

BRB No. 97-0559 BLA

CLIFFORD A. PALMER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ALLIED CHEMICAL CORPORATION)	DATE ISSUED:
)	
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 on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant¹, without the benefit of counsel, appeals the Decision and Order on Remand - Denying Benefits (86-BLA-3648) of Administrative Law Judge Clement K. Kichuk 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 case is before the Board for the third time. The administrative law judge concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). We must affirm the administrative law judge's Decision and Order if the

¹ Claimant is, Clifford Allen Palmer, the miner.

findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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). Employer, and the Director, Office of Workers’ Compensation Programs, have filed letters indicating that they will not file briefs in the instant case.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The relevant procedural history of this case is as follows: claimant filed an application with the Department of Labor (DOL) on August 12, 1983. Director’s Exhibit 1. This application was a duplicate claim, as claimant’s previous claims, filed on April 17, 1970 and October 17, 1976, had been finally denied. Director’s Exhibit 30. Administrative Law Judge George A. Fath issued a Decision and Order denying benefits dated January 13, 1993. Following claimant’s *pro se* appeal, the Board held that claimant had not waived his right to a hearing, and remanded the case to the administrative law judge for a hearing. *Palmer v. Allied Chemical Co.*, BRB No. 91-0163 BLA (July 27, 1992)(unpub.). Upon remand, the administrative law judge conducted a hearing by telephone per agreement of the parties. Thereafter, he found that the evidence established a material change in conditions pursuant to Section 725.309(c), but on the merits found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability at Section 718.204(c). Upon claimant’s second *pro se* appeal, the Board affirmed the administrative law judge’s finding that a material change in conditions was established. The Board also affirmed the administrative law judge’s findings at Section 718.202(a)(2) and (a)(3) and Section 718.204(c)(2) and (c)(3), but the Board vacated his findings at Section 718.202(a)(1) and (a)(4) and Section 718.204(c)(1) and (c)(4). *Palmer v. Allied Chemical Corp.*, BRB No. 993-1052 BLA (Mar. 14, 1996) (unpub.). Upon remand, Administrative Law Judge Kichuk found that the evidence failed to establish entitlement.

The administrative law judge found that the pulmonary function study evidence failed to establish total respiratory disability at Section 718.204(c)(1). Decision and Order at 3-4. The administrative law judge credited the invalidation report of Dr. Zalvidar with respect to Dr. Swamy’s January 24, 1984 test, Director’s Exhibit 16, and Dr. Gaziano’s invalidation report of Dr. Castrodale’s June 19, 1984 pulmonary function study, Director’s Exhibit 17, based upon the superior credentials of Drs. Zalvidar and Gaziano. Decision and Order at 4. This is a permissible finding. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent, supra*. The administrative law judge found further that Dr. Capili’s pulmonary function study, Director’s Exhibit 30, produced results so poor compared to later data that Dr. Crisalli found it to be invalid. Decision and Order at 6. An administrative law judge may give less weight to evidence based upon factors which tend to undermine the reliability of

the results. See *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); see also *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189(1984). In addition, the administrative law judge correctly found that Dr. Hatfield invalidated his own test, Director's Exhibit 30; Decision and Order at 6. Finally, we note that Dr. Crisalli's pulmonary function study produced non-qualifying results.² Employer's Exhibit 9. We affirm, therefore, the administrative law judge's finding that the pulmonary function study evidence of record fails to establish total disability pursuant to Section 718.204(c)(1), as it is supported by substantial evidence and in accordance with applicable law.

With respect to the administrative law judge's findings at Section 718.204(c)(4), he correctly noted that the Board remanded the case for the administrative law judge to consider the exertional limitations listed in Dr. Swamy's opinion. The administrative law judge noted the exertional limitations, but ultimately discounted Dr. Swamy's opinion because he relied upon a pulmonary function study later invalidated by Dr. Zalvidar, a physician he found possessed superior credentials. See *Hutchens, supra*; *Burich, supra*. He then permissibly concluded that Dr. Swamy's opinion was outweighed by Dr. Crisalli's opinion, that claimant was not totally disabled, because he permissibly found that it was better supported by the objective evidence of record. Decision and Order at 5-6; see *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986). We affirm, therefore, the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c)(4), as it is based upon substantial evidence and in accordance with applicable law.³ As this finding precludes entitlement pursuant to the Part 718 regulations,

² As used herein, the term "non-qualifying test" refers to a test that yields values which exceed the values of the applicable table, *i.e.*, 20 C.F.R. Part 718, Appendices B, C. A "qualifying test" yields values which are equal to or less than the requisite table values.

³ We need not address the administrative law judge's findings pursuant to Section 718.202(a), as they are rendered moot by our disposition of this case. See *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Likewise, we need not address the administrative law judge's finding with respect to a material change in conditions finding at 20 C.F.R. §725.309(c), as we affirm the

see *Trent, supra*; *Perry, supra*, we affirm the denial of benefits.

administrative law judge's disposition of the case on the merits. 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).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge