BRB No. 13-0412 BLA

TERRY O. GUNDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE MOUNTAIN ENERGY	)	
	)	DATE ISSUED: 05/16/2014
and	)	
	)	
OLD REPUBLIC INSURANCE 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 Second Remand and Decision and Order on Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

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

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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Second Remand and Decision and Order on Reconsideration (04-BLA-5323) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a claim filed on June 15, 2001,[1] and is before the Board for the third time.

In the initial 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)(4) 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,[2] holding that the administrative law judge's "cursory statement that the evidence from both parties was entitled to equal weight d[id] not constitute a sufficient reason" for his finding that claimant failed to meet his burden of establishing pneumoconiosis. *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1016, 24 BLR 2-297, 2-301 (10th Cir. 2010). 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 30 U.S.C. §932(a). *Gunderson*, 601 F.3d at 1027, 24 BLR at 2-319. Accordingly, the court remanded the case for further proceedings. *Id*.

On remand, the administrative law judge stated that the Tenth Circuit's decision required him to "choose one party's argument over the other," Decision and Order on Remand at 6, and he summarily credited the medical opinions that claimant's lung disease is due to smoking. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board found merit in the arguments of claimant and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge misconstrued the Tenth Circuit's remand instructions, conflated the issues that were before him for adjudication, and failed to explain his findings. *Gunderson v. Blue Mountain Energy*, BRB No. 11-0668 BLA, slip op. at 4-5

[1] Because this claim was filed before January 1, 2005, amendments to the Black Lung Benefits Act that became effective on March 23, 2010, do not apply to this case.

[2] Because claimant's coal mine employment took place in Utah and Colorado, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

(July 30, 2012)(unpub.). Therefore, the Board vacated the administrative law judge's decision, and remanded the case for him to reconsider the claim in a manner consistent with the Tenth Circuit's opinion:

> [O]n 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 determinations, while clearly explaining his rationale as to each medical expert at [20 C.F.R. §]718.202(a)(4). 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).

Gunderson, slip op. at 5-6 (footnote and citations omitted).

On remand, the administrative law judge found that the better reasoned medical opinions established that claimant suffers from legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2). The administrative law judge further found that claimant is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Subsequently, employer moved for reconsideration, which the administrative law judge granted in part, and denied in part. Specifically, the administrative law judge rejected employer's argument that it was entitled to notice and an opportunity to respond before the administrative law judge could consider the preamble to the revised 2001 regulations in weighing the conflicting medical opinions. However, the administrative law judge granted employer's request to alter the benefits commencement date from June

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

2001, the month in which claimant filed his claim, to January 2004, the month in which he retired from coal mine employment.[4]

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b),(c). Claimant and the Director respond, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its arguments on appeal.

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Legal Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Cohen, Parker, Repsher, and Renn.[5] Drs. Cohen and Parker diagnosed claimant with COPD due to both thirty years of coal mine dust exposure and thirty pack-years of smoking. Claimant's Exhibits 5-6, 13-14. Drs. Renn and Repsher attributed claimant's COPD solely to smoking. Director's Exhibit 23; Employer's Exhibits 4, 10, 13, 14; Hr'g Tr. at 60-161.

The administrative law judge determined that the opinions of Drs. Cohen and Parker were the "most probative" of record, because he found that those physicians more thoroughly evaluated claimant's specific condition. Decision and Order on Second Remand at 15. The administrative law judge noted that Dr. Parker specifically linked

[4] Claimant agreed with employer that benefits should commence as of January 2004. Decision and Order on Reconsideration at 2; Claimant's Brief at 6.

[5] The administrative law judge also considered Dr. Shockey's opinion that claimant has chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking, but discounted it because he found that it was less comprehensive than the other opinions of record. Decision and Order on Second Remand at 14-15, 17; Director's Exhibit 11.

claimant's condition to "the documented effects of coal mine dust exposure," supporting his opinion with citations "to [medical] literature . . . approved by the Department in the Preamble" to the 2001 regulatory revisions. *Id*. Further, the administrative law judge found Dr. Parker's explanation, that claimant's lung function continued to worsen after he ceased smoking but continued to mine coal, to be consistent with the "acknowledged view that pneumoconiosis is a latent and progressive condition." *Id*.

In contrast, the administrative law judge found Dr. Repsher's opinion, that claimant's COPD is due solely to smoking, to be entitled to "less weight," because Dr. Repsher based his opinion more on a generalized statistical rationale than on the specifics of claimant's condition. Additionally, the administrative law judge found that Dr. Repsher did not address whether both smoking and coal mine dust exposure could have caused claimant's COPD, noting that the preamble discussed medical literature stating that the effects of smoking and coal mine dust exposure are additive. Further, the administrative law judge discounted Dr. Renn's opinion, that he could distinguish between coal dust-related COPD and smoking-related COPD by using a particular pulmonary function study value, because Dr. Cohen explained that the medical community does not accept that particular test value as having a useful interpretation. Based on the foregoing findings, the administrative law judge found that claimant established the existence of legal pneumoconiosis.

Employer argues that the administrative law judge applied an incorrect legal standard in determining whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 14-15. We disagree. The administrative law judge quoted the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), Decision and Order on Second Remand at 13, credited the medical opinions of Drs. Cohen and Parker that claimant's COPD was significantly related to coal mine dust exposure, and ultimately concluded that "[c]laimant's COPD was substantially caused by his coal mine employment." *Id*. at 17; *see* 20 C.F.R. §718.201(a)(2), (b); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1335 (10th Cir. 2014); *Gunderson*, 601 F.3d at 1018, 24 BLR at 2-305. We therefore reject employer's argument that the administrative law judge applied an improper standard.[6]

[6] Employer takes issue with a sentence in which the administrative law judge paraphrased the definition of legal pneumoconiosis that he had just quoted, by stating that "in other words, if coal mine dust merely contributes to the development of [claimant's] respiratory condition, the miner has established 'legal pneumoconiosis.'" Decision and Order on Second Remand at 13. Pointing to the "merely contributes" language, employer argues that the administrative law judge "failed to apply the regulation as written," requiring remand. Employer's Brief at 15. However, as discussed above, the administrative law judge set forth the correct definition of legal pneumoconiosis, made

Employer next argues that the administrative law judge erred in not providing notice to the parties that he would refer to the preamble to the 2001 regulatory revisions when assessing the medical opinions, and erred by relying on the preamble's discussion of medical science accepted by the Department of Labor when he weighed the conflicting evidence. Employer's Brief at 15-21. We disagree. Contrary to employer's contention, the administrative law judge permissibly relied on the preamble to the revised 2001 regulations as a statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Gunderson*, 601 F.3d at 1025, 24 BLR at 2-315 (holding 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"); *see also Peabody Coal Co. v. Director, OWCP* [*Opp*], F.3d , No. 12-70535, 2014 WL 1282289 (9th Cir. Apr. 1, 2014); *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, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Moreover, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-212 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-132 (4th Cir. 2012).

In addition to challenging the administrative law judge's use of the preamble in his analysis of the evidence, employer argues that the administrative law judge did not discharge his duty to explain the reasons for his determinations. Employer's Brief at 25, 28-29. Employer misunderstands that duty. As the Tenth Circuit stated in its decision in this case, "'[t]his duty of explanation is not intended to be a mandate for administrative verbosity or pedantry. If a reviewing court can discern what the [administrative law judge] did and why he did it, the duty of explanation is satisfied.'" *Gunderson*, 601 F.3d at 1022, 24 BLR at 2-311, *quoting Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999). Because the Board can discern what the administrative law judge did and why he did it, he satisfied his duty of explanation under the APA.

We now turn to employer's allegations of error regarding the analysis of each physician's opinion. Employer contends that the administrative law judge misapplied the

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findings consistent with that definition, and credited medical opinions supportive of the existence of legal pneumoconiosis under the regulatory definition. Therefore, employer has not demonstrated reversible error in the administrative law judge's paraphrase of the definition of legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

preamble and the regulations in according greater weight to Dr. Parker's opinion that claimant's COPD is due to both coal mine dust exposure and smoking. Employer's Brief at 25. This contention lacks merit. The administrative law judge reasonably credited Dr. Parker's diagnosis of legal pneumoconiosis because Dr. Parker linked claimant's impairment to the documented effects of coal mine dust exposure, based on studies that were cited with approval in the preamble to the revised 2001 regulations. *See Gunderson*, 601 F.3d at 1025, 24 BLR at 2-315. Further, the administrative law judge permissibly found Dr. Parker's reasoning to be consistent with the regulation recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Gunderson*, 601 F.3d at 1025, 24 BLR at 2-315; Claimant's Exhibit 6 at 5-7.

Employer argues further that the administrative law judge did not explain why Dr. Cohen's opinion was found to be "most probative." Employer's Brief at 28. This argument lacks merit because the administrative law judge explained that, since he found that Drs. Cohen and Parker "more thoroughly evaluated claimant's specific condition when determining that [his] obstructive lung disease was caused by coal mine dust exposure," their opinions were the most probative. Decision and Order at 15. This determination was within the administrative law judge's discretion as the fact-finder, *see Gunderson*, 601 F.3d at 1025, 24 BLR at 2-315, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113.

Employer argues further that the administrative law judge erred in discounting Dr. Repsher's opinion that claimant's COPD is due solely to smoking. Employer's Brief at 26. Contrary to employer's argument, the administrative law judge permissibly discounted Dr. Repsher's opinion because he found it to be based more on Dr. Repsher's view of the statistical likelihood of developing an impairment due to coal dust exposure, than on claimant's particular condition.[7] *See Goodin*, 743 F.3d at 1345-46; *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Moreover, the administrative law judge rationally discounted Dr. Repsher's opinion because he found that Dr. Repsher did not adequately explain why both coal mine dust exposure and smoking did not contribute to claimant's COPD, considering that the Department of Labor accepted medical literature stating that smoking and coal mine dust exposure are additive in causing COPD. *See Gunderson*, 601 F.3d at 1025, 24 BLR at 2-316-17; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

[7] The record contains Dr. Repsher's testimony that the reason he attributed claimant's COPD solely to smoking, and not to both smoking and coal mine dust exposure, was the greater statistical probability that smoking would cause obstruction. Hr'g Tr. at 115-16.

Employer argues that the administrative law judge did not provide a rational basis for finding Dr. Renn's opinion, that claimant's FEF 25-75 value[8] shows that his COPD is due solely to smoking, to be outweighed by Dr. Cohen's opinion. Employer's Brief at 28. We disagree. The administrative law judge rationally gave less weight to Dr. Renn's opinion, because Dr. Cohen explained that more recent medical literature establishes that the FEF 25-75 value is no longer used as a diagnostic measure. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-104; Decision and Order on Remand at 9, 10, 14, 15; Claimant's Exhibits 13 at 1-2; 14 at 1-2; Employer's Exhibits 10 at 51-52; 14 at 1-2. We therefore reject employer's allegations of error in the administrative law judge's weighing of the medical opinions, and affirm the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant's pulmonary function studies were non-qualifying[9] for total disability, and that there was no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i),(iii). However, the administrative law judge further found that claimant's blood gas studies were qualifying, and supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Turning to the medical opinions under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found the opinions of Drs. Cohen and Parker, that claimant is totally disabled by a respiratory impairment, to be more convincing than the contrary opinions of Drs. Repsher and Renn. Finding that the non-qualifying pulmonary function studies did not outweigh the qualifying blood gas studies and medical opinions, the administrative law judge determined that claimant established that he is totally disabled.

Employer argues that the administrative law judge's finding of total disability is inadequately explained. Employer's Brief at 29. We disagree. The administrative law judge explained that he credited the opinions of Drs. Cohen and Parker over those of Drs. Repsher and Renn, because Dr. Renn misunderstood the conditions under which claimant

[8] The FEF 25-75 value of a pulmonary function study measures the average speed or flow of air coming out of the lung during the middle part of expiration for the FVC maneuver. Claimant's Brief at 11 n.10, *citing Spirometry Handbook*, http://www.nationalasthma.org.au/html/management/spiro_book/sp_bk002.asp.

[9] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

was administered an exercise blood gas study, and because Drs. Cohen and Parker "convincingly explained" that the medical testing of record indicated that claimant's impairment is respiratory in nature, and not a cardiac condition, as Dr. Repsher believed. Decision and Order on Second Remand at 17. Therefore, contrary to employer's argument, the administrative law judge explained why he credited the medical opinions diagnosing total disability.[10] *See* 5 U.S.C. §557(c)(3)(A); *Gunderson*, 601 F.3d at 1022, 24 BLR at 2-311. Further, the administrative law judge acted within his discretion in finding that the non-qualifying pulmonary function studies did not outweigh the qualifying blood gas studies or the opinions of physicians who considered claimant's objective tests in reaching their conclusions that he is totally disabled. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2).

Total Disability Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred by failing to make a separate, specific determination that claimant's total disability is due to pneumoconiosis. Employer's Brief at 15. Claimant must establish that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c). The administrative law judge stated, "Claimant has established that he is totally disabled by his COPD. Because I found that [c]laimant's COPD was substantially caused by his coal mine employment, [c]laimant has proven that he is totally disabled due to legal pneumoconiosis." Decision and Order on Second Remand at 17. Contrary to employer's contention, the administrative law judge made the necessary findings to determine that claimant is totally disabled due to legal pneumoconiosis. *See Goodin*, 743 F.3d at 1346; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1061-62 (6th Cir. 2013). His disability causation finding, although brief, is supported by substantial evidence. We therefore affirm the administrative law judge's finding of total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[10] As summarized by the administrative law judge, Drs. Parker and Cohen provided rational explanations, based on objective data, for finding Dr. Repsher's opinion on total disability flawed. Decision and Order on Second Remand at 8, 12, 17. The administrative law judge was not required to further explain why he credited their opinions, because employer presented no evidence that the rationales for their opinions were similarly flawed. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1022, 24 BLR 2-297, 2-311 (10th Cir. 2010).

Accordingly, the administrative law judge's Decision and Order on Second Remand and Decision and Order on Reconsideration awarding benefits are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge