

BRB No. 11-0668 BLA

TERRY O. GUNDERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BLUE MOUNTAIN ENERGY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE)	DATE ISSUED: 07/30/2012
COMPANY, INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2004-BLA-5323) of Administrative Law Judge Richard K. Malamphy, denying benefits on a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second time. In the last appeal, the Board affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) by a preponderance of the evidence, and affirmed the denial of benefits. *T.G. [Gunderson] v. Blue Mountain Energy*, BRB No. 07-0619 BLA (Apr. 15, 2008) (unpub.). The United States Court of Appeals for the Tenth Circuit subsequently vacated the Board's Decision and Order, holding that the administrative law judge's " cursory statement that the evidence from both parties was entitled to equal weight does not constitute a sufficient basis" for his finding that claimant failed to meet his burden of establishing legal pneumoconiosis.² The court concluded that the administrative law judge "did not offer a scientific explanation for his conclusion that the experts' testimony was 'evenly balanced, and should receive equal weight,'" thereby failing to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1027, 24 BLR 2-297, 2-319 (10th Cir. 2010).

On remand, noting that the Tenth Circuit "require[s] that [he] choose one party's argument over the other," the administrative law judge credited Dr. Renn's medical opinion over that of Dr. Cohen, and found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, the administrative law judge denied benefits.

In the present appeal, claimant challenges the administrative law judge's weighing of the evidence relevant to the issue of the existence of legal pneumoconiosis, arguing that the administrative law judge's decision fails to comply with the APA and with the directive of the Tenth Circuit to provide a reasoned and scientific basis for his conclusions. Claimant requests that the administrative law judge's decision be vacated

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

² The law of the United States Court of Appeals for the Tenth Circuit is applicable, as claimant was employed in the coal mining industry in Colorado. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

and that the case be assigned to a different administrative law judge on remand for a fresh look at the evidence and a proper application of the law. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand of this case for reconsideration of the medical opinion evidence.³ Claimant has filed a reply brief in support of his position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Specifically, claimant argues that the administrative law judge failed to accurately state the issues and provide a valid reason for crediting the opinion of Dr. Renn, that claimant does not have pneumoconiosis and that his obstructive impairment is due solely to cigarette smoking, over that of Dr. Cohen, that claimant's chronic obstructive pulmonary disease (COPD) is due to both coal dust exposure and smoking. Claimant also argues that the administrative law judge failed to weigh the medical opinions of Drs. Parker and Repsher; failed to adequately address the deficiencies in Dr. Renn's opinion; and failed to weigh the credentials of the physicians. Claimant's Brief at 13-29. The Director agrees that a reweighing of the opinions is necessary, as the Circuit Court's decision directed the administrative law judge to explain his evaluation of the conflicting evidence and determine whether either party's evidence preponderated, but did not require him to choose one party's argument or evidence over the other. Director's Brief at 3-4. Some of the arguments of claimant and the Director have merit.

In evaluating the medical opinions of record on remand pursuant to Section 718.202(a)(4), the administrative law judge summarized the arguments of the parties and the conclusions of the physicians, noting that Drs. Shockey, Parker, and Cohen attributed claimant's COPD to smoking and coal dust exposure, while Drs. Repsher and Renn concluded that it was due entirely to smoking. After acknowledging that he found the evidence equally balanced in his prior decision, and that the Tenth Circuit required that he choose one party's argument over the other, the administrative law judge determined that "Drs. Repsher, Renn, and Cohen gave extensive explanations as to their reasoning in this case," while "Dr. Shockey did not give an explanation for the reasons he reached his

³ The Director takes no position on claimant's request to reassign this case to a different administrative law judge. Director's Brief at 2 n. 2.

conclusion.” Decision and Order on Remand at 4, 6. The administrative law judge then credited the opinion of Dr. Renn over that of Dr. Cohen, stating:

Spirometry in this case is not remarkable but the miner has significant blood gas abnormality. Dr. Cohen states that this is due in part to coal dust exposure, and Dr. Renn indicates that this could be due to five enumerated factors. I find Dr. Renn’s opinion to be persuasive as Dr. Cohen has not adequately explained why these other factors are not responsible for the blood gas abnormality.

Decision and Order at 7. The administrative law judge concluded that claimant “has failed to establish that he is totally disabled by a respiratory impairment due to [pneumoconiosis].” *Id.*

At the outset, we agree with the Director’s argument that the administrative law judge conflated the issues of legal pneumoconiosis, total respiratory disability and disability causation, and misconstrued the Tenth Circuit’s remand instructions. As the Director correctly notes, the Tenth Circuit did not require that the administrative law judge choose one party’s argument over the other’s, but instructed him to fully explain his reasoning and offer a scientific basis for his evaluation and weighing of the conflicting medical opinions. The Court specifically acknowledged that “there may be cases in which the scientific evidence is evenly balanced.” *Gunderson*, 601 F.3d at 1026, 24 BLR at 2-317. Noting that “there may be some issues as to which scientific knowledge does not permit an administrative law judge to identify the more probable of the disputed expert opinions,” the Court indicated that, in that case, “the administrative law judge has a duty to explain, on scientific grounds, why a conclusion cannot be reached.” *Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314, *citing Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007). Because the administrative law judge conflated the issues before him for adjudication, and misconstrued the Tenth Circuit’s remand instructions, we vacate the administrative law judge’s finding that claimant failed to establish total disability due to pneumoconiosis, and remand the case for further consideration.

On remand, the administrative law judge must reconsider his determination that the opinion of Dr. Renn outweighs the contrary opinion of Dr. Cohen on the issue of legal pneumoconiosis at Section 718.204(a)(4). While the administrative law judge concluded that the “[s]pirometry in this case is not remarkable,” Decision and Order on Remand at 7, he failed to determine whether the obstructive impairment diagnosed by the various physicians of record, as demonstrated on the pulmonary function studies, was related to coal dust exposure. Further, in finding that claimant has a significant blood gas abnormality and that Dr. Cohen failed to adequately address “the five enumerated factors” suggested by Dr. Renn as possible causes, the administrative law judge appears

to have mischaracterized Dr. Renn’s opinion,⁴ and he did not discuss the opinions of the two physicians in sufficient detail or explain how he resolved the conflicts therein pursuant to Section 718.202(a)(4). Decision and Order on Remand at 7; 5 U.S.C. §557(c)(3)(A); see *Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Moreover, as claimant and the Director correctly note, the administrative law judge failed to indicate the weight, if any, he accorded to the opinions of Drs. Parker and Dr. Repsher.

We find no merit, however, in claimant’s contention that the administrative law judge erred in failing to weigh the relative qualifications of the medical experts and give proper consideration to the credentials of Drs. Cohen and Parker. In his original decision, the administrative law judge accurately summarized the doctors’ respective qualifications, professional appointments, and experience in pulmonary medicine, and determined, within his discretion, that all of the experts were “extremely qualified” to render an opinion. Decision and Order at 22; *Clark*, 12 BLR at 1-155.

Thus, on remand, the administrative law judge must evaluate all of the medical opinions of record; determine if they are adequately reasoned and documented; assign each opinion appropriate weight; and provide valid reasons for each of his credibility

⁴ In summarizing Dr. Renn’s opinion, the administrative law judge quoted the physician’s observation that:

The five basic pathophysiologic mechanisms which result in hypoxemia are reduced inspired oxygen tension, hypoventilation, ventilation-perfusion mismatch, right-to-left shunting, and diffusion impairment. A rigorous evaluation of all possibilities has not been provided for [claimant]. It is obvious that the initial step should be to determine whether or not the apparent exercise-induced hypoxemia is, indeed, a constant medical observation.

Decision and Order on Remand at 6; Employer’s Exhibit 14. The administrative law judge subsequently indicated that Dr. Cohen attributed claimant’s “significant blood gas abnormality” in part to coal dust exposure, whereas Dr. Renn determined that it “could be due to five enumerated factors.” Decision and Order on Remand at 7. The administrative law judge concluded that Dr. Cohen “has not adequately explained why these other factors are not responsible for the blood gas abnormality.” *Id.* However, in the quoted passage, Dr. Renn merely identified five possible causes of hypoxemia. Employer’s Exhibit 14. Claimant notes that Dr. Cohen opined that the hypoxemia shown on the blood gas studies resulted from a diffusion impairment caused in part by coal dust exposure. Claimant’s Brief at 26-27; Claimant’s Exhibit 5.

determinations, while clearly explaining his rationale as to each medical expert at Section 718.202(a)(4).⁵ See *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge is not required to find that one party's evidence preponderates, but if he determines that the medical opinion evidence is equally probative, he must explain why. If, however, claimant satisfies his burden to prove that he has pneumoconiosis, the administrative law judge must render findings as to whether claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, if so, whether claimant's disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

As our review of the administrative law judge's decision in this matter does not reveal evidence of partiality, bias, or prejudice against claimant, we deny claimant's request that this case be assigned to a different administrative law judge on remand.

⁵ There is no merit to claimant's assertion that an administrative law judge is required to determine the credibility of an expert's opinion in light of the preamble to the revised regulations. It is, however, permissible for an administrative law judge to discuss the preamble to the regulations when weighing the medical opinions relevant to the issue of legal pneumoconiosis. See *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Moreover, the Tenth Circuit explicitly acknowledged that "with regard to disputes concerning the existence and causes of pneumoconiosis, an [administrative law judge] has the benefit of a substantial inquiry by the Department of Labor," and noted that an administrative law judge "may properly rely on those regulations when assessing scientific testimony." *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1025, 24 BLR 2-297, 2-315 (10th Cir. 2010).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge