BRB No. 97-1264 BLA

HARRY RUSSELL DEAVERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0447) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with twenty-two years and three months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative

law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) and, in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge found that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309. Additionally, the administrative law judge found the evidence of record sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and to establish the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits as of the month in which the instant claim was filed. Employer appeals, arguing that the administrative law judge made several errors in his findings of fact and his application of the law in awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to several specific arguments raised by employer, but does not address the administrative law judge's weighing of the evidence. Employer replies, reiterating its arguments and contending that recent case law from the United States Supreme Court invalidates the Sixth Circuit's opinion in *Ross*. Claimant has not responded to employer's appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, employer argues that the recent decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997), requires remand to the administrative law judge for consideration of whether the miner may pursue his duplicate claim inasmuch as he has had no additional coal dust exposure since the

previous denial of benefits. Employer argues that neither the Longshore Act nor the Black Lung Act provides statutory authority for the adjudication of duplicate claims when the original claim has been denied for more than one year and the miner has not had subsequent exposure to coal dust. We disagree. Contrary to employer's contention, *Rambo II* does not bar the filing of the instant duplicate claim. *Rambo II*, in which modification was at issue, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether a longshoreman who was experiencing no present, post-work injury reduction in wage-earning capacity, could nonetheless be entitled to nominal benefits so as to toll the one year time limitation for filing for modification. The Supreme Court did not indicate in *Rambo II* that its holding had any bearing whatsoever on duplicate black lung claims. Employer's first assignment of error is therefore rejected. *See also Ross, supra*.

Employer also contends that the one-element standard adopted by the Sixth Circuit in *Ross* for establishing a material change in conditions at Section 725.309 is invalid in view of *Rambo II*. Employer argues that, under the *Ross* standard, once a claimant proves a change in his claim as to some element of entitlement, the claimant benefits from an "irrebuttable presumption" that the change is material. Employer argues that this presumption violates *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994), *Rambo II* and Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated by 30 U.S.C. §932(a), all of which require that claimant prove a material change in conditions by a preponderance of the evidence. We disagree. The Court in *Rambo II* addressed the issue of a longshoreman's potential future decline in earning capacity, and did not address what proof was necessary to establish a material change in conditions in a black lung duplicate claim. The Court's decision in *Rambo II* does not alter *Ross* and the other cases adopting the one-element standard. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-115 (7th Cir. 1997).

Next, employer contends in the alternative that even under *Ross*, the administrative law judge erred by finding a material change in conditions. Employer argues that *Ross* mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must analyze whether the newly submitted evidence differs qualitatively from the previously submitted evidence. Employer contends that the administrative law judge failed to perform this latter task. We reject this contention. The administrative law judge considered the evidence of record and found the existence

of pneumoconiosis as well the existence of a totally disabling respiratory or pulmonary impairment based on the newly submitted pulmonary function studies and the newly submitted medical reports of Drs. Foglesong, Knight and Grodner. Decision and Order at 9-10. Employer's contention, therefore, that the administrative law judge erred in finding a material change in conditions, is rejected.

Turning to employer's arguments on the merits, employer raises several contentions regarding the administrative law judge's weighing of the medical evidence under Sections 718.202(a)(4) and 718.204(b), (c). Employer's contentions, on the whole, amount to little more than a request to reweigh the evidence of record, a task we may not perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We decline to address, therefore, each specific allegation raised by employer. Nevertheless, employer raises one argument regarding the administrative law judge's finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and a general contention regarding the administrative law judge's findings under Section 718.204(b) and (c), that merit specific consideration.

Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4). In weighing the medical opinions of record, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Knight regarding the contribution of the claimant's coal mine employment to his respiratory disease and found this evidence sufficient to establish the existence of pneumoconiosis. Decision and Order at 7, 9. In so finding, the administrative law judge, within his discretion as fact-finder, permissibly accorded significant weight to the medical opinion of Dr. Knight on the basis that he was the claimant's treating physician since 1991 and the documentation and reasoning contained in his reports was the most comprehensive. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Decision and Order at 9. Inasmuch as the administrative law judge properly weighed all of the medical opinions and rationally concluded that the preponderance of the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we affirm his finding thereunder. *Clark*, *supra*; *Perry*, *supra*; *Lucostic*, *supra*.

Employer also contends that the administrative law judge erred in concluding that total disability was established pursuant to Section 718.204(c)(4), asserting that he improperly gave determinative weight to the medical opinions which found that claimant's impairment was totally disabling and failed to consider the exertional

requirements of claimant's usual coal mine employment. In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge reasonably determined that the preponderance of the medical opinion evidence was sufficient to establish total disability based on his conclusion that the opinions of Drs. Knight, Fogleson and Grodner, that claimant was totally disabled, as well as the three qualifying pulmonary function studies, outweighed the older medical opinions and the contrary objective studies of record. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 9-10. Contrary to employer's assertion, the administrative law judge is not required to compare the exertional requirements of claimant's usual coal mine employment with the physicians' assessment of claimant's limitations where the physicians opine that claimant is disabled from any and all coal mine employment. Decision and Order at 10. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge acted within his discretion in concluding that the medical opinions of record establish total disability pursuant to Section 718.204(c)(4). *Clark*, *supra*; *Lucostic*, *supra*. The administrative law judge considered the entirety of the medical opinion evidence in conjunction with the pulmonary function study and blood gas study evidence and the contrary evidence and acted within his discretion in concluding that claimant suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c). *Fields*, *supra*; Decision and Order at 4, 6-7, 9-10. Consequently, we affirm the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law. *Clark*, *supra*; *Lucostic*, *supra*.

Employer's contention that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) is without merit as well. The administrative law judge again credited the opinion of Dr. Knight and found that this opinion was sufficient to establish that claimant's pulmonary impairment was totally disabling as well as that claimant's coal mine employment significantly contributed to his total disability. *See* 20 C.F.R. §718.204(b); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); Decision and Order at 11-12. We therefore affirm the administrative law judge's finding that claimant established that he was totally disabled due to pneumoconiosis pursuant to Section 718.204(b). Consequently, we affirm the administrative law judge's finding that the evidence was sufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. *See Trent*, *supra*.

Next, employer contends that the administrative law judge erred in setting the

filing date as the date from which benefits commence. Employer argues that because the administrative law judge relied on Dr. Knight to find total disability due to pneumoconiosis, who diagnosed total disability due to pneumoconiosis in November, 1995, benefits should not commence until then. We disagree. The administrative law judge found the medical evidence of record insufficient to establish a specific date of onset of disability, and, therefore, found claimant entitled to benefits from June, 1995, the month in which he filed his second application. Decision and Order at 11-12. Contrary to employer's contention, the administrative law judge did not rely solely on Dr. Knight's opinion as the administrative law judge also credited Dr. Foglesong's July, 1995 opinion on total disability and total disability causation. Lastly, a review of the record indicates that there is no evidence, credited by the administrative law judge, which would establish that claimant was not totally disabled at a time subsequent to June, 1995. Consequently, in light of the administrative law judge's full discussion of the relevant medical evidence of record, we affirm his finding that the record does not establish a definitive date when claimant's pneumoconiosis progressed to the point of rendering claimant totally disabled, and therefore affirm his setting of the filing date as the date from which benefits commence. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge