forward flexion, upon side bending to the right and left, and upon straight leg raising above 20 degrees. Dr. Ridgeway further opined that claimant will never be able to return to heavy lifting and that he should be seen by an orthopedic

specialist for a complete evaluation. PX 3. On Dr. Ridgeway's referral, claimant was evaluated by Dr. Cowles who saw claimant twice in May 1984. In a medical questionnaire completed on July 23, 1985, Dr. Cowles indicated that claimant remained totally disabled from May 3, 1984, until August 8, 1984, when she last examined him. PX 1. Dr. Westmoreland, who began treating claimant when Dr. Ridgeway retired, similarly reported in a letter dated October 30, 1990, that claimant suffered from marked tenderness in his back with severe spasm, that he is physically unable to carry on a gainful occupation, and that he remains permanently and totally disabled. PX 6.

Although the administrative law judge did state that claimant's inability to perform his usual work was partly attributable to the vascular accident, which occurred in 1990, we reject employer's assertion that claimant's inability to perform his usual work is due to this cause rather than the work injury. In addition to the aforementioned evidence attributing claimant's inability to perform his usual work solely to his back condition, Dr. Thaler noted in an October 16, 1990, report that claimant was unable to work for the six years between his work-related back injury and his stroke, and that the probability of his returning to active employment, particularly in view of his recent cerebral vascular accident and hypertension, appeared to be remote. PX 7. Inasmuch as the evidence in the present case demonstrates that claimant was precluded from performing his usual work prior to his vascular accident by virtue of the work injury alone, the fact that his vascular accident may have rendered him potentially even more disabled is not determinative. Accordingly, we affirm the administrative law judge's finding that claimant is unable to return to his former employment as it is rational and supported by substantial evidence. Employer has failed to raise any reversible error committed by the administrative law judge in weighing the evidence and making credibility determinations. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991). As employer failed to establish the availability of suitable alternate employment, the award of temporary total and permanent total disability benefits is affirmed.

Employer next argues that it is entitled to a credit under Section 3(e) for payments made to claimant under a long-term disability insurance policy which was paid for by employer. In response, claimant asserts that employer is not entitled to a credit for such payments as they were made by a private insurer, citing *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978)(Miller, J., dissenting on other grounds),[1] as controlling authority. Employer replies that although *Pilkington*

[1]In *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978)(Miller, J., dissenting on other grounds), the Board rejected the credit argument made by employer in the present case. In concluding that employer was not entitled to a credit for the sickness and health policy benefits paid by Aetna, the Board noted that while it may be appropriate for Aetna to intervene to recover the monies it erroneously paid, it could find no authority for allowing employer a credit for monies it never paid. *See also Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978). In *Harris*, the court held that Aetna, a carrier for nonoccupational injuries and illnesses, had a right to intervene in proceedings under the Act and that it had a right to recover for injuries or illnesses found to be work-related. The court further held that Aetna was not a "creditor" and consequently was not barred by Section 916 of the Act which holds that compensation and benefits are exempt from claims of

resolves the credit issue against it, *Pilkington* was wrongly decided because it permits claimant to obtain a double recovery, while requiring employer to pay both the insurance premiums and the compensation awarded under the Act. Employer accordingly urges the Board to reverse *Pilkington* and to allow employer a credit for the disability payments claimant received from Aetna, viewing such payments as advance compensation paid pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j). It should be noted, however, that as authority for its decision in *Pilkington* the Board cited *Aetna Life Insurance Co. v. Harris*, 578 F.2d 52 (3rd Cir. 1978), in which the court enunciated the carrier's right to reimbursement and its right to intervene, a procedure that could have been followed in this case. On the other hand, in *Harris* the court noted that Aetna's claim for reimbursement was derived from the same nucleus of operative facts as Harris's claim for compensation. It is questionable in this case whether the rights of the parties are derived from the same nucleus of facts.[2] *Cf. Del Vacchio v. Sun Shipbuilding and Dry Dock Co.*, 16 BRBS 190 (1984)(the Board denied reimbursement to a carrier where the claim for reimbursement and compensation were based on different sets of facts).

We need not address employer's specific arguments, as this issue is being raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261, 265-266 (1988). We note, however, that under Section 3(e), employer is entitled to a credit for any amounts paid to an employee pursuant to any other worker's compensation law or the Jones Act for the same injury, disability, or death for which benefits are claimed under the Act. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16, 22 (1993). As the long-term disability payments made by Aetna in the present case were not claimed or paid pursuant to any workers' compensation law or the Jones Act, these benefits cannot, in any event, properly be the subject of a Section 3(e) credit. *See generally Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT) (9th Cir. 1988), *aff'g Clark v. Todd Shipyard Corp.*, 20 BRBS 30 (1987)[3].

Accordingly, the Decision and Order Awarding Benefits and Order Denying Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

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creditors.

[2]Employer's brief states, "the exact reason for the disability payments was never clarified."

[3]Moreover, since Aetna's long term disability payments were not compensation payments they also can not properly be the subject of a Section 14(j), 33 U.S.C. §914(j) (1988), credit. *See generally Pardee v. Army and Air Force Exchange Service*, 13 BRBS 1130 (1981).

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge