U.S. Department of Labor

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

BRB No. 20-0299 BLA

ROBERT MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRAMLINE, INCORPORATED	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 05/27/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for Claimant.

Ashley M. Harman and Lucinda Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Dana Rosen's Decision and Order on Remand – Awarding Benefits (2015-BLA-05091) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 2, 2013, and is before the Benefits Review Board for a second time.[1]

The Board previously affirmed, as unchallenged, the administrative law judge's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *Moore v. Tramline Inc.*, BRB No. 18-0437 BLA, slip op. at 2 n.2 (Aug. 29, 2019), *citing Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2). However, it vacated the administrative law judge's finding that Claimant established 17.75 years of coal mine employment. *Id*. at 3-5. It held she erroneously applied the formula at 20 C.F.R. §725.101(a)(32)(iii) when calculating Claimant's coal mine employment.[2] *Id*. Consequently, it also vacated her finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and the award of benefits. *Id.* The Board declined to address, as premature, Employer's arguments pertaining to the administrative law judge's findings regarding rebuttal of the Section 411(c)(4) presumption. *Id*. at 5 n.9.

On remand, the administrative law judge credited Claimant with 17.79 years of surface coal mine employment in conditions substantially similar to those in an underground mine, and again found he established total disability. 20 C.F.R.

[1] We incorporate the procedural history of the case as set forth in *Moore v. Tramline Inc.*, BRB No. 18-0437 BLA (Aug. 29, 2019) (unpub.).

[2] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2018); *see* 20 C.F.R. §718.305.

§718.204(b)(2). Therefore, she found he invoked the Section 411(c)(4) presumption. The administrative law judge reiterated her finding that Employer did not rebut the presumption and again awarded benefits.

On appeal, Employer contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on her erroneously finding Claimant has at least fifteen years of coal mine employment. It also argues she erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[4] 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).

Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge found Claimant established 17.79 years of qualifying coal mine employment during the years 1979 to 2013. Decision and Order on Remand at 4-7. Employer argues the administrative law judge erred in crediting Claimant with 16.29 of those years of coal mine employment during the years 1979 through 2011.[5] Employer's Brief at 6-9. We disagree.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 12.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that all of Claimant's coal mine employment was qualifying and Claimant established one and one-half year of coal mine employment during 2012 and 2013. *See Skrack v. Island Creek*

The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[6] 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).

On remand, the administrative law judge considered written statements from Employer's representative, along with Claimant's sworn testimony, written statements, Social Security Administration (SSA) earnings records, paystubs and employment history form CM911a. Decision and Order on Remand at 4-7; Hearing Tr. at 6, 12-17, 20-26; Director's Exhibits 3, 6-8, 10, 11, 20. She found Claimant's SSA records show no earnings in the years 1983 through 1990 and 1999 through 2004. Decision and Order on Remand at 4. Because "Claimant did not testify that he was paid in cash or was self-employed," the administrative law judge credited Claimant with no coal mine employment for these years. *Id*.

For the years 1979 through 1982, 1991 through 1998, and 2005 through 2011, the administrative law judge found the evidence did not establish the beginning or ending dates of Claimant's employment. Decision and Order on Remand at 4-7. Thus she again applied the formula at 20 C.F.R. §725.101(a)(32)(iii). *Id*.

The administrative law judge first found Claimant's credible testimony, considered in conjunction with his earnings as set forth in his SSA records, establishes he worked for "over a one-year calendar period" for each of the years in 1979 through 1981 with Matney, Matney, and Matney, for the year 1982 with Melvin Powers, for each of the years in 1991 through 1998 with Cary Trucking and Billy Excavation, for each of the years in 2005 through 2010 with R & R Trucking Company, and for the year 2011 with R & R Trucking Company, G & L Trucking, and Employer.[7] Decision and Order on Remand at 4-7. Thus

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Coal Co., 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(b)(1)(i); Decision and Order on Remand at 4, 7-9; May 9, 2018 Decision and Order at 7.

[6] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[7] The administrative law judge found Claimant's employment relationship with R & R Trucking Company, G & L Trucking, and Employer in the years 2010 and 2011 corroborated by Employer's written statements and Claimant's employment history form 911a, written statements, and paystubs. Decision and Order on Remand at 6-7.

she concluded "the evidence established coal mine employment over a one-year calendar period" in 1979 through 1982, 1991 through 1998, and 2005 through 2011. *Id*. at 5-7.

Having determined Claimant established he worked for "over a one-year calendar year period" during these years, the administrative law judge next addressed whether he worked for at least 125 days during each of these years. Decision and Order on Remand at 5-8. She divided Claimant's yearly income, as set forth in his SSA records, with the mine industry's average daily earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id*. at 7-8. If Claimant had 125 or more working days in a given year, she credited him with one year of coal mine employment. *Id*. If he had less than 125 working days, she credited him with "a fractional year based on the ratio of the actual number of days worked to 125." *Id*. Based on this method, she found he had a total of 16.29 years of employment during 1979 to 2011.[8] 20 C.F.R. §725.101(a)(32)(i); Decision and Order on Remand at 5-8.

Employer contends the administrative law judge erred by relying on the formula at 20 C.F.R. §725.101(a)(32)(iii) to "presum[e] 125 days equals a calendar year." Employer's Brief at 6-8. Employer misreads the administrative law judge's determination. As outlined above, the administrative law judge first determined Claimant established full calendar years of employment for each year during 1979 through 1982, 1991 through 1998, and 2005 through 2011, and only then addressed whether the evidence established 125 working days of coal mine employment during each of these years. *See Mitchell*, 479 F.3d at 334-36; 20 C.F.R. §725.101(a)(32). Employer raises no challenge to the administrative law judge's specific explanations for finding Claimant was employed for full calendar years in each year during 1979 through 1982, 1991 through 1998, and 2005 through 2011, *see Skrack*, 6 BLR at 1-711, and we discern no error in the administrative law judge's subsequent method of calculating the number of days and years of employment with which Claimant should be credited in each specific year. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280.

Because Employer does not otherwise challenge the administrative law judge's coal mine employment calculations, we affirm her finding that Claimant established 17.79 years

[8] The administrative law judge found 0.44 of a year in 1979 (($4,808.95 ÷ $87.03 = 55 days) ÷ 125); 0.48 of a year in 1980 (($5,198.62 ÷ $87.42 = 60 days) ÷ 125); 0.50 of a year in 1981 (($5,991.40 ÷ $96.80 = 62 days) ÷ 125); 0.34 of a year in 1982 (($4,347.50 ÷ $101.59 = 43 days) ÷ 125); 0.70 of a year in 1991 (($12,081.83 ÷ $136.64 = 88 days) ÷ 125); 0.82 of a year in 1998 (($15,731.00 ÷ $153.28 = 103 days) ÷ 125); 0.69 of a year in 2009 (($17,935.94 ÷ $209.12 = 86 days) ÷ 125); and a full year during 1992 through 1997, 2005 through 2008, and in 2010 and 2011. Decision and Order on Remand at 7-8.

of qualifying coal mine employment during 1979 to 2013. *See Mitchell*, 479 F.3d at 334-36; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280; 20 C.F.R. §718.305(b)(1)(i); Decision and Order on Remand at 5-9. We also affirm her finding that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[9]

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 that "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 on remand incorporated her prior finding that Employer failed to establish rebuttal by either method.[11]

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[9] Our dissenting colleague asserts the administrative law judge did not comply with the "spirit" of our mandate and paid "lip service" to our prior instructions. Notably, however, the dissent does not identify any error or any unaddressed evidence in the administrative law judge's decision. There are none. The determination that Claimant's employment spanned calendar years in the relevant periods was within her discretion based on the evidence she examined and our prior instruction to first make that threshold finding. Having permissibly determined Claimant's employment spanned calendar years during the relevant periods, her ultimate determination on Claimant's length of coal mine employment is in accord with the regulatory requirements. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *see also Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011) (Board will uphold a length of coal mine employment determination based on a reasonable method of calculation and supported by substantial evidence). No more is required.

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[11] The administrative law judge found Employer established Claimant does not have clinical pneumoconiosis. May 9, 2018 Decision and Order at 31.

Legal Pneumoconiosis

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 10-14.

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Fino and Basheda to disprove legal pneumoconiosis. Both physicians opined Claimant has chronic obstructive pulmonary disease (COPD) due entirely to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibit 17 at 8; Employer's Exhibits 1, 8, 9. The administrative law judge found their opinions unpersuasive and insufficient to rebut the presumption of legal pneumoconiosis. May 9, 2018 Decision and Order at 32-35.

Employer argues the administrative law judge erred in discrediting Dr. Fino's opinion. Employer's Brief at 10-14. We disagree. Dr. Fino opined that he "would not expect [Claimant's coal mine dust] exposure as a truck driver to be a significant contributing factor in [his] respiratory impairment" because a truck driver's level of coal mine dust exposure is not similar to that of an underground coal mine where there is "a higher dust content." Director's Exhibit 17 at 16; Employer's Exhibit 8 at 19, 21. Further, he stated that, in determining Claimant does not have legal pneumoconiosis, his perception of the amount of coal mine dust Claimant was exposed to "play[ed] a very significant part of [his] decision making." Employer's Exhibit 8 at 19.

The administrative law judge found Dr. Fino's understanding of Claimant's level of coal mine dust exposure inconsistent with her finding that Claimant established he worked in conditions substantially similar to conditions in an underground mine. May 9, 2018 Decision and Order at 7, 33-34. Thus, contrary to Employer's contentions, the administrative law judge permissibly discredited his opinion because it was "based on his misunderstanding of the actual degree" of coal mine dust Claimant was exposed to as a truck driver. *Id*. at 34; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Employer next argues the administrative law judge erred in discrediting Dr. Basheda's opinion. Employer's Brief at 14-16. In his report, Dr. Basheda gave several reasons for his opinion that Claimant's COPD is caused by his smoking history. Employer's Exhibit 1. He elaborated in his deposition, stating it would be "disingenuous to say [he] could not exclude coal dust totally, [but] there is no reason to implicate coal

dust in this situation because . . . [Claimant] has the classic clinical findings" of tobacco induced obstructive lung disease. Employer's Exhibits 1, 9 at 14. Contrary to Employer's contentions, in light of the Department of Labor's recognition that the effects of smoking and coal dust exposure are additive, the administrative law judge permissibly found Dr. Basheda failed to adequately explain why Claimant's 17.79 year history of coal mine dust exposure did not significantly contribute, along with his smoking, to his COPD. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Hicks* 138 F.3d at 533; 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); May 9, 2018 Decision and Order at 34-35.

In challenging the above findings, Employer discusses the opinions of Drs. Fino and Basheda at length, asserting they provided reasoned explanations sufficient to rebut the presumption. Employer's Brief at 10-16. Employer's arguments are requests to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly discounted the opinions of Drs. Fino and Basheda, we affirm her determination that Employer did not disprove Claimant has legal pneumoconiosis. Decision and Order at 35. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[12] *See* 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the miner's 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). The administrative law judge permissibly discredited Drs. Fino's and Basheda's opinions on disability causation because they were premised on their belief that Claimant does not have legal pneumoconiosis, contrary to her finding Employer did not disprove the existence of the

[12] The administrative law judge also considered and credited Dr. Forehand's opinion that Claimant has legal pneumoconiosis, which does not aid Employer in rebutting the presumption. May 9, 2018 Decision and Order at 32, 34; Director's Exhibit 17 at 1, 70; Claimant's Exhibit 3. Because the administrative law judge discredited the opinions of Drs. Fino and Basheda, Employer cannot establish Claimant does not have legal pneumoconiosis. *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019)*; Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we decline to address Employer's arguments regarding the administrative law judge's weighing of Dr. Forehand's opinion. *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"); Employer's Brief at 17-19.

disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); May 9, 2018 Decision and Order at 35-36; Director's Exhibit 17 at 8; Employer's Exhibit 1. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to affirm the administrative law judge's award of benefits. The Board previously found the administrative law judge did not properly apply the formula at 20 C.F.R. §725.101(a)(32)(iii) because she credited Claimant with a year of coal mine employment if he established 125 working days, but failed to conduct the threshold inquiry of whether Claimant established a calendar year of coal mine employment. *Moore v. Tramline Inc.*, BRB No. 18-0437 BLA, slip op. at 5 (Aug. 29, 2019). The Board instructed her, on remand, to address this threshold finding, consider all relevant evidence, and explain her findings in accordance with the Administrative Procedure Act (APA).[13] The administrative law judge acknowledged the Board's instructions, but failed to follow them. Thus I would again remand this case.

When the Board remands a case, the administrative law judge must comply with its instructions and "implement both the letter and spirit of the . . . mandate." *See Scott v.*

[13] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions

Mason Coal Co., 289 F.3d 263, 267 (4th Cir. 2002), *quoting United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). An administrative law judge must analyze all the evidence and sufficiently explain the weight she has given to the exhibits so that a reviewing court is able to "discern what the [administrative law judge] did and why [s]he did it." *Sea "B" Mining Company v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016), *quoting Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

The administrative law judge acknowledged the Board's instructions, but failed to substantively execute our mandate. Decision and Order at 2-3. She paid lip service to the requirement by rendering a cursory finding that Claimant established a calendar year of coal mine employment in each year at issue, rather than considering all of the relevant evidence and explaining her findings per our instructions. *Id.* at 3-7. This is evident from the manner in which she treated Claimant's testimony in conjunction with the Social Security Administration (SSA) earnings records, i.e., in reality she continued to treat 125 days of employment (calculated using the SSA earnings records) as establishing a calendar year of employment. Thus I would hold that the administrative law judge has not adequately explained her findings that Claimant has established a calendar year of coal mine employment for each of the years in 1979 through 1982, 1991 through 1998, and 2005 through 2011 in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, her application of the formula at 20 C.F.R. §725.101(a)(32)(iii) remains insufficient, and I would remand for a more thorough consideration of whether Claimant established a calendar year of employment for each relevant year, consistent with our previous remand instructions. Additionally, I would instruct the administrative law judge to discuss and weigh all relevant evidence regarding the starting and ending dates of Claimant's employment, setting forth in detail how she resolves the conflict in the evidence as the APA requires. *See Addison*, 831 F.3d at 254; *Wojtowicz*, 12 BLR at 1-165.

Because I would vacate the administrative law judge's finding that Claimant established 17.79 years of coal mine employment, I would also vacate her finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Thus I would

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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 30 U.S.C. §932(a).

decline to address, as premature, Employer's challenges to the administrative law judge's rebuttal findings.

For these reasons, I respectfully dissent from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge