

BRB No. 12-0043 BLA

JAMES DAVID BOUNDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/25/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke,  
Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

Maia S. Fisher (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:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5334)  
of Administrative Law Judge Thomas M. Burke (the administrative law judge), rendered  
on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended,  
30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited

claimant with thirty-two years of underground coal mine employment, determined that the claim was timely filed, and adjudicated this claim, filed on May 14, 2009, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to support a finding of total respiratory disability, and was, therefore, sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)).<sup>1</sup> The administrative law judge further found that employer failed to establish rebuttal of the presumption.<sup>2</sup> Accordingly, benefits were awarded.

On appeal, employer challenges the constitutionality of the PPACA. Employer also argues that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations, and constitutes a denial of due process and an unconstitutional taking of private property. Further, employer maintains that the rebuttal provisions at amended Section 411(c)(4) apply to the Secretary of Labor, and not to responsible operators. On procedural grounds, employer asserts that the administrative law judge deprived employer of due process and its right to a full and fair hearing in denying it the opportunity to obtain a second affirmative medical examination and testing of claimant. On the merits of entitlement, employer challenges the administrative law judge's weighing of the evidence in finding it sufficient to establish invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). Employer also argues that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's constitutional challenges

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<sup>1</sup> On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

<sup>2</sup> Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

to the PPACA and the administrative law judge's application of amended Section 411(c)(4) to this case.<sup>3</sup>

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).

Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,<sup>4</sup> has rejected 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. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Further, the Board has held that the rebuttal provisions of amended Section 411(c)(4) apply to claims brought against responsible operators, and we decline to revisit this issue. *See Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). Lastly, the absence of implementing regulations does not bar application of amended Section 411(c)(4), as the mandatory language therein is self-executing. *See Mathews v. Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.

Turning first to the evidentiary issue raised in this appeal, employer contends that it was deprived of due process when the administrative law judge denied employer's

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least thirty-two years of qualifying coal mine employment and that his claim was timely filed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3.

<sup>4</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

request to obtain a second affirmative pulmonary evaluation of claimant. In this regard, employer sought to have claimant re-examined in response to Dr. Rasmussen's medical examination dated September 15, 2010, which claimant underwent without providing notice to employer, as required pursuant to claimant's duty to supplement his answers to interrogatories. Citing the preamble to the regulations,<sup>5</sup> employer maintains that claimant's breach of his duty and the administrative law judge's "capricious" denial of employer's request to obtain a second pulmonary evaluation constitute a violation of employer's right to a full and fair hearing under 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), and its right to present the highest quality evidence to the fact finder. Employer's Brief at 6-9. Employer's arguments lack merit.

At the hearing in this case, the administrative law judge denied employer's request for a second pulmonary evaluation of claimant, in response to claimant's submission of Dr. Rasmussen's medical opinion dated September 15, 2010. The administrative law judge determined that, while Dr. Rasmussen's report was submitted just prior to the hearing, employer had had sufficient time to present its case in chief, noting that it had previously submitted Dr. Crisalli's examination report, dated January 29, 2010, and Dr. Castle's consultation report, dated September 8, 2010, in response to Dr. Rasmussen's Department of Labor examination dated July 20, 2009. Hearing Transcript at 9, 34, 37, 39. The administrative law judge held the record open and specifically allowed employer additional time to depose Drs. Crisalli and Castle in response to Dr. Rasmussen's September 15, 2010 report.

We conclude that the administrative law judge acted within his discretion in denying employer's request for a post-hearing second pulmonary evaluation of claimant. Although due process requires that a party be provided with an opportunity for rebuttal where it is necessary to the full presentation of the case, employer's opportunity to respond herein does not include an automatic right to have claimant re-examined. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 950-51, 12 BLR 2-222 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990). A determination as to whether an additional examination is required rests within the sound discretion of the administrative law judge, based on his review of the evidentiary record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). The administrative law judge reasonably found that an additional complete pulmonary

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<sup>5</sup> The Department of Labor stated that "one of [its] goals in proposing a limitation on submission of documentary medical evidence as reflected in [20 C.F.R. §§] 725.414 and 725.310 is to ensure that the claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the fact finder." 65 Fed. Reg. 79,976 (Dec. 20, 2000).

evaluation is not appropriate under the facts of this case, and we find no abuse of his discretion. *See Miller*, 870 F.2d at 951-51, 12 BLR at 2-228-29; *Owens*, 14 BLR at 1-47; *Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-196, 1-200 (1987).

Turning to the merits of entitlement, employer contends that the administrative law judge, in finding invocation of the amended Section 411(c)(4) presumption established, erred in weighing the evidence relevant to total respiratory disability pursuant to Section 718.204(b). Employer challenges the administrative law judge's reliance on the medical opinion of Dr. Rasmussen, arguing that the administrative law judge provided no reason for discounting the contrary opinions of Drs. Crisalli and Castle, and that he failed to critically analyze the basis for Dr. Rasmussen's opinion. In this regard, employer asserts that the administrative law judge failed to consider the respective qualifications of the physicians; failed to provide a basis for accepting Dr. Rasmussen's explanation for claimant's hypoxemia; failed to discuss instances where the objective data did not support Dr. Rasmussen's conclusions; and ignored Dr. Rasmussen's "incorrect and contradictory" references to claimant's blood pressure responses. Further, as the medical literature referenced by Drs. Rasmussen, Crisalli and Castle is not contained in the record, employer asserts that the administrative law judge had no basis for determining whether the medical literature supports their respective positions. Employer also argues that the administrative law judge failed to consider the "contrary probative" evidence weighing against a finding of total respiratory disability. Employer's Brief at 15-23. Employer's arguments have merit.

In evaluating the evidence at Section 718.204(b), the administrative law judge found that the pulmonary function study evidence at Section 718.204(b)(2)(i) failed to establish total pulmonary disability, as none of the pulmonary function studies of record produced qualifying results. Decision and Order at 11. The administrative law judge further determined that the blood gas studies conducted by Dr. Rasmussen in 2009 and 2010 produced qualifying results at rest and during exercise, and that the 2010 blood gas study conducted by Dr. Crisalli, who measured only resting blood gases, produced non-qualifying results. The administrative law judge found that, when considered together, the weight of the blood gas study evidence at Section 718.204(b)(ii) established a disabling impairment of gas exchange. Decision and Order at 11. In addressing whether the medical opinion evidence established total disability at Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Crisalli, and Castle. The administrative law judge noted that Dr. Rasmussen<sup>6</sup> opined that

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<sup>6</sup> Dr. Rasmussen examined claimant on July 20, 2009 and on September 15, 2010, and diagnosed legal and clinical pneumoconiosis with a marked loss of lung function, as reflected by an impairment in oxygen transfer during light to moderate exercise. He determined that claimant does not have the pulmonary capacity to perform his last regular

“claimant’s [blood] gas exchange impairment constitutes a respiratory disability that would preclude him from performing his usual coal mine work,” while “Drs. Crisalli<sup>7</sup> and Castle<sup>8</sup> opined that claimant does not have a pulmonary disability,” as “they concluded that [claimant’s] qualifying arterial blood gas scores are cardiac related.” Decision and Order at 12; Director’s Exhibit 10; Claimant’s Exhibit 2; Employer’s Exhibits 1, 5, 6, 7. The administrative law judge noted that “the physicians agree that the results of claimant’s arterial blood gas studies show hypoxemia; however, they disagree as to

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coal mine job, which required heavy and very heavy manual labor. He stated that three factors could play a role in claimant’s impairment, namely, cardiac disease, which does not lead to exercise hypoxia; coal dust exposure; and smoking, which is unlikely to cause exercise hypoxia absent ventilatory impairment. Dr. Rasmussen ruled out obesity as a factor, because it does not lead to exercise hypoxia. Director’s Exhibit 10; Claimant’s Exhibit 2.

<sup>7</sup> Dr. Crisalli examined claimant on January 18, 2010, and found no evidence of pneumoconiosis; no pulmonary functional impairment; no obstructive defect; no restrictive defect; no air trapping; no diffusion impairment; and no change after bronchodilators. Employer’s Exhibits 1, 6 at 20. He stated that claimant’s resting arterial blood gas results were well within normal limits and were significantly improved compared to Dr. Rasmussen’s 2009 results. Employer’s Exhibit 1. He stated that claimant has normal pulmonary function and normal oxygen transfer based on testing. He opined that while claimant may be disabled due to hypertension and his coronary artery disease, claimant has no pulmonary impairment due to coal dust exposure. Employer’s Exhibit 1. He disagreed with Dr. Rasmussen, opining that claimant does not have a diffusion impairment. Employer’s Exhibit 6 at 25. Dr. Crisalli elected not to exercise claimant due to his significant cardiac history and his abnormally high blood pressure. Employer’s Exhibit 6 at 26. Dr. Crisalli attributed claimant’s abnormalities on the objective studies to cardiac disease, obesity, and possibly sleep apnea and pulmonary hypertension. Employer’s Exhibit 6 at 37.

<sup>8</sup> Dr. Castle provided a consulting report and deposition, and determined that claimant does not have coal workers’ pneumoconiosis and is not totally disabled as a result of coal dust exposure. He opined that the arterial blood gas changes noted in claimant were most likely related to coronary artery disease or hypertensive cardiovascular disease. Employer’s Exhibits 5, 7. He opined that claimant may be disabled as a result of coronary artery disease, hypertensive cardiovascular disease, and possibly sleep apnea and obesity, to some degree. Employer’s Exhibit 5 at 16. Dr. Castle acknowledged that coal dust exposure can cause gas exchange impairment, Employer’s Exhibit 5 at 34, but he found no diffusion impairment, Employer’s Exhibit 5 at 20, and no respiratory impairment. Employer’s Exhibit 5 at 29.

whether his hypoxemia is indicative of the presence of a pulmonary impairment or is instead a product of claimant's cardiac disease and hypertension." Decision and Order at 11. After summarizing the doctors' respective opinions, the administrative law judge found that "Dr. Rasmussen's opinion is accepted as being better supported by the objective data," as the doctor "thoroughly and persuasively explained how the objective data supports his opinion that claimant is totally disabled due to a pulmonary impairment of oxygen transfer and also how it undermines the opinions set forth by Drs. Crisalli and Castle." Decision and Order at 13. The administrative law judge found that "weighed together, Dr. Rasmussen's well-reasoned report and claimant's qualifying arterial blood gas results establish that claimant has a total pulmonary disability." *Id.*

We agree with employer that the administrative law judge, in finding that the weight of the arterial blood gas studies and medical opinions of record established the presence of a totally disabling respiratory or pulmonary impairment, gave no reason for discounting the opinions of Drs. Crisalli and Castle. Instead, the administrative law judge uncritically accepted Dr. Rasmussen's opinion, that claimant's disability is respiratory in nature, and focused on Dr. Rasmussen's explanations for his conclusions. The administrative law judge did not explain how Dr. Rasmussen's opinion is better supported by the objective test results than the opinions of Drs. Crisalli and Castle, who also relied on objective testing in concluding that claimant has the respiratory capacity to perform his last coal mine work and that his disability is non-respiratory in nature. As the administrative law judge is charged with resolving conflicts in the evidence, we vacate the administrative law judge's finding of total disability at Section 718.204(b), and his finding that claimant is entitled to invocation of the presumption at amended Section 411(c)(4), and remand the case for further consideration. As the administrative law judge's weighing of the evidence on the issue of total disability affected his consideration of the evidence relevant to rebuttal, we must also vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).

On remand, the administrative law judge must reevaluate and weigh the medical opinions of record in light of their reasoning, documentation, and the physicians' qualifications; provide a detailed rationale for his crediting or discrediting of the evidence, in compliance with the Administrative Procedure Act,<sup>9</sup> *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); and determine whether the weight of the

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<sup>9</sup> The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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).

evidence, like and unlike, is sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment at Section 718.204(b). See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

If, on remand, the administrative law judge again determines that claimant has established total disability and is entitled to invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. See *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge