BRB No. 97-1102

MAURICE E. WILSON	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
NORFOLK & WESTERN RAILWAY COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Order Denying Motion for Summary Decision and Decision and Order Awarding Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna), Norfolk, Virginia, for claimant.

James L. Chapman, IV (Crenshaw, Ware & Martin, P.L.C.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Motion for Summary Decision and Decision and Order Awarding Benefits (96-LHC-123) of Administrative Law Judge Daniel A. Sarno, Jr., 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer at its Barney Yard location as a brakeman, where he was responsible for releasing coal cars down railroad tracks toward the dock where the coal would be loaded onto ships. On November 13, 1985, claimant suffered a work-related injury when he pushed down on a pinch bar and felt pain in

his lower back. Initially diagnosed with an acute lumbar strain, claimant attempted to return to work on three occasions, but each time he was sent home by his supervisors due to his complaints of pain. Claimant has been unable to return to either his former job with employer as a brakeman, or the part-time truck driving job he held with Albermarle Supply Company prior to his injury.

In December 1986, claimant filed a civil action in state court against employer under the Federal Employee's Liability Act (FELA), 45 U.S.C. §§51-60. Prior to trial, on July 15, 1987, the parties entered into a settlement agreement with respect to this claim for a gross amount of $150,000, of which $37,500 was designated for claimant's attorney's fee. On August 4, 1987, pursuant to the parties' joint motion, the state court ordered that the action be dismissed. Independent of the civil action, claimant filed for retirement benefits with the Railroad Retirement Board due to his disability, and for the years 1987 through 1995, claimant received a total of $119,268.18 in retirement benefits. Claimant presently receives in excess of $1,000 per month in retirement benefits. On August 10, 1995, claimant filed a claim under the Act seeking permanent partial disability compensation as a result of his 1985 back injury.[1]

Employer, on July 26, 1996, filed a motion to dismiss claimant's longshore claim with the administrative law judge, alleging that the doctrines of *res judicata*, collateral estoppel and election of remedies barred claimant's claim under the Act, based on the dismissal of claimant's FELA action by the Virginia state court. In the alternative, employer argued that the administrative law judge should approve the 1987 FELA settlement as a valid settlement of the claim filed under the Act pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). In an Order Denying Motion for Summary Decision, the administrative law judge found that the doctrines of *res judicata* and collateral estoppel did not apply to the instant case, as an order based on the merits of claimant's FELA claim had never been issued. The administrative law judge next determined that the doctrine of election of remedies was inapposite, as employer failed to show that there were inconsistent remedies available to claimant when the FELA action was settled, that claimant assumed a position in his claim under the Act that was inconsistent with that which he took in his FELA case, or that employer was prejudiced by the longshore claim. While not specifically addressing employer's contention that the 1987 FELA settlement constituted a valid settlement agreement under Section 8(i) of the Act, the administrative law judge construed the FELA settlement as an advance payment of compensation by

[1]Section 13, 33 U.S.C. §913, was not an issue in the instant case, as employer never filed a first report of injury. Thus, the statute of limitations under Section 13 was tolled pursuant to Section 30(f) of the Act, 33 U.S.C. §930(f).

employer under Section 14(j) of the Act, 33 U.S.C. §914(j), which may be credited against any liability employer may incur as a result of claimant's longshore claim.

Thereafter, in his Decision and Order, the administrative law judge initially found that claimant's average weekly wage, including earnings while working for Albermarle Supply Company, totaled $543.09. Next, the administrative law judge determined that employer was entitled to a credit for only the net amount paid to claimant as a result of the FELA settlement; thus, the administrative law judge found that employer's credit did not include the amount apportioned for claimant's FELA attorney's fee. Next, the administrative law judge rejected employer's contention that it was entitled to a credit for the amount of benefits claimant received from the Railroad Retirement Board. Lastly, the administrative law judge found that claimant was capable of working five minimum wage jobs which paid $4.00 per hour as of April 17, 1986, but that employer failed to establish that claimant was capable of performing three higher paying contracting jobs. Concluding that claimant's post-injury wage-earning capacity was thus $160 per week, the administrative law judge awarded claimant permanent partial disability compensation commencing on April 17, 1986 at a weekly rate of $255.39, based on a post-injury loss in wage-earning capacity of $383.09 per week.[2] 33 U.S.C. §908(c)(21).

Employer advances several arguments on appeal. First, employer contends that the administrative law judge erred by failing to dismiss claimant's claim under the Act pursuant to the doctrines of *res judicata*, full faith and credit, and election of remedies. In the alternative, employer asserts that the administrative law judge should have accepted the parties' 1987 FELA settlement as a valid settlement of claimant's claim under the Act pursuant to Section 8(i) of the Act. Next, employer contends that the administrative law judge committed error by failing to offset against its longshore liability the entire $150,000 claimant received as a result of the 1987 FELA settlement, as well as the payments claimant has received from the Railroad Retirement Board. Lastly, employer argues that administrative law judge erred by including income claimant received from Albermarle Supply Company in calculating claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's denial of employer's requests to either dismiss the claim or accept the 1987 FELA settlement as a Section 8(i) settlement. Additionally, claimant urges affirmance of the administrative law judge's determinations with regard to employer's credit and claimant's average weekly wage. Employer replies, reiterating its prior arguments.

[2]The parties stipulated that claimant reached maximum medical improvement, and that claimant is entitled to temporary total disability compensation from November 14, 1985 through April 16, 1986. Decision and Order at 2.

I. *Res Judicata, Full Faith and Credit, Election of Remedies*

In his Order Denying Motion for Summary Decision, the administrative law judge denied employer's motion to dismiss the claim based on the doctrines of *res judicata* and election of remedies. The administrative law judge first found that since there had been no prior decision on the merits with regard to the instant case, *res judicata* did not apply. Next, the administrative law judge determined that the doctrine of election of remedies did not apply to the instant case, as employer failed to establish that claimant has assumed a position in his claim under the Act that is inconsistent with his position in connection with his FELA action.[3] For the reasons that follow, we affirm the administrative law judge's determinations.

The application of *res judicata* requires a showing of the following three elements: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir.), *cert. denied,* 498 U.S. 900 (1990), *citing Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). The third element, identity of parties, is not in dispute. On appeal, employer contends that the doctrine of *res judicata* should apply to the instant case since, (1) the Virginia court's dismissal of the FELA action on August 4, 1987 constitutes a final order on the merits for claim preclusion purposes, and (2) both the FELA action and longshore claim arise from the same event, the November 13, 1985, work injury. We reject employer's contentions.

[3]The administrative law judge also rejected employer's collateral estoppel argument. Employer has not raised the collateral estoppel contention on appeal.

It is undisputed that the root of claimant's FELA action and longshore claim lies in the November 13, 1985, work injury. However, issue and claim preclusion can only be given effect when the legal standards are the same in both the previous and current jurisdictions. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). It is axiomatic that the standards for establishing recovery under the FELA, which provides a negligence cause of action for railroad employees, and the Act, a workers' compensation scheme, are distinct. *See* 33 U.S.C. §901 *et seq.*; 45 U.S.C. §§51-60; *see, e.g., Barlow*, 20 BRBS at 181. In addition, it is well-established that relitigation of an issue or claim will only be precluded in a second case where the parties or their privies had a full and fair opportunity to litigate the claim or issue. *See In re Raynor*, 922 F.2d 1146 (4th Cir. 1991); *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994)(Brown and McGranery, JJ., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP,* ___ F.3d ____, 1998 WL 146417 (9th Cir. 1998); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70 (CRT)(2d Cir. 1994), *cert. denied*, 115 S.Ct. 1092 (1995). In the instant case, the parties never actually litigated the FELA action, but, rather, settled the case before it came to trial. Even if the FELA case had been litigated, however, as the standards for establishing entitlement under FELA and the Act are different, the issues regarding entitlement to benefits under the Act, such as causation and nature and extent of disability, could not have been litigated in the prior case. *See, e.g., Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995)(recovery under Act failed to bar Jones Act action under collateral estoppel doctrine where jurisdictional issue not previously litigated). Thus, as employer has failed to establish an identity of the two causes of action, the second element in establishing *res judicata*,[4] the doctrine of *res*

[4]With regard to the second element, the United States Court of Appeals for the Fourth Circuit, wherein this case lies, has adopted a transactional approach to the identity of claims question, stating that the appropriate inquiry is whether the new claim arises out of the same transaction or series of transactions as the claim resolved in the prior judgment. *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir.), *cert. denied*, 498 U.S. 900 (1990). However, the Fourth Circuit has recognized that *res judicata* does not bar claims that did not exist at the time of the prior litigation. *See Meekins v. United Transportation Union*, 946 F.2d 1054 (4th Cir. 1991). Claimant filed his FELA action in 1986, prior to the definitive holding by the United States Supreme Court that railroad workers connected with the loading and unloading of vessels were covered under Section 2(3) of the Act, 33 U.S.C. §902(3). *See Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Thus, employer's *res judicata* contention also fails in this regard.

judicata does not bar claimant from bringing his claim under the Act.

As a component of its *res judicata* argument, employer additionally contends that the Virginia state court Order which dismissed claimant's FELA action by virtue of the parties' settlement constitutes a final order on the merits and must be accorded full faith and credit, pursuant to the Full Faith and Credit Act, 28 U.S.C. §1738. We disagree. The Full Faith and Credit Act, which extends to federal courts the principles embodied in the Full Faith and Credit Clause of the United States Constitution, **U.S. Constitution** Art. IV, §1, cl.1, mandates that the "judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. §1738. This Act "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 373 (1996).

Contrary to employer's assertions, the 1987 Virginia dismissal order in the instant case does not appear to constitute a final judgment for purposes of the full faith and credit doctrine. Claimant's FELA claim was never litigated before the court, the order was issued pursuant to a settlement by the parties, and the court never specifically adopted the terms of the settlement as its findings.[5] *See* Cl. Ex. 25. In

[5]While consent judgments are generally considered final orders on the merits in the Fourth Circuit, *see Keith*, 900 F.2d at 740, the Fourth Circuit has also held that "[w]hen a consent judgment entered upon settlement of the parties of an earlier suit is invoked by a defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties." *Id.; see also Young-Henderson v. Spartanburg Area Mental Health Center*, 945 F.2d 770 (4th Cir. 1991). In *Young-Henderson*, the court held that since the terms of the Consent Order specifically did not terminate claims filed subsequent to the commencement of the action, *res judicata* did not preclude those subsequent claims. Here, the dismissal order of the Virginia court merely states: "On motion of the parties, by counsel, it appearing to the court that all matters in controversy have been compromised and settled, it is ORDERED that this action be, and it is hereby dismissed agreed." Cl. Ex. 25. While the terms of the settlement indicate that claimant released employer from all claims which he may for personal injuries, known or unknown, as a result of the November 13, 1985, *see* Cl. Ex. 34, there is no evidence in the record of an intent to preclude a claim under the Act. As discussed further below, assuming such

any event, employer's full faith and credit argument is rejected for the reasons stated above with regard to employer's overall *res judicata* argument. Under Virginia law, a judgment in favor of a party bars relitigation of the same cause of action, or any part thereof, which could have been litigated, between the same parties. *Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974). The test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim. *See Davenport v. Casteen*, 878 F. Supp. 871 (W.D.Va. 1995). In the instant case, an action brought under FELA, a negligence statute, is not the same as a claim brought under the Act. Evidence required to prove negligence in a FELA case, 45 U.S.C. §51, would be unnecessary in a longshore claim. Similarly, under the Act, a claimant, in addition to establishing causation, must also establish the nature and extent of disability, 33 U.S.C. §908, elements unnecessary in a FELA action.

The notion that claimant's longshore claim and FELA action are two distinct causes of action is also supported by the fact that the Act itself recognizes remedies that are simultaneously available under other schemes, and explicitly provides for the crediting of amounts received under other schemes against an award under the Act. *See* 33 U.S.C. §§903(e), 933(f). In addition, the Board has held that the net proceeds of a settlement of a FELA action, though not specifically enumerated in the Act, may provide the basis for a credit against an employer's compensation liability under the Act. *See Jenkins v. Norfolk & Western Railway Co.*, 30 BRBS 109 (1996). As claimant's 1987 FELA claim and his claim under the Act cannot be considered the same cause of action, we reject employer's full faith and credit argument. *See, e.g., Munguia v. Chevron U.S.A., Inc.*, 23 BRBS 180, 183 (1990), *aff'd on recon. en banc*, 25 BRBS 336 (1992), *aff'd on other grounds*, 999 F.2d 808, 27 BRBS 103 (CRT), *reh'g denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1839 (1994).

Lastly, employer's contention that claimant's claim is barred by the doctrine of election of remedies based on the 1987 settlement of claimant's FELA action must also fail. The election of remedies doctrine precludes a litigant from pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternative remedy. *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 1087, 13 BRBS 301, 306-307 (5th Cir. 1981). The doctrine of election of remedies "'refers to

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an intent existed, the 1987 settlement could not preclude claimant's claim under the Act, as Section 15(b) of the Act, 33 U.S.C. §915(b), invalidates any agreement which waives a claimant's right to compensation under the Act.

situations where an individual pursues remedies that are legally or factually inconsistent.'" *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 681 (4th Cir. 1994), *citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974). Generally, the doctrine will not apply where there is no risk of double recovery. *See Dionne*, 40 F.3d at 681; *St. Paul Fire & Marine Insurance Co. v. Vaughn*, 779 F.2d 1003, 1010 (4th Cir. 1985). Specifically, election of remedies does not apply to bar pursuit of simultaneous remedies under the Act and under other statutes, such as state compensation statutes, because the Act does not preempt such laws. *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). Rather, the Act is structured so that amounts received under another system are credited against the amount obtained under the Act. *See* 33 U.S.C. §903(e); *see, e.g., Jenkins*, 30 BRBS at 110-111; *see generally Munguia*, 23 BRBS at 182. Accordingly, the administrative law judge's determination that claimant's claim is not barred by the doctrines of *res judicata* and election of remedies is affirmed.

II. *Section 8(i)*

As an alternative argument, employer urges the Board to consider the 1987 FELA settlement as a valid settlement of claimant's claim under the Act pursuant to Section 8(i) of the Act. Specifically, employer contends that since it submitted the 1987 settlement to the administrative law judge for approval under Section 8(i) and the administrative law judge failed to address this issue either in his Order Denying Motion for Summary Decision or Decision and Order Awarding Benefits, the 1987 settlement must be deemed approved pursuant to Section 8(i)(1) of the Act, 33 U.S.C. §908(i)(1)(1994). In his Order Denying Motion for Summary Decision, the administrative law judge did not specifically address employer's contention that the 1987 FELA settlement should be deemed a settlement under Section 8(i); rather, the administrative law judge determined that as the Act and the FELA are mutually exclusive remedies, the FELA settlement should be construed as an advance payment under the Act pursuant to Section 14(j).[6]

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1994),[7]

[6]Section 14(j) of the Act, 33 U.S.C. §914(j), provides: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due."

[7]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days

provides for the settlement of "any claim for compensation under this chapter" by a procedure in which an application for settlement is submitted for the approval of the district director or administrative law judge. Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting). The procedures governing settlement agreements are delineated in the Act's implementing regulations. *See* 20 C.F.R. §§702.241-702.243. These regulations require, *inter alia*, that the settlement application be signed by all parties, 20 C.F.R. §702.242(a), that it contain specific information justifying the adequacy of the amount agreed to or clearly outline potential disputed issues, 20 C.F.R. §702.242(b)(2), (6), and that a complete application be submitted to the district director or administrative law judge, 20 C.F.R. §702.243(a).

> unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

In the instant case, the 1987 settlement reached by the parties was in connection with claimant's 1987 FELA action; it was not submitted in accordance with Section 8(i) of the Act or Section 702.241 or 702.242 of the regulations. Section 16 of the Act, 33 U.S.C. §916, allows no assignments, releases or commutations of compensation, except as provided under the Act. *See, e.g.,* 33 U.S.C. §908(i)(1)(1994). The 1987 FELA settlement signed by claimant, therefore, cannot be effective as to his claim under the Act, as its purpose was to finalize the FELA action, not the settlement of his longshore claim. *See Henson*, 27 BRBS at 217-218. Accordingly, employer's request that the 1987 FELA settlement be deemed a settlement under Section 8(i) of the Act is denied.

III. *Credit*

Employer next asserts that its liability under the Act should be offset by both the gross amount it paid to claimant under the 1987 FELA settlement, and the amounts claimant has received from the Railroad Retirement Board. We will consider each of these contentions separately. In his Decision and Order, the administrative law judge accepted the parties' stipulation that $37,500 from the total $150,000 FELA settlement was paid for claimant's attorney's fee. Relying on *Jenkins*, 30 BRBS at 109, the administrative law judge then determined that only the net amount paid to claimant as a result of the FELA settlement was allowable as a credit against employer's longshore liability; thus, the administrative law judge found that employer was entitled to a credit of $112,500. On appeal, employer contends that the administrative law judge's decision should be reversed, as to not allow it a credit for the entire amount of the FELA settlement would result in a payment for claimant's attorney's fee under the Act for work performed in connection with the FELA action. Employer's contention is without merit.

In *Jenkins*, an administrative law judge awarded the employer an offset for the gross amount of a previous FELA settlement. On appeal, the Board held that attorney's fees are excluded in calculating the amount of an offset pursuant to Sections 3(e) and 33(f)[8] because, as claimant is never in receipt of the funds designated as attorney's fees, there is no danger of a double recovery for the

[8]Section 3(e) provides a credit for "amounts paid to an employee." 33 U.S.C. §903(e); *see Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). Section 33(f) provides for a credit based on the "net amount," which is "equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)." 33 U.S.C. §933(f); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995).

disability in question. Finding no distinction between attorney's fees awarded from actions that are subject to Sections 3(e) and 33(f) of the Act, which authorize only a net offset, and contingent fees disbursed pursuant to a FELA settlement, the Board held that as the claimant's FELA attorney's fee was not paid to the claimant, this amount cannot be deemed a recovery for the same disability for which the claimant is entitled to benefits under the Longshore Act. The Board, accordingly, vacated the administrative law judge's decision and remanded the case for a calculation of the net FELA recovery. *Jenkins*, 30 BRBS at 111. Accordingly, for the reasons stated *Jenkins*, we affirm the administrative law judge's granting of an offset for the net amount claimant received in the FELA settlement.

Employer also contends that it is entitled to a credit for the payments claimant received from the Railroad Retirement Board. Subsequent to his November 13, 1985 work injury, claimant has received in excess of $135,000 in benefits from the Railroad Retirement Board. In his Decision and Order, the administrative law judge found that the amounts claimant has received from the Railroad Retirement Board are not subject to an offset against employer's liability under the Act, as employer failed to establish that these payments constitute workers' compensation benefits under Section 3(e) of the Act, 33 U.S.C. §903(e). Employer asserts that the administrative law judge's finding is in error, as claimant has received his payments from the Railroad Retirement Board as a result of his 1985 work injury and because he is unable to return to his former job as a brakeman. For the reasons that follow, we affirm the administrative law judge's denial of a credit on this basis.

Section 3(e) of the Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter *pursuant to any other workers' compensation law or section 688 of Title 46* . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e)(1994)(emphasis added). In the instant case, claimant continues to receive payments made pursuant to the Railroad Retirement Act of 1974, 45 U.S.C. §231 *et seq.* Under this Act, railroad employees may be entitled to annuities if they have completed 10 years of service and "a permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty . . ."[9] 45 U.S.C. §231a(1)(iv).[10] The Railroad Retirement Board determines whether the employee's

[9]Claimant, who was born on May 3, 1939, *see* Cl. Ex. 26, worked for employer for approximately 25 years. *See* Tr. at 22.

[10]A railroad employee may also receive annuities if he has reached the retirement age as defined by the Social Security Act, if he has reached the age of 60 and has completed 30 years of service, if he has reached the age of 62 and does not

condition is disabling. *See* Cl. Ex. 34. While claimant herein is receiving annuities due to a disabling condition resulting from the injury he suffered in 1985, this fact does not convert the annuity to a workers' compensation benefit under Section 3(e). The Railroad Retirement Act does not require that a disability be work-related, an element required in workers' compensation schemes. Thus, payments from the Railroad Retirement Board are indeed retirement benefits, paid to employees who have retired from their railroad employment, either voluntarily or involuntarily. Such payments are not subject to a credit under Section 3(e).

In a situation similar to the instant case, the United States Court of Appeals for the Ninth Circuit, in *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988), denied the employer a credit for disability payments the claimant received from the Veterans Administration. Analyzing the legislative history of Section 3(e) with regard to the term "workers' compensation law," the court noted the House Committee's statement "that the offset applies not only in instances in which the employee receives state workers' compensation, but also in those in which he receives benefits under the Federal Employees' Compensation Act (FECA)." *Id.*, 848 F.2d at 128, 21 BRBS at 116 (CRT). *See* H.R. 2488, 98th Cong., 2d Sess. (1984). The Ninth Circuit reasoned that since the legislative history referenced FECA but not other federal disability acts, the congressional intent was to limit the credit doctrine under Section 3(e) to payments received under state and federal workers' compensation laws, as well as Jones Act benefits, and not to include other forms of state or federal benefits. *Todd Shipyards*, 848 F.2d at 128, 21 BRBS at 116 (CRT). Similarly, the Railroad Retirement Act is not mentioned in the legislative history of Section 3(e). Accordingly, the administrative law judge's denial of a credit to employer for payments claimant has received from the Railroad Retirement Board is affirmed.

IV. *Average Weekly Wage*

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have 30 years of service, or if a permanent physical or mental condition is totally disabling. 45 U.S.C. §231a(1)(i-iii, v).

Lastly, employer challenges the administrative law judge's determination of claimant's average weekly wage. In his Decision and Order, the administrative law judge found that claimant established that he could no longer perform his part-time job at Albermarle Supply Company. Thus, the administrative law judge included claimant's earnings at Albermarle Supply Company in computing his total average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c).[11] On appeal, employer contends that the administrative law judge erred in finding that claimant met his burden of establishing that he could not perform his part-time job.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.[12] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). All sources of income are to be included in determining claimant's average weekly wage. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson*, 14 BRBS at 855.

In the instant case, the administrative law judge credited claimant's testimony that his part-time job at Albermarle Supply Company required repetitive lifting and delivering of five gallon drums of wax and acid, and that subsequent to his injury, he could no longer perform this task. *See* Decision and Order at 8; Tr. at 26. Employer asserts that the physical requirements of claimant's part-time job at Albermarle Supply Company are consistent with the limitations imposed on claimant by Dr. Nichols, his treating physician. In his November 4, 1986 report, however, Dr.

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[11]The parties stipulated that claimant's earnings while working for Albermarle Supply Company during the 45 weeks preceding his injury totalled $3,957.60. Applying this amount, the administrative law judge determined that claimant's average weekly wage derived from his work at Albermarle Supply Company was $87.95. The administrative law judge added this amount to claimant's average weekly wage derived from his work for employer, and determined that claimant's total average weekly wage is $543.09. *See* Decision and Order at 8; Errata Order at 1.

[12]Neither employer nor claimant argues that Section 10(a) or (b) is applicable.

Nichols, stated that claimant is not able to lift greater than 20 pounds repetitively, bend, stoop or climb repetitively, but could perform sedentary work. Cl. Ex. 1-11. Thereafter, at his June 30, 1987 deposition, Dr. Nichols testified that claimant is qualified to perform sedentary work, and should not lift more than five pounds, climb vertical stairs or ladders, or perform repetitive bending or squatting activities. Cl. Ex. 2 at 17. In his April 6, 1992 report, Dr. Nichols again recommended that claimant perform only sedentary work. Cl. Ex. 1-7. While Dr. Nichols deposed in 1996 that claimant could perform light duty work, he maintained his restriction that claimant should not perform repetitive lifting of 25 pounds. Emp. Ex. 2 at 7.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

On the basis of the record before us, the administrative law judge's decision to credit the testimony of claimant that he can longer perform his part-time job with Albermarle Supply Company is rational, and his decision is supported by substantial evidence. Accordingly, the administrative law judge's calculation of claimant's average weekly wage, which included income derived at Albermarle Supply Company, is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge