BRB No. 93-1052 BLA

CLIFFORD A. PALMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ALLIED CHEMICAL CORPORATION	)	
	)	
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 George A. Fath, Administrative Law Judge, United States Department of Labor.

Clifford A. Palmer, Bayard, West Virginia, *pro se*.

William T. Brotherton, III (Spilman, Thomas & Battle), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on Remand (86-BLA-3648) of Administrative Law Judge George A. Fath denying 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). This case is before the Board

[1] Claimant is Clifford A. Palmer, the miner, whose initial claim for benefits, filed on April 17, 1970, was finally denied on October 13, 1973. Director's Exhibit 30. Claimant filed a second application for benefits on October 19, 1976, which was finally denied on September 24, 1980. Director's Exhibit 30. The present application for benefits, filed on August 26, 1983, was denied by the district director on October 21, 1983, and again on June 25, 1985, after which claimant requested a hearing. Director's Exhibits 1, 23, 25-26.

for the second time. In *Palmer v. Allied Chemical Corp*., BRB No. 91-0163 BLA (July 27, 1992)(unpub.),

the Board vacated the denial of benefits because claimant had not properly waived his right to a hearing, and reversed the administrative law judge's finding that the evidence did not establish a material change in conditions. *Palmer*, slip op. at 2-4. Accordingly, the Board remanded the case for the administrative law judge to hold a hearing on the merits of entitlement. *Palmer*, slip op. at 4.

On remand, pursuant to the parties' agreement, the administrative law judge conducted a formal hearing by telephone conference call during which claimant was represented by counsel. Decision and Order on Remand at 3; Hearing Transcript at 6. The administrative law judge found a material change in conditions established, but on consideration of the merits of the claim, determined that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, we affirm the administrative law judge's determination to conduct the hearing by telephone. Hearing Transcript at 5-6; *see* 20 C.F.R. §725.454(a). We also affirm as supported by substantial evidence the administrative law judge's finding that Dr. Swamy's January 24, 1984 medical report establishes a material change in conditions. *See Shupink v. LTV Steel Co*., 17 BLR 1-24 (1992); Director's Exhibit 18.

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three x-rays: three were negative and one was classified as unreadable. Director's Exhibits 20-21; Employer's Exhibits 9-10. Accordingly, he found the x-ray evidence to be negative for pneumoconiosis. Decision and Order on Remand at 4. The administrative law judge, however, failed to consider the x-ray interpretations, including two positive readings, filed with claimant's earlier claims. Director's Exhibit 30. Because the

administrative law judge failed to weigh the evidence filed with claimant's two prior claims along with that of the new claim, as is required once a material change in conditions is established, *see Shupink*, *supra*; *see also Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), we vacate his finding at Section 718.202(a)(1).

Pursuant to Sections 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order on Remand at 4; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Swamy and Crisalli, Director's Exhibit 18; Employer's Exhibit 9, according greater weight to Dr. Crisalli's opinion that claimant did not suffer from pneumoconiosis because Dr. Crisalli possessed superior credentials and because the administrative law judge found his opinion to be better reasoned. Decision and Order on Remand at 5. However, the administrative law judge overlooked Dr. Hatfield's August 4, 1978 medical opinion diagnosing pneumoconiosis. Director's Exhibit 30. Because the administrative law judge failed to consider all the relevant evidence, *see Shupink*, *supra*, we vacate his finding pursuant to Section 718.204(a)(4).

At Section 718.204(c)(1), the administrative law judge considered three pulmonary function studies, of which two were qualifying.[2] Director's Exhibits 16, 17; Employer's Exhibit 9. The administrative law judge accorded little weight to the January 24 and June 19, 1984 qualifying studies because they had been invalidated by reviewing physicians. Decision and Order on Remand at 5; Director's Exhibits 16, 17. However, the administrative law judge provided no rationale for according greater weight to the opinions of the consulting physicians over those of the administering physicians regarding the validity of the test results; therefore, we vacate his finding. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting). We instruct the administrative law judge on remand to reweigh the pulmonary function studies, including in his consideration the two studies filed with claimant's prior claims. *See Shupink*, *supra*; *Defore v. Alabama By-Products Corp*., 12 BLR 1-27 (1988); Director's Exhibit 30.

[2] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

Pursuant to Section 718.204(c)(2), the administrative law judge correctly noted that neither the January 24, 1984 nor the February 20, 1990 blood gas study yielded qualifying[3] values. Decision and Order on Remand at 5; Director's Exhibit 19; Employer's Exhibit 9. The administrative law judge failed to consider the June 14, 1979 blood gas study, Director's Exhibit 30, but because this study is also non-qualifying, his error is harmless. *See Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2). We also affirm as supported by substantial evidence his finding pursuant to Section 718.204(c)(3) that the record contains no evidence of cor pulmonale with right- sided congestive heart failure.

Pursuant to Section 718.204(c)(4), the administrative law judge found that Dr. Swamy "failed to discuss the extent of [claimant's] disability," and therefore credited Dr. Crissali's opinion that claimant was not totally disabled. Decision and Order on Remand at 6. The administrative law judge, however, did not consider Dr. Swamy's assessment of claimant's physical limitations, Director's Exhibit 18, in conjunction with the evidence of record regarding the exertional requirements of claimant's usual coal mine employment.[4] Director's Exhibit 9; *see Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds*, 14 BLR 1-37 (1990)(*en banc*). Thus, we vacate the administrative law judge's finding and remand this case for him to make findings regarding the nature and exertional requirements of claimant's usual coal mine employment, *Budash, supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), and then compare all the medical opinions with these requirements to determine whether claimant has demonstrated total respiratory disability at Section 718.204(c)(4), *see Taylor v. Evans and*
Gambrel Co., 12 BLR 1-83 (1988).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[3] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(2).

[4] Claimant indicated that his job as a continuous miner operator required him to sit for seven hours a day, and to lift and carry twenty pounds a distance of four feet, five times a day. Director's Exhibit 9. At the hearing, claimant testified that additional work activities were sometimes required, such as setting timbers, shoveling, and rock dusting. Hearing Transcript at 21-22.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge