IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TERRY GUNDERSON,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION ROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent

BLUE MOUNTAIN ENERGY and OLD REPUBLIC INSURANCE COMPANY,

Intervenors

On Petition for Rehearing En Banc

RESPONSE OF THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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Blue Mountain Energy and Old Republic Insurance Company (collectively Blue Mountain) seek rehearing en banc of the panel decision in *Gunderson v. U.S. Department of Labor*, 601 F.3d 1013 (10th Cir. 2010). Blue Mountain's petition fails to identify any Supreme Court or Tenth Circuit authority with which the panel decision conflicts, and amounts to nothing more than an attempt to re-litigate the case. It should be denied.

BACKGROUND

Terry Gunderson applied for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44. Mr. Gunderson mined coal for thirty years, and also has a lengthy cigarette-smoking history. He suffers from chronic obstructive pulmonary disease (COPD). The primary issue in this case is whether his COPD is pneumoconiosis as defined by the BLBA and the Department of Labor's regulations. *See* 30 U.S.C. § 902(b); 20 C.F.R. § 718.201. Three physicians (Drs. Shockey, Cohen and Parker) concluded that Mr. Gunderson's COPD arose, at least in part, from dust exposure during his work in the coal mines. In other words, they determined that he suffers from "legal pneumoconiosis"—*i.e.*, a pulmonary disease, including an obstructive lung condition, arising out of coal-mine employment. *See* 20 C.F.R. § 718.201(a)(2) (defining legal pneumoconiosis); *Andersen v. Director, OWCP*, 455 F.3d 1102, 1104 (10th Cir. 2006). Two other physicians (Drs. Repsher and Renn) found that Mr. Gunderson's COPD was

attributable solely to cigarette smoking and, thus, was not pneumoconiosis.

A Department of Labor administrative law judge (ALJ) found that the medical opinions attributing Mr. Gunderson's COPD to coal-dust exposure and those attributing it solely to smoking were equally probative. Since Mr. Gunderson must prove that he has pneumoconiosis by a preponderance of the evidence, the ALJ concluded that he failed to carry his burden of persuasion and denied his claim. The Benefits Review Board affirmed the ALJ's decision.

On Mr. Gunderson's appeal to this Court, a divided panel vacated the decisions below because the ALJ failed to adequately explain his evaluation of the conflicting medical opinions, as required by the Administrative Procedure Act (APA). 601 F.3d at 1021-26; *see* 5 U.S.C. § 557(c)(3)(A), incorporated into the BLBA by 5 U.S.C. § 554(c)(2), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a). Explaining that "[t]he mere fact that equally qualified experts gave conflicting testimony does not authorize the ALJ to avoid the scientific controversy by declaring a tie[,]" the panel remanded the case for the ALJ to adequately explain his findings. 601 F.3d at 1024.[1] 601 F.3d at 1024-25. Judge O'Brien dissented, concluding that the ALJ had adequately explained his reasoning. *Id*. at 1027-30. Blue Mountain now petitions for rehearing en banc.

[1] The panel also held that the ALJ had properly excluded certain evidence from the record. 601 F.3d at 1026-27. This holding is not at issue on rehearing.

ARGUMENT

A. Blue Mountain has not demonstrated that the panel decision conflicts with decisions of the Supreme Court, this Court, or other circuits.

En banc review is "an extraordinary procedure." Tenth Cir. R. 35.1(A). Requests for such review are disfavored, and will not be granted unless the requesting party demonstrates that a panel decision conflicts with a decision of the Supreme Court or another decision of this Court, or that the panel decision involves a question of "exceptional importance," such as a conflict with a decision from another circuit. FED. R. APP. P. 35(b)(1)(A), (B); Tenth Cir. R. 35.1(A).

Blue Mountain has not met that burden here. It attempts to show that the panel's decision conflicts with the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, this Court's decision in *Andersen v. Director, OWCP*, and the District of Columbia Circuit's decision in *National Mining Association v. Department of Labor*. Those decisions, however, address a benefits claimant's burden of proof. In contrast, the panel decision here addresses an ALJ's statutory obligation to explain why he decided a case the way he did. There is no conflict between the panel's opinion and the decisions cited by Blue Mountain.

1. *Director, OWCP v. Greenwich Collieries*.

Blue Mountain contends that the panel decision here conflicts with the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pet. for Reh'g at 3, 8. This conflict simply does not exist. As the

panel recognized, this case and *Greenwich Collieries* address very different questions.

In *Greenwich Collieries*, the Supreme Court invalidated the "true doubt rule." 512 U.S. at 281. Under that rule (a non-statutory and non-regulatory rule of decision), if the evidence with respect to an element of entitlement on a BLBA claim was in equipoise, the factfinder would find in favor of the benefits claimant. 512 U.S. at 269. In effect, the rule shifted the burden of persuasion to the party opposing entitlement when the evidence was equally balanced. *Id*. The Supreme Court struck down the true doubt rule because it violated Section 7(c) of the APA, 5 U.S.C. § 556(d), and held that a BLBA claimant must establish all elements of entitlement by a preponderance of the evidence. 512 U.S. at 271-81.

In no way does the panel decision conflict with *Greenwich Collieries*. It does not revive the true doubt rule or shift any burden of persuasion from Gunderson to Blue Mountain. As the panel explained, *Greenwich Collieries* "does not address the dispositive issue here—whether the ALJ's decision was sufficiently reasoned or explained[.]" 601 F.3d at 1026. The panel acknowledged that, under *Greenwich Collieries*, claimants lose where the evidence is in equipoise. *Id.* It simply held that the ALJ failed to explain why he found the positive and negative medical opinions equally probative. 601 F.3d at 1021-26. The ALJ summarized the findings of each physician, and concluded that all of the opinions were "well-

reasoned." Other than his repeated invocation of the phrase "well-reasoned," however, the ALJ did not explain why he found each of the opinions credible and supported by the evidence on which the doctors claimed to rely. The panel remanded the case for the ALJ to explain his weighing of the evidence.

If, on remand, the ALJ finds that that a preponderance of the medical-opinion evidence supports a finding of legal pneumoconiosis, then Mr. Gunderson will prevail on this issue. Conversely, if the negative opinions preponderate, Blue Mountain will prevail. Likewise, as the panel specifically recognized, if the ALJ again finds the evidence equally balanced—and adequately explains that finding—then Mr. Gunderson will not have met his burden of persuasion, and Blue Mountain will prevail. *See* 601 F.3d at 1026 (citing *Greenwich Collieries*).

All of this is fully consistent with the allocation of the burden of persuasion ordained by Section 7(c) of the APA and *Greenwich Collieries*. Indeed, the panel did not vacate the ALJ's decision because it disagreed with his allocation of the burden of persuasion; rather, it did so because it was unable to determine why he found the evidence evenly balanced. 601 F.3d at 1021-26. This does not even implicate the Supreme Court's decision in *Greenwich Collieries*, let alone conflict with it.

2. *Andersen v. Director, OWCP*.

Blue Mountain also contends that the panel decision conflicts with this

Court's decision in *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006). As with *Greenwich Collieries*, however, the panel decision neither implicates nor conflicts with *Andersen*.

The claimant in *Andersen*, like Mr. Gunderson, suffered from COPD. 455 F.3d at 1102. An ALJ had denied his claim because he failed to prove by a preponderance of the evidence that his COPD arose, at least in part, out of his coal-mine employment. *Id*. Before the Court, the claimant argued that because he had worked in coal-mine employment for over ten years, he was entitled to a presumption that his COPD was caused by his employment, and that it should be considered legal pneumoconiosis. 455 F.3d at 1104-05; *see* 30 U.S.C. § 921(c)(1) (miner with pneumoconiosis entitled to presumption that disease arose out of coal-mine employment if he worked at least ten years in the mines); 20 C.F.R. § 718.203 (same).

The Court rejected these arguments. It held, in agreement with the Director, that COPD falls within the definition of legal pneumoconiosis only if the claimant affirmatively proves that the disease was caused, at least in part, by dust exposure during coal-mine employment. 455 F.3d at 1105; *see* 20 C.F.R. § 718.201(a)(2) (defining legal pneumoconiosis as a lung disease "arising out of coal mine employment"). The Court also held that the "ten-year presumption" does not apply to legal pneumoconiosis, and cannot be used to establish the requisite link between

a miner's COPD and his coal-mine employment. 455 F.3d at 1105-06. Rather, the miner must establish that link by affirmative medical evidence. 455 F.3d at 1107.

Blue Mountain does not explain how the panel decision conflicts with *Andersen*. Rather, it merely complains that the panel did not cite *Andersen*.[2] Pet. for Reh'g at 3. But *Andersen* simply does not address the issues presented in this case. The questions addressed in *Andersen* were (1) whether a miner had to prove that his COPD arose out of coal-mine employment for it to be considered legal pneumoconiosis, and (2) whether the ten-year presumption was available to assist him in proving that link. Neither issue is present here. No one—not the parties, the ALJ, the Board nor the panel—has suggested that Mr. Gunderson was somehow relieved of the burden of proving that his COPD arose out of coal-mine employment. Likewise, there has been no suggestion that any presumption was available to aid Mr. Gunderson.

Instead, the question here is whether the ALJ adequately explained why he concluded that Mr. Gunderson failed to meet his burden of proof. Simply put, the panel's holding that the ALJ failed to sufficiently explain his findings in no way conflicts with *Andersen's* teaching that a claimant must link COPD to coal-mine employment by affirmative medical evidence and without the aid of any

[2] The panel decision does cite *Andersen* in discussing the distinction between clinical and legal pneumoconiosis. 601 F.3d at 1018.

presumption.

3. *National Mining Association v. Department of Labor*.

Blue Mountain also claims that the panel decision conflicts with the District of Columbia Circuit's decision in *National Mining Association v. Department of Labor*, 292 F.3d 849 (2002) ("*NMA*"). Pet. for Reh'g at 3, 5. Even a cursory reading of *NMA* reveals that there is no conflict.

In *NMA*, an organization of coal-mine operators challenged the validity of the then-newly revised black lung program regulations. 292 F.3d at 855; *see* 20 C.F.R. Parts 718, 725, 726. The court upheld all but one regulation.[3] In pertinent part, the court upheld 20 C.F.R. § 718.201, the regulation defining pneumoconiosis. 292 F.3d at 862-63, 868. The mine operators contended that the revised definition would permit adjudicators to ignore any medical opinion attributing a miner's lung disease to smoking. *Id.* at 863. The Court rejected this argument as "entirely meritless" because "the regulation's text in no way indicates that medical reports will be excluded if they conclude that a particular miner's obstructive disease was caused by smoking. Indeed, the preamble itself states that

[3] The court invalidated 20 C.F.R. § 725.459 (2001), dealing with liability for certain witness costs, which is not at issue here. 292 F.3d at 875. It also held that several other regulations (20 C.F.R. § 718.204(a), dealing with disability causation; 20 C.F.R. §725.701, dealing with compensability of medical bills; and 20 C.F.R. §§ 725.204, .212(b), .213(c), .214(d), .219(c) and (d), dealing with the definition of eligible survivors) could not be applied retroactively. 292 F.3d at 864-65, 867-68. None of these regulations is at issue in this case.

the revised definition does not alter the requirement that individual miners must demonstrate that their obstructive lung disease arose out of their work in mines." *Id.* (citing 65 Fed. Reg. 79938 (Dec. 20, 2000)).

By way of explicating the supposed conflict between the panel decision and *NMA*, Blue Mountain alleges that the panel's "decision . . . suggests that even smoking cases now need to be transformed into a challenge of the Department's regulations." Pet. for Reh'g at 5. The gravamen of this argument is not clear. If Blue Mountain is asserting that the panel decision somehow indicates that a miner with COPD need not affirmatively prove that the disease arose out of coal-mine employment, it is simply incorrect. The panel's decision focuses on what an ALJ must do (provide a comprehensible rationale for his conclusions), not on what Mr. Gunderson must prove (that his obstructive lung disease arose out of his work in mines). And to the extent the panel touched on Gunderson's burden, it correctly noted that if the evidence was, in fact, evenly balanced, he could not obtain benefits. 601 F.3d at 1026.[4]

[4] Blue Mountain also cites purported conflicts with various decisions, where this and other courts determined that an ALJ had adequately explained his findings. Pet. for Reh'g at 10-11. There is, however, no conflict between the panel opinion and the cases cited by Blue Mountain. Rather, the panel decision and the cited cases illustrate two sides of the same principle—an ALJ's decision will be affirmed when he adequately explains his findings, but will not be affirmed when he does not.

Blue Mountain's argument, in reality, is that it simply disagrees with the panel's determination that the ALJ did not provide an adequate explanation for his conclusion. That disagreement, however, is not a ground for rehearing. *See U.S. v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) ("The function of en banc hearings is not to review alleged errors for the benefit of losing litigants."). There is no conflict between the panel decision and any controlling precedent of the Supreme Court or this Court. Thus, Blue Mountain's request for en banc review on this basis should be denied.

B. Blue Mountain has not otherwise shown that the panel decision implicates an issue of "exceptional importance" requiring en banc review.

Blue Mountain also argues that rehearing is necessary because the panel's decision "suggested that . . . the ALJ ought to consult matters outside the record" in evaluating the conflicting medical opinions. Pet. for Reh'g at 4. These extra-record materials are, apparently, the preamble to the Department's regulations (65 Fed. Reg. 79920-80107 (Dec. 20, 2000)) and "various unarticulated 'rules of thumb' that other courts and other ALJ's have used in other cases[.]" Pet. for Reh'g at 2, 3. This claim is peculiar, in that the panel decision makes no reference to either the preamble or "unarticulated rules of thumb" allegedly derived from it.[5]

[5] The panel decision does state that "with regard to disputes concerning the existence and causes of pneumoconiosis, an ALJ has the benefit of a substantial inquiry by the Department of Labor," but the panel was clearly referencing the (cont'd . . .)

Indeed, Blue Mountain concedes that the panel "never mention[ed] the Preamble[.]" Pet. for Reh'g at 1.[6]

Blue Mountain's actual complaint appears to be that the preamble was mentioned in Gunderson's brief-in-chief. *See* Pet. for Reh'g at 1 ("*Gunderson's* principal argument is that the ALJ . . . did not rely on conclusions stated and medical research cited in the Preamble . . . . *Gunderson* believes that the ALJ is obligated to go outside the trial record to consider what the Department of Labor's lawyers wrote in the regulatory Preamble"), 5 ("The Court does not consider that the part of the Preamble *relied on by Gunderson* is mostly false science") (emphasis added). However, the time for Blue Mountain to argue about Gunderson's brief-in-chief has passed. As explained above, the function of en banc hearings is not to review alleged errors in panel decisions, and it is certainly not to correct alleged errors in an opponent's brief.

Moreover, even if the panel had referred to the regulatory preamble, an ALJ may look to the preamble—as well as the BLBA itself, the legislative history of the statute, the Department's regulations, and prior precedents—in evaluating and

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(. . . cont'd)
regulatory definition of pneumoconiosis in 20 C.F.R. § 718.201, not the preamble to the regulations or to any unarticulated rules of thumb derived from that preamble. *See* 601 F.3d at 1024-25.

[6] It was, however, cited by the dissenting judge. 601 F.3d at 1030. Blue Mountain does not express any objection to this citation.

determining the credibility of medical opinions. *See Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726-27 (7th Cir. 2008). The preamble provides the rationale behind the Department's regulations, including the Department's determination of certain questions of scientific fact, which may aid in the resolution of a case. *See Andersen*, 455 F.3d at 1105 (relying in part on BLBA regulatory preamble); *see generally Martin v. O.S.H.R.C.*, 941 F.2d 1051, 1056 (10th Cir. 1991) (proper to look to preamble to aid in interpretation or construction of regulation). The Department was authorized to make such determinations, *see Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004), and an ALJ may judge the credibility of a medical opinion by reference to the Department's determinations.[7] *See, e.g., Freeman United Coal Min. Co. v. Summers*, 272 F.3d 473, 483 n. 7 (7th Cir. 2001).

For instance, the Department's regulations make clear that pneumoconiosis (whether clinical or legal) may be progressive and latent, and that coal dust inhalation may cause significant obstructive lung disease. 20 C.F.R. §

[7] Blue Mountain complains that the panel decision erroneously requires the ALJ to resolve "scientific" controversies. Pet. for Reh'g at 11-12. This is a semantic argument. Whether termed "scientific" or not, an ALJ must resolve the disputes before him. While some questions—whether coal-dust can cause obstruction—are answered by the regulations, the more particular question of whether an individual miner's obstructive lung disease arose out of coal-mine employment must be decided by the ALJ based on the "scientific" evidence (*e.g.*, medical opinions) before him.

718.201(a)(2), (c). The preamble, in turn, sets forth the scientific evidence underlying these regulations. 65 Fed. Reg. 79938-44, 79968-72 (Dec. 20, 2000).

While a significant portion of Blue Mountain's petition is devoted to fulminating against the preamble—asserting that it is "mostly wrong" or merely the creation of DOL's lawyers (Pet. for Reh'g at 5-6)—Blue Mountain does not (and cannot) support these assertions. *See Midland Coal Co.* 386 F.3d at 490 (employer has "heavy burden" to show that DOL not authorized to resolve scientific questions in the manner it did so). Indeed, to a large extent, Section 718.201 merely codifies prior case law, which consistently recognized that pneumoconiosis may be progressive, and that coal dust can cause disabling obstructive lung disease. *See*, *e.g.*, *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996) (recognizing progressive nature of pneumoconiosis); *Consolidation Coal Co. v. Hage*, 908 F.2d 393, 395 (8th Cir. 1990) (obstructive lung disease caused by coal-mine employment compensable under BLBA).

In short, the panel did not direct the ALJ to evaluate the medical opinions in light of the preamble to DOL's black lung program regulations. Even if the panel had done so, en banc review would not be justified because it is appropriate for an ALJ to consider the preamble on remand.[8] Hence, Blue Mountain has failed to

[8] Of course, it is possible that the ALJ might misapply the preamble (or the regulations, binding authority, or the statute) on remand, but that is hardly a reason (cont'd . . .)

show that an issue of "exceptional importance" justifies rehearing of the panel's decision.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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to reverse the panel's remand order. *Cf. NMA*, 292 F.3d at 863 ("To the extent that appellants' objection is based on *anticipated* misapplications of the rule by agency adjudicators, it is unripe for review.") (quoted in Pet. for Reh'g at 5).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the page limitation of FED. R. APP. P. 35(b)(2) because it contains fourteen pages (excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii)), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Times New Roman font.

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CERTIFICATE FOR ELECTRONIC FILING

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, an electronic copy of the foregoing pleading was served through the CM/ECF systems, and two paper copies were served by mail, postage prepaid, on the following:

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