BRB Nos. 12-0173 BLA
and 12-0173 BLA-A

ERMIL A. FREEMAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/17/2013
	)	
ARCH OF WEST VIRGINIA/	)	
APOGEE COAL COMPANY	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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 BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2010-BLA-5069) of Administrative Law Judge Richard A. Morgan, rendered on a request for modification of the denial of a subsequent claim filed on September 22, 2005, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The pertinent procedural history of this case is as follows.[1] In a Decision and Order dated November 17, 2008, Administrative Law Judge Adele Higgins Odegard found that a change in an applicable condition of entitlement was established under 20 C.F.R. §725.309, as claimant proved that he is totally disabled, an element of entitlement previously adjudicated against him. On the merits, however, Judge Odegard found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and denied benefits. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *E.F.* [*Freeman*] *v. Arch of West Virginia/Apogee Coal Co.*, BRB No. 09-0212 BLA (Sept. 29, 2009)(unpub.) Claimant filed a request for modification on December 1, 2009.

On March 23, 2010, amendments to the Act, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Relevant to this case, the amendments revived Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4).

Subsequent to the district director's denial of claimant's request for modification, claimant requested a hearing, which was held on August 24, 2011, before Judge Morgan (the administrative law judge). Director's Exhibit 87. In his Decision and Order, the administrative law judge credited claimant with twenty-one years of coal mine employment, at least fifteen years of which were in underground mining. The administrative law judge determined that, although claimant proved that he is totally disabled under 20 C.F.R. §718.204(b), the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Relying upon his findings at 20 C.F.R. §718.202(a), the administrative law judge found that claimant

[1] Claimant filed his initial claim for black lung benefits on June 28, 1973, which was denied. Director's Exhibit 1. Claimant filed his second claim on November 29, 1989, which was denied because claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. Claimant took no further action until filing the claim that is the subject of the present appeal. Director's Exhibit 3.

was not entitled to the presumption set forth in amended Section 411(c)(4), without explicitly addressing rebuttal of the presumption. The administrative law judge concluded that claimant did not demonstrate either a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 or a basis for modification of the prior denial of his subsequent claim under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge misstated the burden of proof and did not properly weigh the evidence relevant to whether he has pneumoconiosis and is totally disabled by it. Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer argues that the administrative law judge erred in referring to the preamble to the amended regulations in discounting Dr. Tuteur's opinion. Employer also challenges the constitutionality of the PPACA and amended Section 411(c)(4).[2] Employer further argues that the application of amended Section 411(c)(4) in this case is premature because of the absence of implementing regulations. Additionally, employer contends that the rebuttal provisions at amended Section 411(c)(4) do not apply to responsible operators. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to reject employer's contention with respect to the preamble to the amended regulations. The Director also urges the Board to reject employer's argument that amended Section 411(c)(4) is unconstitutional.[3]

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.[4] 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).

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[2] Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act is denied. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fifteen years of qualifying coal mine employment and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

I. The Validity of Amended Section 411(c)(4)

We reject employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property, for the reasons set forth in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.). *See also Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), we reject employer's argument that the rebuttal provisions at amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Lastly, there is no merit to employer's assertion that application of amended Section 411(c)(4) is barred, pending promulgation of implementing regulations. *See Mathews*, 24 BLR at 1-201. Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.

II. The Application of Amended Section 411(c)(4)

The primary issue before the administrative law judge in this case was whether claimant could invoke the amended Section 411(c)(4) presumption, thereby establishing a basis for modification of the denial of his 2005 claim under 20 C.F.R. §725.310. When addressing whether claimant established invocation of the presumption, the administrative law judge stated:

> The claim was filed after January 1, 2005 and the [c]laimant had more than fifteen years of coal mine employment. There was no [x]-ray evidence of complicated pneumoconiosis. As discussed above, the [c]laimant failed to prove the existence of pneumoconiosis. Thus, he is not entitled to the benefit of the rebuttable presumption.

Decision and Order at 24. Claimant argues that the administrative law judge erred in finding that claimant failed to invoke the amended Section 411(c)(4) presumption, as he improperly placed the burden of proof on claimant to establish the existence of pneumoconiosis. Although it is unclear whether the administrative law judge actually determined that claimant did not invoke the presumption or believed, erroneously, that it

was rebutted because claimant did not establish that he has pneumoconiosis, we agree with claimant that the administrative law judge's analysis of the invocation issue does not accord with amended Section 411(c)(4).

To establish invocation of the amended Section 411(c)(4) presumption, claimant is required to prove: that his claim was filed after January 1, 2005; that it was pending on or after March 23, 2010; that he had at least fifteen years of underground coal mine employment or coal mine employment in substantially similar conditions; and that he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. 921(c)(4). Once these prerequisites are satisfied, claimant is presumed to be totally disabled due to pneumoconiosis and the burden shifts to the party opposing entitlement to rebut the presumption by establishing either that the miner does not have clinical or legal pneumoconiosis,[5] or that his total disability did not arise out of, or in connection with, his coal mine employment. *Id*.; *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995).

In the present case, the administrative law judge determined that the claim was filed after January 1, 2005, that claimant had more than fifteen years of coal mine employment and that claimant has a totally disabling respiratory impairment. Decision and Order at 2, 21, 24. Additionally, there is no dispute that the September 22, 2005 claim was pending on March 23, 2010. Claimant invoked the presumption of total disability due to pneumoconiosis, therefore, and the burden shifted to employer to rebut it. Because the administrative law judge did not place the burden of proof on employer when addressing the issue of the existence of pneumoconiosis, we vacate his finding that claimant "is not entitled to the benefit" of the amended Section 411(c)(4) presumption. *Id*. at 24. We also vacate the administrative law judge's determination that claimant did not establish a basis for modification at 20 C.F.R. §725.310 and remand this case to the administrative law judge for further consideration.[6] *Id*.

[5] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] We also vacate the administrative law judge's determination that, because claimant did not prove that he has pneumoconiosis, he did not establish a change in an

On remand, the administrative law judge must determine whether employer has rebutted the amended Section 411(c)(4) presumption by affirmatively establishing that claimant does not have pneumoconiosis or that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43. When weighing the medical opinion evidence on remand, the administrative law judge is instructed to assess the conflicting medical opinions in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Finally, in reconsidering whether employer has rebutted the amended Section 411(c)(4) presumption on remand, the administrative law judge must identify and weigh all relevant evidence and set forth his findings in detail, including the underlying rationale, in accordance with the Administrative Procedure Act.[7] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

III. The Administrative Law Judge's Reliance on the Preamble

On cross-appeal, employer alleges that the administrative law judge erred in relying upon the findings of the Department of Labor (DOL) in the preamble to the amended regulations as a basis for discounting Dr. Tuteur's opinion as to the existence of legal pneumoconiosis.[8] We disagree. Contrary to employer's suggestion, the preamble

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applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge is not required to reconsider this issue on remand, however, as 20 C.F.R. §725.309 is not relevant to claimant's request for modification. Because claimant established a change in an applicable condition of entitlement when his 2005 subsequent claim was before Judge Odegard, a finding that was reaffirmed by the administrative law judge in the present decision, claimant was not required to again satisfy the requirements of 20 C.F.R. §725.309 when he requested modification.

[7] 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law.

[8] Dr. Tuteur reviewed claimant's medical records and diagnosed chronic obstructive pulmonary disease (COPD), chronic bronchitis and emphysema. Employer's Exhibit 1. Dr. Tuteur also determined that claimant has a totally disabling respiratory impairment. *Id*. With respect to the etiology of claimant's COPD and impairment, Dr.

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 (6th Cir. 2012); *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Rather, "the preamble simply sets forth the medical and scientific premises relied on by the Department in coming to . . . conclusions in its regulations." *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012). Therefore, an administrative law judge may look to the preamble in assessing the credibility of a physician's views. *Id*.; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 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).

In the present case, the administrative law judge acted within his discretion in discrediting Dr. Tuteur's opinion, as the administrative law judge properly determined that Dr. Tuteur's opinion regarding the cause of claimant's chronic obstructive pulmonary disease (COPD) was inconsistent with the credible scientific evidence cited in the preamble to the regulations and relied upon by the DOL in drafting the definition of legal pneumoconiosis. Specifically, Dr. Tuteur's dismissal of the role of coal dust exposure, because "the relative risk is 20:1 in favor of tobacco smoke," conflicts with the credible scientific evidence that coal dust exposure can be a clinically significant cause of COPD, and that the risks of smoking and coal dust exposure are additive. Employer's Exhibit 1; 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Looney*, 678 F.3d at 313. The administrative law judge also provided an additional, valid rationale for according less weight to Dr. Tuteur's opinion by finding that he did not "clearly explain how he arrive[d] at the 20:1 ratio." Decision and Order at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983). We affirm, therefore, the administrative law judge's finding that Dr. Tuteur's opinion regarding the existence of legal pneumoconiosis is not well-reasoned.

Tuteur acknowledged that coal dust exposure was a potential cause, but concluded that smoking was the sole cause. *Id*. Dr. Tuteur based his conclusion on the fact that claimant smoked for more than forty years of smoking, while his coal mine employment totaled twenty-four years. *Id*. Dr. Tuteur also cited studies that indicate that one is unlikely to develop COPD as a result of coal dust inhalation. *Id*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons expressed in my dissent in *Snider v. Consolidation Coal Co.*, BRB No. 11-0727 BLA (July 30, 2012) (unpub.) (Boggs, J., concurring and dissenting), but mindful that there is now precedent to the contrary, I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge