

BRB No. 97-0981 BLA

ANGELO SPERLAZZO)		
)		
Claimant-Petitioner)		
)		
v.)		
)	DATE	ISSUED:
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Respondent)	DECISION and ORDER	

Appeal of the Decision and Order Upon Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Scranton, Pennsylvania, for claimant.

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (94-BLA-0732) of Administrative Law Judge Ainsworth H. Brown 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 on appeal before the Board for a second time. In his initial Decision and Order issued on May 18, 1995, the administrative law judge credited claimant with two years of qualifying coal mine employment, and found that an earlier claim filed on February 10, 1988, had been denied by the district director on March 22, 1988. The administrative law judge determined that claimant took no further action until he filed the present claim on January 19, 1993, and thus the claim was governed by the duplicate claim provisions at 20 C.F.R. §725.309. The administrative law judge found that claimant established a material change in conditions pursuant to Section 725.309(d), based on the concession of the Director, Office of Workers' Compensation Programs (the Director), of the issue of pneumoconiosis. The administrative law judge

further found, however, that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied.

On appeal, the Board acknowledged the Director's concession that a material change in conditions was established at Section 725.309(d), that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(a), and that if claimant was found totally disabled, then pneumoconiosis was a substantial contributor to his disability pursuant to Section 718.204(b). The Board also acknowledged claimant's concession on appeal that the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3). Because the administrative law judge conflated his findings regarding the issues of total disability and causation, the Board vacated the administrative law judge's findings pursuant to Section 718.204(c)(4), and remanded this case for the administrative law judge to reconsider the medical opinion evidence thereunder and provide adequately explained, valid reasons for his weighing of that evidence. *Sperlazzo v. Director, OWCP*, BRB No. 95-1591 BLA (Dec. 20, 1996)(unpublished).

On remand, the administrative law judge found the evidence insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), and consequently denied benefits.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(c)(4). The Director responds, urging affirmance.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant contends that the administrative law judge erred in crediting the opinion of the Director's expert, Dr. Sahillioglu, who was the only physician of record who concluded that claimant had no significant respiratory impairment which would prevent him from performing his usual coal mine employment, over the contrary opinion of the highly-qualified Dr. Weiss, who performed extensive examinations and testing of claimant and whose opinion is supported by those of Drs. Fasciana, Aquilina and Joseph. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *O'Keeffe, supra*. In evaluating the evidence at Section 718.204(c)(4), the administrative law judge acknowledged the relative qualifications of the physicians, and accurately reviewed the bases for their opinions. The administrative law judge acted within his discretion in

discounting the opinion of Dr. Joseph, that claimant was totally disabled due to pneumoconiosis, because he found that the opinion was conclusory. Decision and Order Upon Remand at 3; see generally *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded less weight to the opinion of Dr. Aquilina because he failed to adequately reconcile his conclusion of disability with the results of his pulmonary function studies, which were interpreted as showing only a mild impairment.¹ Decision and Order at 2; see generally *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Inasmuch as the objective evidence of record was insufficient to support a finding of total respiratory disability, and Drs. Weiss and Fasciana relied in part on pulmonary function studies performed with suboptimal effort, the administrative law judge reasonably accorded determinative weight to the opinion of Dr. Sahillioglu, which he determined was better supported by the objective evidence of record than the other medical opinions. Decision and Order Upon Remand at 3; see generally *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge's findings pursuant to Section 718.204(c)(4) are supported by substantial evidence and thus are affirmed.

Inasmuch as claimant has failed to establish the existence of a totally disabling respiratory impairment, a requisite element of entitlement under 20 C.F.R. Part 718, see

¹Claimant asserts that Dr. Aquilina considered claimant's pulmonary function study results abnormal, albeit non-qualifying, and that it was merely a computer printout which indicated that the results showed a mild impairment. Claimant's Brief at 4. A review of the record, however, reveals that all three of Dr. Aquilina's pulmonary function studies computed as showing a mild impairment, see Director's Exhibits 15, 56, Claimant's Exhibit 2, and Dr. Aquilina indicated in his report of March 1, 1988 that the February 25, 1988 ventilatory studies showed a mild defect on fair effort. Director's Exhibit 56. While Dr. Aquilina indicated in his report of December 4, 1992 and in his deposition testimony, see Director's Exhibit 19, Claimant's Exhibit 8, that claimant's pulmonary function studies were consistently abnormal and disabling, he never explained the inconsistency between his later opinion and his March 1, 1988 report.

Trent v. Director, OWCP, 11 BLR 1-26 (1987), we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Upon 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