



BRB No. 20-0372 BLA

JUDY K. TAYLOR )  
(Widow of JIMMY K. TAYLOR) )

Claimant-Respondent )

v. )

COASTAL COAL COMPANY, LLC )

and )

Self-Insured through COASTAL COAL )  
COMPANY, LLC, c/o UNDERWRITERS )  
SAFETY & CLAIMS )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 06/28/2021

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton,  
Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for  
Employer and its Carrier.

Cynthia Liao (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and, GRESH Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2017-BLA-06016) rendered on a survivor's claim<sup>1</sup> filed on May 13, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established the Miner had twenty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.<sup>2</sup> 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the administrative law judge erred in finding the Miner was totally disabled and Claimant invoked the presumption.<sup>3</sup> Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenge to the Section 411(c)(4) presumption.

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<sup>1</sup> Claimant is the widow of the Miner, who died on November 15, 2015. Director's Exhibit 10.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established twenty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

The Benefits Review Board’s scope of review is defined by statute. We must affirm the administrative law judge’s Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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, 362 (1965).

### **Constitutionality of the Section 411(c)(4) Presumption**

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer’s Brief at 12-14. Employer cites the district court’s rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.* Employer’s arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, \_\_\_ U.S. \_\_\_, No. 19-840, 2021 WL 2459255 at \*10 (Jun. 17, 2021).

### **Invocation of the Section 411(c)(4) Presumption – Total Disability**

To invoke the Section 411(c)(4) presumption, a claimant must establish the miner “had at the time of his death, a totally disabling respiratory or pulmonary impairment.” 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.<sup>5</sup> 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v.*

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<sup>4</sup> Because the Miner performed his last coal mine employment in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 7.

<sup>5</sup> Neither the Employer nor the Claimant submitted medical opinion evidence; as the administrative law judge noted, the record consists of autopsy reports and treatment records. The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or medical opinions in those records, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 5-6.

*Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no “contrary probative evidence.” 20 C.F.R. §718.204(b)(2).

The administrative law judge determined Claimant established total disability based on the pulmonary function study evidence because the treatment records contain one study conducted on April 8, 2014 that is qualifying for total disability,<sup>6</sup> and there is no contradictory evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5-7. He noted the pulmonary function study was not conducted in conjunction with a hospital stay or acute flare up.<sup>7</sup> Decision and Order at 7. He further found that while “the treatment records do not directly make a finding of total disability,” they “support the objective findings on the [April 8, 2014 pulmonary function study]” because they “show a declining pulmonary condition,” and establish “the Miner required a [Bilevel Positive Airway Pressure] machine and was confined to a wheelchair due to his pulmonary condition.” *Id.* He therefore concluded the miner was totally disabled. *Id.*

Employer argues the administrative law judge erred in relying on the April 8, 2014 pulmonary function study because it does not comply with the quality standards. Employer’s Brief at 6-11; *see* 20 C.F.R. §718.103. Contrary to Employer’s argument, the administrative law judge correctly found that because the April 8, 2014 study was conducted as part of the Miner’s treatment and not in anticipation of litigation, it is not subject to the quality standards.<sup>8</sup> *See J.V.S. [Stowers] v. Arch of W. Va.*, 24 BLR 1-78, 1-89 (2010) (quality standards “apply only to evidence developed in connection with a claim for benefits” and not to testing included as part of a miner’s treatment); 20 C.F.R. §718.103; 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000) (“[20 C.F.R.] §718.101 is clear that it applies quality standards only to evidence developed ‘in connection with a claim’ for black lung benefits”); Decision and Order at 5; Director’s Exhibit 15 at 21. Employer makes no other

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<sup>6</sup> A “qualifying” pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A “non-qualifying” study exceeds those values.

<sup>7</sup> By contrast, the administrative law judge noted the arterial blood gas studies in the treatment records were all conducted “during hospital stays or times of exacerbation” and declined to give them weight. Decision and Order at 6.

<sup>8</sup> The administrative law judge’s finding that the April 8, 2014 pulmonary function study was conducted as part of Miner’s medical treatment and not in conjunction with litigation is affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 5; Director’s Exhibit 15 at 21.

argument on appeal. Having rejected its sole contention as plainly contrary to the regulations, we therefore affirm the administrative law judge's determination that the pulmonary function study evidence establishes total disability.<sup>9</sup> 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5-7. We also affirm his finding that the evidence overall establishes total disability. See *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2).

Consequently, we affirm the administrative law judge's determination that Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.305(b)(1), (c)(2). We further affirm, as unchallenged, the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(2).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

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<sup>9</sup> Employer does not challenge those findings.