BRB No. 97-0455 BLA
Case No. 95-BLA-0301

JOHN W. HIGGINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER ON MOTION
Party-in-Interest	)	FOR RECONSIDERATION

Employer has timely filed a Motion for Reconsideration of the Board's Decision and Order, issued on October 21, 1997, which vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and remanded this case for reconsideration of the evidence relevant to causation thereunder. Employer maintains that its Response Brief, which urged affirmance of the administrative law judge's denial of benefits, additionally preserved its challenge to the administrative law judge's findings at 20 C.F.R. §§725.309, 718.202(a)(2) and 718.204(c)(4) without the necessity of filing a cross-appeal. We hereby grant employer's motion for reconsideration and vacate our affirmance of the administrative law judge's findings pursuant to Sections 725.309, 718.202(a)(2) and 718.204(c)(4), in order to address employer's arguments thereunder.

Initially, employer argues that the 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 dismissal of this duplicate claim as a matter of law because a claimant's only course of action following a denial is to seek modification within a year of the denial. 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.

Employer also contends that the one-element standard adopted by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), for establishing a material change in conditions at Section 725.309, is invalid in view of *Rambo II*. Employer argues that *Rambo II* requires a claimant to prove a material change in condition without the benefit of any presumption that a change in conditions has occurred, thus overruling *Ross*, which created the presumption that a change in conditions occurs when newly submitted evidence establishes one element of entitlement previously adjudicated against claimant. 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 established at Section 725.309. Employer maintains that *Ross* requires a finding that claimant's condition has actually worsened since the prior denial, and not merely that new evidence was subsequently developed which shows that benefits should have been granted. Employer's arguments are without merit. The administrative law judge found that biopsy evidence developed in support of modification established the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant. The administrative law judge further determined that this new evidence differed qualitatively, in that there was no biopsy evidence submitted in the earlier claims, thus claimant established a material change in conditions at Section 725.309. Decision and Order at 10, 13. The administrative law judge then addressed all of the evidence of record and found that the weight of the evidence established total disability due to pneumoconiosis pursuant to Sections 718.202(a)(2), 718.203(b), and total respiratory disability pursuant to Section 718.204(c), all of which elements were previously adjudicated against claimant. The administrative law judge's findings pursuant to Section 725.309 are supported by substantial evidence, in accordance with applicable law, *see Ross, supra,* and thus are affirmed.

Turning to the merits, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(2), because biopsy evidence of anthracotic pigmentation does not satisfy claimant's burden of proof thereunder. Employer's arguments are unsupported by the record. The administrative law judge permissibly credited the pathology report of Dr. Philip, which documented a "few small benign fibrous nodules consistent with anthracosilicotic nodules" or "coal workers' pneumoconiotic nodules," and not merely anthracotic pigmentation, to support his finding of

the existence of pneumoconiosis at Section 718.202(a)(2). Decision and Order at 5, 12-14; Claimant's Exhibit 1. Although employer asserts that the opinions of Drs. Alexander and Branscomb constitute substantial evidence of no respirable disease caused by dust exposure in coal mine employment, the administrative law judge accurately determined that Dr. Alexander's report did not contradict Dr. Philip's opinion. Decision and Order at 9, 12-14; Claimant's Exhibit 1; Employer's Exhibit 7. The administrative law judge reasonably gave little weight to Dr. Branscomb's opinion that the medical records did not establish the presence of pneumoconiosis and that Dr. Philip's report did not contain a description of the pathologic changes required by the American College of Pathology to diagnose coal workers' pneumoconiosis as opposed to benign deposits of carbon, because Dr. Branscomb did not address Dr. Philip's finding of micronodules consistent with pneumoconiosis. Decision and Order at 9, 12-14; Claimant's Exhibit 1; Employer's Exhibit 6. We, therefore, affirm the administrative law judge's findings pursuant to Section 718.202(a)(2), as supported by substantial evidence.[1]

Lastly, employer contends that the administrative law judge erred in finding total respiratory disability established at Section 718.204(c)(4), because Drs. Vaezy, Broudy and Harrison, who opined that claimant did not retain the respiratory capacity to perform his usual coal mine employment, demonstrated no knowledge of claimant's duties as a maintenance supervisor, thus the administrative law judge could not compare claimant's functional ability with the exertional requirements of his job. Contrary to employer's arguments, however, the administrative law judge could properly credit the opinions of Drs. Vaezy, Broudy and Harrison, in conjunction with claimant's testimony, to support his finding of total respiratory disability at Section 718.204(c)(4), as they were buttressed by seven out of eight pulmonary function studies of record, which produced values indicative of total respiratory disability under the regulatory criteria at Section 718.204(c)(1). Decision and Order at 16, 17; *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's findings pursuant to Section

[1]Employer also notes that the administrative law judge failed to weigh the medical opinions relevant to the existence of "legal" pneumoconiosis at Section 718.202(a)(4). Inasmuch as Section 718.202(a) provides four alternative methods of establishing the existence of pneumoconiosis, however, the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(2) obviated the need for him to address the evidence at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

718.204(c)(4), as supported by substantial evidence.

Accordingly, we grant employer's motion for reconsideration, and affirm the administrative law judge's findings pursuant to Sections 725.309, 718.202(a)(2) and 718.204(c)(4), as supported by substantial evidence. In all other respects, we reaffirm our prior Decision and Order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge