BRB No. 00-0382 BLA

FRANK D. GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIMPSON MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS S-I FUND	)	DATE ISSUED:
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard E. Huddleston and the Decision and Order on Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judges, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-BLA-2036) of Administrative Law Judge Richard E. Huddleston and the Decision and Order on Modification - Denial of Benefits (98-BLA-0830) of Administrative Law Judge Robert L. Hillyard 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). Administrative Law Judge Richard E. Huddleston adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the parties' stipulation that claimant worked in qualifying coal mine employment for at least ten years. Next, Administrative Law Judge Huddleston found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and accordingly, denied benefits on August 28, 1996. Director's Exhibit 78. Claimant filed an appeal with the Department of Labor (DOL) in a letter dated September 26, 1996, which the DOL claims examiner construed as a request for modification pursuant to 20 C.F.R. §725.310. Director's Exhibits 80, 82. The case was assigned to Administrative Law Judge Robert L. Hillyard, who conducted a formal hearing on modification and initially found that employer conceded that claimant established at least ten years of qualifying coal mine employment. Next, Administrative Law Judge Hillyard found that because the evidence submitted since the prior denial failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an element previously adjudicated against claimant, claimant failed to establish a change in conditions under Section 725.310. Administrative Law Judge Hillyard also determined that, after a review of the record in its entirety, no mistake in a determination of fact had been made by Administrative Law Judge Huddleston in the previous decision pursuant to Section 725.310, and accordingly, denied benefits.

On appeal, claimant challenges Administrative Law Judge Huddleston's determination that claimant failed to establish the existence of pneumoconiosis as defined by the Act pursuant to Section 718.202(a)(4) and Administrative Law Judge Hillyard's determination that there was no mistake in a determination of fact under Section 725.310 in Administrative Law Judge Huddleston's prior decision. Employer responds, urging affirmance of the denial of benefits in both decisions. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

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[1] Claimant is Frank D. Gray, the miner, who filed his application for benefits on August 11, 1994. Director's Exhibit 1.

2 Claimant does not challenge the administrative law judges's findings that the existence of clinical coal worker's pneumoconiosis has not been established by x-ray evidence or physicians' opinion. Rather, he contends that the evidence establishes the existence of "legal" pneumoconiosis as more broadly defined by the Act and regulations. 30 U.S.C. §902(b); 20 C.F.R. §718.201.

3 We affirm the administrative law judge's findings regarding length of coal mine

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, claimant argues that Administrative Law Judge Huddleston erred by finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) as defined in the Act. Specifically, claimant asserts that Administrative Law Judge Huddleston mistakenly based his determination that claimant does not have "legal" or statutory pneumoconiosis on his belief that claimant's pulmonary function studies continued to improve. Contrary to Administrative Law Judge Huddleston's finding that claimant's pulmonary function studies improved, however, a review of the record reveals that the results of claimant's pulmonary function studies did not improve, but rather, remained consistent or, on some tests, decreased in value. *See* Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibit 4. Although Administrative Law Judge Huddleston improperly relied on this determination as a basis for finding certain medical opinions entitled to less weight, because he nevertheless provided alternate, valid bases, *see infra*, upon which to accord less weight to the opinions of Drs. Vaezy and Myers, any error in this regard does not require remand. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 n.4 (1983); *see also Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); Director's Exhibit 78 at 15.

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employment, a change in conditions pursuant to Section 725.310, and pursuant to Section 718.202(a)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 4, 6-7.

4 Claimant does not contend that Administrative Law Judge Huddleston erred in his consideration of Dr. Vaezy's opinion. Administrative Law Judge Huddleston acted within a proper exercise of his discretion by finding Dr. Vaezy's opinion that coal dust exposure "may" have or "possibly" aggravated claimant's asthma to be equivocal, and therefore, entitled to less weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Director's Exhibits 16, 17, 62. Similarly, Administrative Law Judge Huddleston permissibly accorded less weight to Dr. Myers's opinion as it was "somewhat" dated, *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985)(although not determinative in weighing medical reports, recency is relevant); *Kozele, supra*; Director's Exhibit 78 at 14.

Claimant next argues the administrative law judge erred in not finding that the opinion of Dr. Myers establishes the existence of pneumoconiosis as defined by the Act because Dr. Myers did not address whether claimant's asthma was substantially aggravated by claimant's coal mine employment even after he left the mines. Claimant contends that Dr. Myers implicitly addressed this issue inasmuch as Dr. Myers stated that "exposure to coal and rock dust is a significant contributing factor to his present respiratory function impairment, even though he shows no evidence of coal workers' pneumoconiosis," based on an examination of claimant ten months after he had ceased working in the mines.

We disagree, however, inasmuch as Dr. Myers unequivocally diagnosed perennial asthma with no occupational lung disease caused by coal mine employment, opined that claimant's reduced pulmonary function study values were due to perennial asthma and noted that claimant was unable to perform his usual coal mine employment or comparable and gainful work due to his perennial asthma. Director's Exhibit 59. Although Dr. Myers opined that coal dust significantly contributed to claimant's present respiratory impairment, he did not say that it had a permanent effect on claimant's pulmonary symptoms. *See Henley v. Cowan and Co.*, 21 BLR 1-147 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, because Dr. Myers unequivocally diagnosed asthma while also stating that claimant had no occupational lung disease caused by coal mine employment, we cannot say that the administrative law judge erred in finding that Dr. Myers's opinion did not establish pneumoconiosis as defined by the Act. *See Director, OWCP v. Rowe*, 719 F.3d 251, 5 BLR 2-99 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1989). Consequently, we affirm Administrative Law Judge Huddleston's finding that Dr. Myers's opinion was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.201 as rational and supported by substantial evidence. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR (6th Cir. 2000); Director's Exhibits 59, 78 at 14.

Claimant also asserts that Administrative Law Judge Huddleston erroneously relied on the opinions of Drs. Dineen, Vuskovich, and Lane in finding that the

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5 Claimant does not challenge Administrative Law Judge Huddleston's determination that because claimant suffered from asthma since birth, which was "long before he entered a coal mine," the condition could not be caused by or significantly related to coal mine employment pursuant to Section 718.201. Decision and Order at 14; 20 C.F.R. §718.201; *see Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Shoup v. Director, OWCP*, 11 BLR 1-110, 1-112 (1987); Director's Exhibit 78 at 14. Rather, claimant contends that there is evidence, if properly considered which would establish that coal dust exposure substantially aggravated claimant's asthma and, therefore, establish the existence of legal pneumoconiosis pursuant to Section 718.201.

aggravation of claimant's asthma due to coal dust exposure had abated. Specifically, claimant avers that Dr. Dineen's opinion concerning the effect that the cessation of coal dust exposure had on a miner's bronchial asthma is general in nature and non-specific to claimant's actual condition. When Dr. Dineen was asked about the effects that coal dust would have on claimant's asthma once he left coal mine employment, assuming that Dr. Vaezy's opinion that coal mine employment aggravated the miner's asthma was correct, Dr. Dineen replied, "[T]ypically with bronchial asthma, once the exposure to the irritating agent is terminated, then the portion of the symptoms related to that particular exposure should cease after the inflammation that was caused by that exposure has been adequately treated." Director's Exhibit 63 at 19. In his report dated June 6, 1994, however, Dr. Dineen opined, "My assessment is that Frank Gray does not have coal workers' pneumoconiosis. ... [and] has severe obstructive airway disease with moderately severe respiratory impairment secondary to asthmatic bronchitis [that] is not related to his occupational exposure to coal dust. ...There is no radiographic, spirometric, or clinical evidence that he has sustained a lung injury as a result of his occupational exposure to coal dust." Director's Exhibits 59, 63. A review of Dr. Dineen's deposition testimony reveals that he opined that claimant suffers from "severe obstructive airway disease due to bronchial asthma, not caused in whole or in part by his exposure to coal mine, rock or sand dust," based on a physical examination, x-ray, pulmonary function studies and blood gas studies. Director's Exhibit 63 at 18. Thus, contrary to claimant's argument, Administrative Law Judge Huddleston rationally accorded greater weight to Dr. Dineen's opinion, inasmuch as Dr. Dineen, unlike Dr. Vaezy, addressed "the issue of what happens when claimant is no longer exposed to the irritants," Decision and Order at 15, and his opinion, taken as a whole, is specific to claimant *See* . *Rowe*, *supra*; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999)("a reasoned medical opinion is not rendered a nullity because it acknowledges the limits of reasoned medical opinions"), *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997). Director's Exhibit 78 at 15.

Similarly, claimant argues that Administrative Law Judge Huddleston improperly relied on the opinions of Drs. Vuskovich and Lane because these physicians' opinions, that claimant's asthma is not related to his occupational coal dust exposure, are illogical and unfounded due to their failure to consider whether coal mine dust aggravated claimant's lung condition. Particularly, claimant contends that just because Drs. Vuskovich and Lane opine that claimant's asthma existed prior to and was not caused by his coal mine employment, their opinions do not opine that coal mine employment has not aggravated asthma.

In a report dated March 18, 1994, Dr. Vuskovich diagnosed the presence of asthma, "a disease of the general population and <u>in no way related to this man's occupation in the coal industry</u>" and opined that claimant "<u>does not have an occupational lung disease caused by coal mine employment</u>." Director's Exhibit 59. (emphasis added). On June 21, 1995, Dr. Lane diagnosed the presence of asthmatic bronchitis, a disease of

the general population unrelated to claimant's occupation, and the absence of coal workers' pneumoconiosis. Director's Exhibit 49. Thus, contrary to claimant's argument, the administrative law judge could reasonably find that the opinions of Drs. Vuskovich and Lane did not establish the existence of pneumoconiosis as defined by the Act. *See Cornett*, 227 F.3d at 576, BLR (legal definition of pneumoconiosis requires evidence that coal dust exposure aggravated the respiratory condition); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Contrary to claimant's contention, the burden of establishing the existence of pneumoconiosis as defined by the Act is on claimant, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and we cannot say that because these physicians did not specifically address whether claimant's coal mine employment aggravated his asthma, the administrative law judge erred in finding that they did not establish legal pneumoconiosis. *See Ondecko*, *supra*. Moreover, contrary to claimant's argument, the fact that Dr. Lane did not examine or treat claimant does not render his opinion unreasoned *per se*. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-382 (4th Cir. 1990); *Evosovich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

Conceding that he has had asthma since childhood, claimant argues that the evidence demonstrates that his coal mine work exacerbated his lung disease on repeated occasions. Administrative Law Judge Huddleston, however, properly considered the opinions of Drs. Vaezy and Myers, and permissibly determined that they were not credible. Because Administrative Law Judge Huddleston rationally discounted these opinions as less credible on this issue, claimant failed to satisfy his burden in this regard. *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86, 2-91 (4th Cir. 1995)(a physician's medical opinion as to one issue may be well supported by facts, documents, and reasons while the same physician's opinion may not adequately address a different issue.) Director's Exhibit 78 at 15.

Finally, claimant asserts that Administrative Law Judge Huddleston erred in implicitly requiring any aggravation of claimant's lung disease to be permanent under Section 718.201 and contends that the Board's decision in *Henley v. Cowan and Co.*, 21 BLR 1-147 (1999), was wrongly decided. Claimant therefore requests that the Board revisit the holding in *Henley*. We reject claimant's general allegation regarding Administrative Law Judge Huddleston's implicit use of a "permanence requirement" inasmuch as claimant fails to state with specificity how our holding in *Henley* was erroneous. Moreover, our review of Administrative Law Judge Huddleston's decision fails to reveal any such error. Subsequent to Administrative Law Judge Huddleston's decision, the Board held in *Henley* that the aggravation of a pulmonary condition by coal

mine employment must be significant and permanent in order to constitute "legal" pneumoconiosis as defined at Section 718.201. *Henley*, 21 BLR at 1-150. Claimant has not provided any countervailing rationale to justify our revisiting this case precedent and has provided no grounds to overturn this decision. We, therefore, deny claimant's request to do so. Inasmuch as Administrative Law Judge Huddleston properly found that claimant failed to satisfy his burden to establish the existence of "legal" pneumoconiosis as defined under Section 718.201, we affirm this determination. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We next turn to claimant's challenges to Administrative Law Judge Hillyard's Decision and Order on Modification. Claimant avers that Administrative Law Judge Hillyard focused only on whether claimant established the existence of clinical pneumoconiosis, ignoring the issue of whether claimant established the presence of "legal" pneumoconiosis. Administrative Law Judge Hillyard, within a proper exercise of his discretion, determined that the opinions of Drs. Myers, Vuskovich, Dineen, and Lane, which find that claimant does not have coal workers' pneumoconiosis and that claimant's asthma was not substantially aggravated by coal dust exposure, were more reasoned and better supported than the report of Dr. Vaezy. *See Cornett, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark, supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Modification at 7. Thus, Administrative Law Judge Hillyard permissibly credited the physicians' opinions that found an absence of both clinical and "legal" pneumoconiosis as defined under Section 718.201. We, therefore, affirm the administrative law judge's determination that, because claimant failed to establish the existence of pneumoconiosis under Section 718.202(a), claimant failed to establish a mistake in a determination of fact under Section 725.310 inasmuch as these findings are rational, contain no reversible error, and are supported by substantial evidence. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); Decision and Order on Modification at 7.

Accordingly, the Decision and Order Denying Benefits of Administrative Law Judge Huddleston and the Decision and Order on Modification - Denial of Benefits of Administrative Law Judge Hillyard are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge