BRB No. 13-0431 BLA

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| ESSIE McELRATH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| DRUMMOND COMPANY, INCORPORATED | ) | |
| | ) | DATE ISSUED: 03/19/2014 |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Cordova, Alabama, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (12-BLA-5900) of Administrative Law Judge Paul R. Almanza denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a subsequent claim filed on May 27, 2011.[2]

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to

After crediting claimant with twenty-two years of coal mine employment,[3] the administrative law judge found that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] In addition, the administrative law judge conducted a *de novo* review of the entire record, and found that claimant could not establish any element of entitlement. Accordingly, the administrative law judge denied benefits.

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the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] Claimant's first two claims, filed on August 8, 1973 and June 26, 1984, were finally denied, and a third claim, filed on February 14, 1997 was withdrawn. Director's Exhibit 1. Claimant filed a fourth claim on February 18, 2003. *Id.* In a Proposed Decision and Order dated January 7, 2004, the district director denied claimant's claim because claimant failed to establish any element of entitlement. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. *Id.* However, after claimant failed to respond to a Show Cause Order, Administrative Law Judge Paul H. Teitler dismissed the claim on July 29, 2005. *Id.* An order of dismissal has "the same effect as a decision and order disposing of the claim on its merits . . . ." 20 C.F.R. §725.466(a). A fifth claim, filed on March 2, 2009, was subsequently withdrawn, and is, therefore, considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2.

[3] Claimant's coal mine employment was in Alabama. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

On appeal, claimant argues that the evidence establishes that he is totally disabled due to pneumoconiosis. Claimant also asserts that he is entitled to benefits pursuant to the regulations set forth at 20 C.F.R. Part 727. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior 2003 claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his 2011 claim. 20 C.F.R. §725.309(c).

Claimant contends that Dr. Clemmons's March 7, 1984 medical report establishes that he is totally disabled due to pneumoconiosis. However, because this medical report predates the denial of claimant's 2003 claim in 2005, it is not relevant to determining whether claimant has demonstrated a change in an applicable condition of entitlement in this claim. *See* 20 C.F.R. §725.309(c)(3), (4); Director's Exhibit 1.

Claimant's remaining statements do not raise any substantive issue or identify any specific error on the part of the administrative law judge in determining that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2).[5] We, therefore, affirm the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 15.

Finally, we reject claimant's assertion that he is entitled to benefits pursuant to the regulations set forth at 20 C.F.R. Part 727. Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations, and the presumptions set forth therein, are not applicable in this case. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.2).

[5] Because we affirm the administrative law judge's finding that the new medical evidence did not establish total disability, claimant's testimony is insufficient to carry his burden to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-124-25 (1999).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge