**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0005 BLA

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| HERMIS JOHNSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| SHIPYARD RIVER COAL TERMINAL | ) | |
| | ) | DATE ISSUED: 09/30/2020 |
| 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer

Barry H. Joyner (Kate S. O'Scannlain, 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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Joseph E. Kane's Decision and Order Awarding Benefits (2017-BLA-06260) rendered on a claim filed on September 29, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted the parties' stipulation that Claimant worked eighteen years in underground coal mine employment and found he is totally disabled by respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge determined Claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act. 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 and the automatic entitlement provision at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[1] Alternatively, Employer argues the administrative law judge erred in finding Claimant established total disability necessary to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding the presumption unrebutted. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's contention that Sections 411(c)(4) and 422(*l*) are unconstitutional.

The 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.[2] 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 summarily "objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*) because section 1556 of the

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the United States Constitution." Employer's Brief at 2. We agree with the Director's argument that Employer has failed to adequately brief its challenge to the constitutionality of the Section 411(c) presumption and the Section 422(*l*) automatic entitlement provision. *See* 20 C.F.R. §802.211(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994); Director's Brief at 2.

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). Employer's contention regarding Section 422(*l*) is irrelevant inasmuch as this case involves only a living miner's claim and there is no survivor's claim. Although Employer states application of the Section 411(c)(4) presumption violates Article II of the Constitution, it fails to identify the provision of Article II upon which it relies, to provide any argument or to cite any authority for its constitutional objection. Employer's Brief at 2; Director's Brief at 2. We therefore decline to further address Employer's constitutional challenge to the Section 411(c)(4) presumption as Employer has not complied with the regulation requiring it to provide argument and authority concerning each issue raised. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Barnes*, 18 BLR at 1-57 (Board will decline to address issues that are not raised with specificity).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 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 cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer contends the administrative law judge erred in finding Claimant established total disability based on the pulmonary function study evidence and Dr. Ajjarapu's medical opinion.[3] We disagree.

The administrative law judge considered four pulmonary function studies. The October 19, 2016 study was qualifying[4] before and after a bronchodilator was administered. Director's Exhibit 11. The May 17, 2017 study was qualifying and no bronchodilator was administered. Claimant's Exhibit 6. The July 7, 2017 study had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Employer's Exhibit 3. The April 20, 2018 study was qualifying and no bronchodilator was administered. Claimant's Exhibit 5.

Relying on Dr. Rosenberg's opinion, the administrative law judge found the May 17, 2017 and April 20, 2018 studies invalid. Decision and Order at 6-7; Claimant's Exhibits 5, 6. Considering the remaining two studies, the administrative law judge gave greater weight to the pre-bronchodilator values.[5] *Id*. at 7, *citing* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator [during pulmonary function testing] does not provide an adequate assessment of disability"). Because the October 19, 2016 and July 7, 2017 studies had qualifying pre-bronchodilator vales, he found the pulmonary function study evidence supports a finding Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7.

Employer's sole argument is the administrative law judge mischaracterized the October 19, 2016 pre-bronchodilator study as qualifying. Employer's Brief at 3. It notes the regulations require the largest FEV1 be used to determine disability and that Dr. Ajjarapu's report incorrectly recorded the largest FEV1 value for the October 19, 2016

[3] The administrative law judge found the arterial blood gas studies were non-qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 5, 7.

[4] 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). A "non-qualifying" study exceeds those values.

[5] We affirm, as unchallenged by the parties, the administrative law judge's crediting of the pre-bronchodilator values. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

study as 1.6 liters when the largest FEV1 value for the test is actually 1.63 liters.[6] *Id*. at 3-4, *citing* 20 C.F.R. Part 718, Appendix B (2)(v)(A).[7] Employer asserts that when applying the tables at Appendix B for Claimant's age and height when the October 19, 2016 study was conducted and the correct FEV1 value of 1.63 and FVC value of 2.48 liters, the study is non-qualifying for total disability. *Id*.

Employer did not identify Dr. Ajjarapu's incorrect reporting of the highest FEV1 value while the case was before the administrative law judge and, in fact, specifically stated in its post-hearing brief that the October 19, 2016 study was qualifying for total disability. Employer's Post-Hearing Brief at 7. Notwithstanding, Employer's contention of error does not require remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

The administrative law judge noted that the pulmonary function studies reported varying heights for Claimant and he averaged them and found Claimant's actual height is 66.8 inches. Decision and Order at 6; *citing Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Because 66.8 inches does not appear in the chart in Appendix B, he rounded up to the closest table value height of 66.9 inches. *Id*. When we apply the table values for a miner seventy-one years of age[8] with an average height of 66.9 inches and the FEV1

[6] Employer states, "Dr. Ajjarapu reported her best FEV1 value as 1.60 liters with an FVC of 2.48 liters. However, when the complete set of results is reviewed, the best FEV1 result is actually 1.63 liters. Apparently, the machine that Dr. Ajjarapu [uses] ranks the [pulmonary function test] results by FVC and reports the highest FVC and its associated FEV1 score as the 'best' results." Employer's Brief at 3-4.

[7] The relevant regulation states "the first step in evaluating a spirogram for the FVC and FEV1 shall be to determine whether or not the patient has performed the test properly or as described in (2)(ii) of this Appendix. The largest recorded FVC and FEV1, corrected to BTPS, shall be used in the analysis." 20 C.F.R. Part 718, Appendix B (2)(v)(A).

[8] The administrative law judge noted Claimant was over 71 years of age when all of the pulmonary function studies were conducted. Decision and Order at 6. He observed that "for miners over 71 years old, the table values of Appendix B for a 71 year old should be used to determine whether the study is qualifying" but further noted Employer is permitted to submit evidence to rebut whether the test results demonstrate total disability. *Id*. The administrative law judge found Employer submitted no rebuttal evidence on this point. *Id*. We affirm the administrative law judge's reliance on the table values for a 71

value of 1.63 liters advocated by Employer, the October 19, 2016 is nonetheless qualifying for total disability.[9] 20 C.F.R. Part 718, Appendix B. Therefore, we reject Employer's contention the administrative law judge erred in finding the October 19, 2016 pre-bronchodilator study qualifying. As Employer raises no other arguments regarding the administrative law judge's weighing of the pulmonary function studies, we affirm his determination that they support a finding Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); Decision and Order at 7.

Employer next argues the administrative law judge erred in crediting Dr. Ajjarapu's opinion that Claimant is totally disabled. Employer's Brief at 4. We disagree. Dr. Ajjarapu conducted the pulmonary evaluation for the Department of Labor on October 19, 2016. She indicated in her initial report that Claimant's pulmonary function study showed a moderate obstructive impairment but noted it did not satisfy the regulatory criteria for total disability. Director's Exhibit 11. The district director subsequently asked Dr. Ajjarapu to reconsider her opinion taking into account that the study is qualifying for total disability. Director's Exhibit 18. In a supplemental report, Dr. Ajjarapu concluded that Claimant is totally disabled from performing his usual coal mine employment. Director's Exhibit 19.

The administrative law judge found Dr. Ajjarapu's opinion adequately reasoned and supported by the objective evidence. Decision and Order at 13. Employer contends Dr. Ajjarapu's opinion is based on a "faulty analysis" of her pulmonary function testing. Employer's Brief at 4. Because we affirmed the administrative law judge's determination that the October 19, 2016 pre-bronchodilator study is qualifying for total disability, we reject employer's contention. *See supra*. We also reject Employer's assertion the administrative law judge ignored Dr. Ajjarapu's initial statement that Claimant is not totally disabled. The administrative law judge acknowledged Dr. Ajjarapu changed her opinion and permissibly found her supplemental statement that Claimant is totally disabled reasoned and documented. Decision and Order at 9, 13-14; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We consider Employer's arguments regarding Dr. Ajjarapu's opinion to be a request the Board reweigh the evidence, which we are not empowered to do. *See Anderson v.*

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year old miner and the table height of 66.8 inches at Appendix B, as those determinations are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[9] For a miner 71 years old a qualifying FEV1 is 1.63, a qualifying FVC is 2.12 and a qualifying MVV is 65. 20 C.F.R. Part 718, Appendix B. The October 19, 2016 study is qualifying based on the FEV1 of 1.63 and the MVV of 47.53. Director's Exhibit 11.

*Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Employer also makes no specific argument as to the administrative law judge's discrediting of Dr. Rosenberg's opinion. Decision and Order at 13; *see* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47. We therefore affirm the administrative law judge's finding that Claimant established total disability based on Dr. Ajjarapu's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14. We further affirm the administrative law judge's overall finding, based on his review of the evidence as a whole, that Claimant is totally disabled and thereby invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; Decision and Order at 14.

**Rebuttal of the Section 411(c)(4) Presumption**

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis[10] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

We affirm, as unchallenged, the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis. Decision and Order at 16-19; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis, precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge also found Employer failed to establish "no part of [Claimants] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). Specifically, the administrative law judge discredited Dr. Rosenberg's opinion on disability causation because he did not diagnose respiratory disability or clinical pneumoconiosis contrary to the administrative law judge's findings that Claimant is totally disabled and that Employer failed to disprove Claimant has clinical pneumoconiosis.[11] *See Big Branch Res., Inc. v.*

[10] "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). "Clinical pneumoconiosis" consists of "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).

*Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 19.

Employer notes Dr. Rosenberg diagnosed a respiratory impairment but it was not severe enough to be totally disabling. Employer's Brief at 5. It alleges the administrative law judge's analysis of disability causation is based on her faulty weighing of the pulmonary function study evidence. Because Dr. Rosenberg did not diagnose clinical pneumoconiosis and we have affirmed the administrative law judge's reliance on Claimant's qualifying pre-bronchodilator results to find total disability established, we see no error in his discrediting of Dr. Rosenberg's opinion. *See Ogle*, 737 F.3d at 1074; *Ramage*, 737 F.3d at 1062; Employer's Exhibits 3, 7; *supra* at 6. We therefore affirm the administrative law judge's determination that Employer failed to establish that no part of Claimant's respiratory disability was caused by clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 20.

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

MELISSA LIN JONES
Administrative Appeals Judge