BRB Nos. 02-0287
and 02-0287A

AMY PORTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 18, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Peter B. Silvain, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2001-LHC-1658, 2001-LHC-1659) of Administrative Law Judge Fletcher E. Campbell, 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board heard oral argument in this case on August 20, 2002, in Newport News, Virginia.

On October 28, 1992, claimant was diagnosed with carpal tunnel syndrome, and was temporarily totally disabled as a result for one week in 1994. On October 16, 1995, she had further carpal tunnel problems and sustained a 10 percent impairment to her right arm, entitling her to 31.2 weeks of benefits under the schedule, 33 U.S.C. §908(c)(1). The district director held an informal conference and issued a compensation order awarding claimant benefits in accordance with the parties' stipulations. Employer's last payment of benefits was made on July 25, 1999. Cl. Ex. 3. On August 12, 1999, claimant sent a letter to the Office of Workers' Compensation Programs (OWCP) requesting "minimal ongoing compensation" pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Cl. Ex. 2. In a letter dated October 18, 1999, the claims examiner asked for clarification of the August 12 letter. Emp. Ex. 6. In a reply letter dated October 21, 1999, claimant specifically stated she did not wish to have an informal conference scheduled. Emp. Ex. 7. On March 13, 2001, claimant sent a letter to the district director requesting an informal conference on the issue of temporary total disability benefits from January 5, 2001, and continuing, because she had undergone surgery as a result of her worsening wrist condition. ALJ Ex. 1.

The administrative law judge found that claimant's August 12, 1999, letter constituted a valid motion for modification, rejecting employer's argument to the contrary. Nevertheless, he found that the correspondence from claimant to the OWCP in October 1999, stating there was no need for an informal conference, "stopped the Rambo II process in its tracks[,]" Decision and Order at 5, although it did not constitute a withdrawal of the claim. Accordingly, he found that the claim for a nominal award remained open and pending until an order was issued. Despite his determination that the October 1999 letter did not constitute a withdrawal of the August 1999 claim, he determined that it "torpedoed the process" and concluded claimant is estopped from "pursuing her own claim by virtue of her own impediment to the normal processing of it." *Id.* at 5-6. Because he found claimant was estopped from pursuing the 1999 claim, the administrative law judge determined the March 2001 claim for temporary total disability benefits was barred by the statute of limitations under Section 22, 33 U.S.C. §922, as it was filed more than one year after the July 21, 1999, compensation order. Therefore, the administrative law judge denied claimant's claim for benefits. Decision and Order at 6.

Claimant appeals the administrative law judge's decision, contending the doctrine of equitable estoppel does not apply to this case. She argues she never withdrew her 1999 petition for modification, the October 1999 letter did not forever rule out an informal conference, there is no requirement that an informal conference be held immediately and, in any event, employer also chose not to pursue the claim. She contends her claim for a *de minimis* award constituted a valid and timely motion for modification, tolling the Section 22 statute of limitations, and that this claim is still open as it has not been adjudicated. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement with claimant's contentions. Employer responds to claimant's appeal, arguing that equitable estoppel was properly applied and that it is unreasonable for claimant to assert that employer should have to pursue claimant's claim. BRB No. 02-0287. In its cross-appeal, employer argues that the request for a *de minimis* award does not constitute a valid motion for modification or an actual nominal award which would toll the statutory time for filing a motion for modification. Employer also asserts that the motion claimant filed in 2001 for temporary total disability benefits did not relate back to the original petition for a nominal award pursuant to Rule 15(c) of the Federal Rules of Civil Procedure (FRCP), Fed. R. Civ. P. 15(c). The Director and claimant respond, urging the Board to reject employer's arguments.[1] BRB No. 02-0287A.

Nominal Award and Section 22 in General

Nominal or *de minimis* awards are benefits to which an injured employee may be entitled if she has no current loss of wage-earning capacity as a result of her injury but has established the significant possibility that the injury will cause future economic harm. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The claimant bears the burden of proving by a preponderance of the evidence that "the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future." *Rambo II*, 521 U.S. at 139, 31 BRBS at 61(CRT); *see Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001). Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

Under Section 22, an application to re-open a claim need not meet any formal criteria. Rather, it need only be a writing such that a reasonable person would conclude that a modification request has been made. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Gilliam*, 35 BRBS 69; *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case

[1]On August 20, 2002, employer filed a reply to the Director's response brief. That pleading is hereby accepted into the record. 20 C.F.R. §§802.213, 802.217.

arises, has stated that the modification application "must manifest an *actual* intention to seek compensation for a particular loss, and filings anticipating future losses are not sufficient to initiate § 922 review." *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 226, 32 BRBS 102, 103(CRT) (4th Cir. 1998) (emphasis in original); *see also Gilliam*, 35 BRBS 69; *Meekins v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 5, *aff'd mem*., 238 F.3d 413 (4th Cir. 2000). In order to determine whether a filing constitutes a valid motion for modification manifesting an actual intent to pursue a claim for benefits, the administrative law judge must consider both the content of the filing and the context in which it was filed, *i.e.,* the circumstances of the case itself. *Jones v. Newport News Shipbuilding & Dry Dock*, __ BRBS __, BRB No. 02-0227 (Oct. 18, 2002), *citing Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181, 21 BLR 2-545, 2-557 (4th Cir. 1999). A request for modification must be made prior to one year from the last payment of compensation or the denial of the claim. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In this case, claimant received permanent partial disability benefits under the schedule for her carpal tunnel syndrome, and, on August 12, 1999, fewer than three weeks after final payment of those benefits, claimant sent a letter to the OWCP requesting an award of nominal benefits. The letter stated:

> [Claimant] has a condition which is likely to deteriorate further in the future. She therefore requests a minimal ongoing compensation award for purposes of keeping her claim open in the future. She will require additional medical attention and may lose additional time from work in the future. Therefore in accordance with the United States Supreme Court's decision in Rambo II, she should receive a minimal ongoing compensation award. Kindly note this letter as a request for that.

Cl. Ex. 2. The administrative law judge found this letter sufficient to constitute a valid and timely motion for modification, Decision and Order at 5, and it is undisputed that it was filed within one year of the date claimant was last paid benefits.[2]

[2]The administrative law judge used the date of the district director's compensation order awarding benefits as the date on which the time for modification began to run. Section 22 of the Act states that a modification request must be made "at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim. . . ." 33 U.S.C. §922. As the date of the last payment of benefits was only four days after the date the compensation order was issued, and the alleged motion for modification was filed fewer than three weeks after the last payment of benefits, there is no question that the August 12, 1999, letter was filed within the Section 22 time constraints.

Employer argues that claimant's request for a *de minimis* award is not an actual award that would toll the Section 22 statute of limitations, and that the letter is a prohibited anticipatory filing and does not allege a change of condition or a mistake of fact. Claimant and the Director disagree, and they assert the 1999 letter tolled the statute of limitations because it expressed an actual intent to seek a particular type of benefits for a particular type of loss. Moreover, the Director argues that, because the Supreme Court held in *Rambo II* that an injured employee without an actual quantifiable loss of wage-earning capacity may have a present right to nominal benefits, the letter seeking a *de minimis* award constitutes an assertion to a present right to compensation based on changes in claimant's condition. The Director also states that *Rambo II* overrules that portion of the *Pettus* holding prohibiting anticipatory filings, Dir. Brief at 9 n.2; *see also Pool Co. v. Cooper*, 274 F.3d 173,180-181, 35 BRBS 109, 115(CRT) (5th Cir. 2001),[3] and he posits that as *Rambo II* permits *de minimis* awards, it follows that it permits modification based on such requests.

The Board addressed these identical arguments in *Jones*, slip op. at 6-8, and held that a motion for modification requesting a *de minimis* award is not, as a matter of law, invalid on its face. Rather, because the Supreme Court held in *Rambo II* that a *de minimis* award is a present award of benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), a claim for nominal benefits may be made pursuant to Section 22. *Jones*, slip op. at 7-8. The inquiry into the validity of the motion, however, does not end there. Pursuant to the Board's decision in *Jones*, and in accordance with the Fourth Circuit precedent, *see Borda*, 171 F.3d 175, 21 BLR 2-545; *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT), consideration also must be given to the circumstances surrounding the letter to determine whether, as a matter of fact, the letter at issue here is a valid motion for modification. *Jones*, slip op. at 8.

For example, in *Meekins*, 34 BRBS 5, claimant Meekins injured his knee and was awarded benefits under the schedule. The employer voluntarily paid those benefits in 1989. In 1994, Meekins was laid off and filed a claim for temporary total disability benefits. The administrative law judge awarded benefits, which the employer paid on October 10, 1995. On February 7, 1996, Meekins filed a motion for modification seeking "additional (temporary total, permanent total, permanent partial, temporary partial) benefits. . . ." Meekins's letter asked OWCP to "consider this a request for additional compensation in modification of the previous award and not a request for the scheduling of an informal conference." *Meekins*, 34 BRBS at 6

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[3]The United States Court of Appeals for the Fifth Circuit stated:

> To the extent that *Pettus* does stand for the proposition that a claim may only seek compensation for an antecedent period of disability, it is in direct conflict with the Supreme Court's holding in *Metropolitan Stevedore* [*Rambo II*], and we must disregard it.

Pool Co. v. Cooper, 274 F.3d 173, 181, 35 BRBS 109, 115(CRT) (5th Cir. 2001).

(parenthetical and emphasis in original). No further action was taken on this case until March 1998 when Meekins sought benefits for periods of disability in 1997 and requested an informal conference. As the 1996 letter did not claim a particular disability and as Meekins did not intend, at the time it was filed, to have the claim processed, by virtue of his request that an informal conference not be scheduled, the Board affirmed the administrative law judge's determination that the letter was not a valid motion for modification. *Id.* at 9; *see also Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT); *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT). Thus, even where a document on its face states a claim for modification, the circumstances surrounding its filing may establish the absence of an actual intent to pursue modification at that time.

Content and Context of the 1999 Claim

Having held that a request for a *de minimis* award may constitute a valid motion under Section 22, we now address the specific content and context of the 1999 letter to ascertain whether claimant exhibited an actual intent to file a claim for nominal benefits at the time the August 1999 letter was filed. With regard to content, employer challenges the letter, stating that it failed to identify a change in condition or mistake in the determination of a fact and that the request for a *de minimis* award was only in anticipation of a change of condition. Therefore, employer argues, the letter is insufficient on its face. We reject employer's argument. As in *Jones*, claimant here filed a letter requesting nominal benefits; based on its content, this letter states a valid basis for modification. *Jones*, slip op. at 8. On its face, the August 1999 letter requested a specific type of compensation which claimant would immediately be able to receive if she could prove entitlement. Thus, the content of the letter is sufficient.

With regard to the circumstances surrounding the case, employer contends claimant did not have the requisite intent to pursue an actual claim for nominal benefits; rather, it argues, this claim is anticipatory and was filed for the sole purpose of attempting to keep claimant's claim open indefinitely. Further, employer argues that claimant did not follow through with her claim, thereby proving this lack of intent. As the Board stated in *Jones*, under *Pettus* and *Greathouse*, anticipatory petitions for modification are not permitted; thus, the circumstances at the time of filing must support the conclusion that claimant intended to actually pursue modification. If the purpose of claimant's 1999 request was merely to hold open the claim indefinitely until some future time when she became disabled, then the 1999 letter was not a valid request for modification. *Jones,* slip op. at 8-9.

After a review of the evidence, we agree with employer that the context of the filing establishes that claimant lacked the intent to pursue an actual claim for nominal benefits at the time she filed the petition for modification. Accordingly, we affirm the administrative law judge's denial of benefits, albeit on grounds different from those utilized by the administrative law judge. First, the August 12, 1999, letter was filed only eighteen days after the last payment of benefits. While it is conceivable

claimant's condition could have changed in that short period of time, providing a basis for her assertion that she anticipated future economic harm, there is no evidence of record to support such a conclusion. Rather, the first evidence of a deterioration of claimant's wrist condition can be found in a December 6, 2000, letter from Dr. Kline wherein he reported that conservative treatment of claimant's carpal tunnel syndrome was unsuccessful, and he recommended surgical intervention. Cl. Ex. 1B. Claimant's August 1999 letter was clearly filed well in advance of the December 2000 evidence of any deterioration of her condition and, thus, constitutes an anticipatory filing. *Pettus*, 73 F.3d at 527, 30 BRBS at 9(CRT).

Further evidence that claimant lacked the intent to proceed with a claim at the time it was filed is also found in her actions subsequent to the filing. When a claimant files a petition for modification with OWCP, the burden is, as the Director states, on the district director to take some action – typically, to schedule an informal conference and begin processing the claim.[4] 33 U.S.C. §§919, 922; 20 C.F.R. §§702.311-702.312, 702.373. Claimant thus is not required to take action to move her claim forward; mere inaction by the district director does not prove that claimant lacked the intent to pursue her claim. *See Borda*, 171 F.3d 175, 21 BLR 2-545; *Jones*, slip op. at 10. In *Jones*, the claimant filed a letter which was, in content, identical to the August 12, 1999, letter herein. Although no action was taken by the district director or by either party for over one year after the letter was filed, the Board affirmed the administrative law judge's determination that the letter was a valid motion for modification. The Board reasoned, as did the administrative law judge, that Jones was not accountable for the district director's failure to act upon the filed claim.[5] *Jones*, slip op. at 10.

In the instant case, however, the OWCP did act. Specifically, a claims examiner sent a letter to claimant on October 18, 1999, asking for clarification of the August 1999 letter. The claims examiner's letter stated:

> This will acknowledge receipt of your August 12, 1999 correspondence. Please advise if this is to be considered a request for an informal conference and/or Section 22 Modification so that we can [determine] what additional action needs to be taken by this office. If we do not receive a response from you on or before November 2, 1999, we will schedule an informal conference to determine the extent [of] your request and status of this file.

[4]Section 22 of the Act, and its implementing regulation at 20 C.F.R. §702.373, specify that modification claims are to be processed in the same manner as original claims.

[5]Claimant Jones also had developed a hip injury, a sequela of his work-related knee injury, prior to filing his motion for modification.

Emp. Ex. 6. Thus, claimant had the option of responding or doing nothing, and if she did nothing, the processing of her claim would commence. Claimant chose to respond, stating that she did not want OWCP to schedule an informal conference, and, in so responding, she deliberately halted the administrative process.[6] Emp. Ex. 7. Following this response, no further action was taken on this claim until claimant filed a revised motion for modification on March 13, 2001.[7] The administrative law judge found that the letter declining an informal conference deliberately impeded the processing of the claim, and this finding is supported by the plain wording of the letter.[8] *See Meekins*, 34 BRBS 5. In direct response to an inquiry from OWCP, claimant, in no uncertain terms, stated she did not wish to commence processing the claim. This action by claimant distinguishes her case from *Jones.* Because claimant intentionally acted in a manner contrary to the pursuit of her claim, her actions align her case with *Meekins*, wherein the Board held that the claimant's request that the district director not process the claim supported the administrative law judge's finding that claimant's letter was merely an effort at keeping the option of seeking modification open until claimant had a loss to claim. Similarly, it is clear from claimant's actions here that she did not have the requisite intent to pursue a claim for nominal benefits, but rather was attempting to file a document which would hold her claim open indefinitely. The total circumstances surrounding the filing of the 1999 letter establish that the application did not manifest an actual intent to seek compensation for the loss alleged. Because the 1999 motion was thus an anticipatory filing, it was not a valid motion for modification. *Greathouse*, 146 F.3d 224, 32 BRBS 102(CRT); *Pettus*, 73 F.3d 523, 30 BRBS 6(CRT).

In addition, even if, as a matter of law, claimant's 1999 filing manifested an intent to pursue a claim for a *de minimis* award at that time, she would have been unable to do so in this case as it involves only an injury to her arm, a body part covered by the schedule, 33 U.S.C. §908(c)(1)-(20), for which permanent partial disability compensation must be paid under Section 8(c)(1). The schedule is the exclusive remedy for permanent partial disability to the body parts listed therein, and benefits paid pursuant to the schedule fully compensate claimants for their permanent partial disabilities, as those payments presume a loss in wage-earning capacity. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); s*ee also Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Gilchrist v.*

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[6]The one-sentence letter stated: "Please be advised that no informal conference is requested in the above referenced matter at this time." Emp. Ex. 7.

[7]While it is true employer could have requested an informal conference and a formal hearing, *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994), so as not to leave the matter pending, employer is not required to do so, and, in this case, the claims examiner's letter clearly placed the onus on claimant to follow through.

[8]The administrative law judge correctly determined that claimant's October 1999 response did not amount to a withdrawal of her claim. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Jones*, slip op. at 10; *Gilliam*, 35 BRBS 69; *Madrid*, 22 BRBS at 152.

Newport News Shipbuilding & Dry Dock Co., 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984). As claimant's injury falls under the schedule, she is precluded from receiving permanent partial disability benefits for a wage loss pursuant to Section 8(c)(21) of the Act. *PEPCO,* 449 U.S. 268, 14 BRBS 363.

As the Board discussed in *Jones,* the Supreme Court's holding that nominal awards may be granted is grounded in its analysis of Section 8(h) of the Act, 33 U.S.C. §908(h), which states relevant factors for determining wage-earning capacity, including the future effects of the disability. *Rambo II*, 521 U.S. at 135, 31 BRBS at 60(CRT); *Jones*, slip op. at 6-7. Section 8(h) works in conjunction with Section 8(c)(21), which requires the determination of a claimant's wage-earning capacity in order to calculate her entitlement to benefits, 33 U.S.C. §908(c)(21), (h). Thus, a nominal award for permanent partial disability, which is available only where claimant shows a significant possibility of future economic harm, is an award entered pursuant to Section 8(c)(21). *See Rambo II*, 521 U.S. at 131-132, 31 BRBS at 58(CRT). Section 8(h) is not applicable, and the determination of wage-earning capacity is not relevant, in determining an injured employee's entitlement to a permanent partial disability award under the schedule. *See Gilchrist,* 135 F.3d 915, 32 BRBS 15(CRT). As the Supreme Court's decision in *PEPCO* provides that claimants with permanent partial disabilities to body parts covered by the schedule do not have the option of receiving benefits under Section 8(c)(21), claimant here is not eligible for benefits under Section 8(c)(21), including a *de minimis* award.[9] Thus, claimant's 1999 motion also is invalid because it is based on a type of benefits which claimant cannot receive for an injury to her arm.

In summary, claimant's 1999 petition for modification is invalid in light of the circumstances of this case, as the context in which it was filed demonstrates that the petition was an attempt to hold the claim open in anticipation of possible future loss.[10] It was not an actual claim for a present loss at the time it was filed. As no

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[9]Inasmuch as claimant's arm condition had become permanent at the time she filed her 1999 "claim" for *de minimis* benefits, it is appropriate to view the claim in the context of Section 8(c)(21). By our holding in this case, we do not mean to exclude a timely Section 22 motion for permanent total, temporary total or temporary partial disability benefits, 33 U.S.C. §908(a), (b), (e), as such awards are not precluded to a claimant with an injury to a body part covered by the schedule. *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 277 n. 17, 14 BRBS 363 n. 17 (1980).

[10]At oral argument, claimant's attorney acknowledged that he had made protective filings in this and other cases, as both parties alluded to the filing of many similar letters in various cases. Claimant asserted that, unless such filings are permitted in scheduled cases, there will be nothing to protect a claimant's ability to seek additional benefits where a scheduled injury deteriorates more than one year after the last payment, as employer does not pay on permanent partial disability ratings until a formal award enters, triggering the one-year modification period. *Cf. Intercounty Constr. Corp. v. Walter,* 422 U.S. 1, 2 BRBS 3 (1975)(where no formal order issues a timely claim remains open). Claimant avers that without these pending claims, there is nothing to prevent employer from passing

valid motion was pending, and the motion seeking temporary total disability benefits filed in 2001 was not filed within the one-year period under Section 22, claimant did not file a timely request for modification.[11] We therefore affirm the administrative law judge's denial of benefits.

Equitable Estoppel

In light of our holding that claimant's 1999 motion was not sufficient under Section 22 of the Act, claimant's contention that the administrative law judge erred in applying the doctrine of equitable estoppel is moot. However, for the sake of judicial efficiency, we shall briefly address her argument. Claimant contends the facts of the case do not satisfy the elements necessary for equitable estoppel to apply under the Act pursuant to the United States Court of Appeals for the Ninth Circuit's decision on remand in *Rambo I*. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *rev'd on other grounds*, *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Equitable estoppel is a doctrine in equity which prevents one party from taking a position inconsistent with an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the Act, four elements are necessary:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

"PEPCO individuals" out of work after one year without additional liability. OA Tr. at 63. Claimant is correct that *Rambo* addresses such policy concerns in allowing nominal awards to hold a claim open. Nonetheless, we cannot alter the statute, which does not permit individuals like claimant to receive Section 8(c)(21) awards, including *Rambo* awards, and the Fourth Circuit's precedent in *Pettus* and its progeny preclude protective filings which merely anticipate future loss.

[11]Accordingly, we need not address employer's contention concerning the "relation back" theory under the FRCP. *But see Jones*, slip op. at 11-12.

Rambo, 81 F.3d at 843, 30 BRBS at 29(CRT); *see also Betty B Coal,* 194 F.3d at 504, 22 BLR at 2-23. In order to apply equitable estoppel, assuming, *arguendo*, that the other three elements have been satisfied, employer must have acted to its detriment in reliance upon claimant's assertion that she did not want an informal conference on the matter of the nominal benefits. The administrative law judge explained that it was the district director who took "action" by not scheduling an informal conference, rather than any detrimental action taken by employer, and his interpretation is that employer relied on the letter, believing the claim to have been abandoned. However, the Fourth Circuit has stated that reasonable reliance to the party's detriment is essential to application of this argument. *Betty B Coal*, 194 F.3d at 504, 22 BLR at 2-23. Although, it was reasonable for employer to have relied on the statement that claimant did not wish to proceed to informal conference at that time, there was no *detrimental* reliance by employer. While employer may have thought the issue was abandoned or resolved in some manner, it suffered no injury because of the letter: it took no action in reliance on the letter and it did not pay any benefits or place itself in a position of harm.[12] In the absence of any detrimental reliance, the administrative law judge erred in applying the doctrine of equitable estoppel to this case. *Id.* In light of our decision holding the 1999 motion for modification to be invalid, the administrative law judge's error with regard to equitable estoppel is harmless.

In summary, we hold that although claimant's 1999 petition for modification stated a valid claim on its face, the circumstances of the case demonstrate a lack of intent to pursue the claim for a nominal award when it was filed; moreover, nominal awards are not available to claimant, as she sustained an injury covered by the schedule. Consequently, we hold that claimant's 1999 petition does not constitute a valid motion for modification and, as the motion filed in 2001 is barred by the Section 22 statute of limitations, we affirm the denial of benefits.

[12]The Director also concedes there was no harm to the district director.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge