

BRB No. 95-1591 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner, (J. Davitt McAteer, Acting Solicitor of Labor; 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:

Claimant¹ appeals the Decision and Order (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

¹ Claimant is Angelo Sperlazzo, the miner, whose initial application for benefits filed on February 10, 1988 was finally denied on March 22, 1988. Director's Exhibit 56. Claimant filed the present claim on January 19, 1993. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found a material change in conditions established pursuant to 20 C.F.R. §725.309(d), credited claimant with two years of coal mine employment, and accepted the concession of the Director, Office of Workers' Compensation Programs (the Director) that claimant suffers from pneumoconiosis pursuant to Section 718.202(a). The administrative law judge found, however, that the evidence failed to establish

total disability due to pneumoconiosis pursuant to Section 718.204 and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding only two years of coal mine employment established. Claimant's Brief at 3. In addition, while claimant concedes that total respiratory disability was not established pursuant to Section 718.204(c)(1)-(3), he asserts that the administrative law judge erred in weighing the medical opinion evidence on this issue. Claimant's Brief at 6-11. The Director has filed a Motion to Remand, asserting that the administrative law judge erred in weighing the evidence pursuant to Section 718.204 and urging the Board to remand the case for the administrative law judge to reconsider the medical opinion evidence regarding total respiratory disability.² Director's Brief at 2-8.

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 by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director concedes on appeal that a material change in conditions was established as defined in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(a), and that if claimant is found totally disabled, then pneumoconiosis is a substantial contributor to his disability under *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). Director's Brief at 2 n.2, 3. Accordingly, we confine our review to the administrative

² We affirm as unchallenged on appeal the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge's analysis pursuant to Section 718.204(c)(4).³

The issue under Section 718.204(c) is the existence and extent of respiratory disability, not its causation. Compare 20 C.F.R. §§718.204(c) with 20 C.F.R. §718.204(b). We agree with the parties that the administrative law judge confused these issues by purporting to discredit the opinions of Drs. Weiss, Aquilina, and Fasciana that claimant has a totally disabling respiratory impairment on the grounds that they 1) failed to explain why pneumoconiosis and not asbestosis was the cause of claimant's respiratory disability; 2) failed to adequately address claimant's smoking history; and 3) relied on an exaggerated coal mine employment history. Decision and Order at 10-12; Claimant's Brief at 7-11; Director's Brief at 3-7. These factors relate to the cause of claimant's disability and therefore do not constitute valid reasons for discrediting opinions regarding the existence of a totally disabling respiratory impairment. See *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989) (distinguishing issue of total respiratory disability under Section 718.204(c) from issue of whether respiratory disability is due to pneumoconiosis under Section 718.204(b)); see also *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-21-22 (1994); *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11, 1-15 (1991).

³ The Director has conceded the relationship of claimant's pneumoconiosis to his coal mine employment, thereby relieving him of the burden of proving at least ten years of coal mine employment so that this fact might be presumed. See 20 C.F.R. §718.203(b). Further, by conceding causation, the Director has removed the length of claimant's coal mine employment as a possible factor in weighing the medical opinions on remand. Therefore, we decline to address claimant's contention that the relevant evidence establishes ten years of coal mine employment.

Although the administrative law judge also cited the non-qualifying⁴ nature of the objective study evidence as a reason for questioning the opinions of Drs. Aquilina and Fasciana and for crediting that of Dr. Sahillioglu, a potentially valid consideration under Section 718.204(c), see *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985), it is unclear whether the administrative law judge considered the opinions of Drs. Aquilina and Fasciana in their entirety on this point. The administrative law judge stated that the non-qualifying objective study evidence was a "discrepancy" that neither physician explained. Decision and Order at 10-11. In fact, both physicians acknowledged the non-qualifying nature of the objective studies but explained that they considered the values obtained to be abnormal and therefore indicative of respiratory disability. Director's Exhibits 18, 19; Claimant's Exhibits 3 at 13, 34-35, 8 at 13-17, 25.

Inasmuch as the administrative law judge conflated his findings pursuant to Sections 718.204(c) and 718.204(b) and failed to provide adequately explained, valid reasons for his weighing of the evidence, we vacate his finding pursuant to Section 718.204(c)(4) and instruct him to reconsider all the medical opinion evidence to determine whether it establishes total respiratory disability. If so, he must then weigh all the relevant evidence together to determine whether total respiratory disability is established pursuant to Section 718.204(c). See *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). If total respiratory disability is found established, the administrative law judge must then determine the date of onset of total disability due to pneumoconiosis. See *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

⁴ A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge