U.S. Department of Labor

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

BRB No. 19-0502 BLA

LLOYD HUFF Claimant-Respondent v. D M & M COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Rita A. Roppolo (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven B. Berlin's Decision and Order Awarding Benefits (2017-BLA-05408) 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 October 22, 2015.

The administrative law judge determined Employer is the properly designated responsible operator. He also credited Claimant with 16.95 years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[2] It further asserts the removal provisions applicable to the administrative law judge rendered his appointment unconstitutional and challenges the constitutionality of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). On the merits, Employer contests its designation

[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) (2018); 20 C.F.R. §718.305.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

as the responsible operator and asserts the administrative law judge erred in finding Claimant invoked the Section 411(c)(4) presumption and in finding it failed to rebut it. Claimant responds in support of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, (the Director) filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment, its challenge of the constitutionality of the Section 411(c)(4) presumption, and its request to hold the case in abeyance. The Director, however, agrees with Employer that the case should be remanded for further consideration of the responsible operator determination. Employer replied to Claimant's and the Director's briefs, reiterating and expanding on its arguments.

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.[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).

Appointments Clause

Employer requests the Board vacate the administrative law judge's Decision and Order and remand this case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 11-16; Employer's Reply Brief at 1-9. Employer acknowledges the Secretary of Labor

[3] Claimant takes no position on the responsible operator determination. Claimant's Brief at 3 (unpaginated).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4-5, 17; Director's Exhibit 3.

[5] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause, which requires that they be appointed by the President or the head of a department. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

(the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[6] but maintains it was insufficient to cure the defect as there was no prior valid appointment to ratify. Employer's Brief at 11-13; *see also* Employer's Reply Brief at 3-4.

The Director responds, asserting the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Brief at 4-5. She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. *Id.* at 5-6. We agree with the Director.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Thus, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

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[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Berlin.

At the time he ratified the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

Under the presumption of regularity, it is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Berlin and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Berlin. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Berlin "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, employer has not overcome the presumption of regularity.[7] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments

[7] While Employer notes correctly that the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 13-14, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F.Supp.2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act.").

[8] We also reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 15-16; Employer's Reply Brief at 8-9. Employer's argument lacks merit because the Executive Order does not state that the prior appointment procedures in place were impermissible or violated the Appointments Clause. Director's Brief at 8. The Order also only affects the government's internal management and, therefore, does not create any right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). *Id*.

of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper). Hence, in light of Employer's failure to demonstrate error in the Secretary's action ratifying the administrative law judge's appointment, we also reject Employer's argument that the ratification is an invalid action that cannot be a cure.[9] Employer's Brief at 12-14, 16; Employer's Reply Brief at 3-4, *citing U.S. v. L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

Removal Provisions

Employer refers to the removal provisions for administrative law judges in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the United States Supreme Court's holding that the similar two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Employer's Brief at 14-15, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *see also* Employer's Reply Brief at 4-5. We decline to address this issue, as it is inadequately briefed and Employer did not specifically raise the issue before the

[9] As the Director notes, Employer does not specifically argue that the administrative law judge's issuance of the October 25, 2017 notice of hearing prior to the December 21, 2017 ratification of his appointment independently taints the proceedings with an Appointments Clause violation. *See* Director's Brief at 4 & n.4. However, to the extent Employer suggests *Lucia* precludes the administrative law judge from adjudicating this case because he was not properly appointed when hearing this case and issuing his Decision and Order because he issued a notice of hearing prior to ratification, such argument is meritless. Employer's Brief at 12, 16; Employer's Reply Brief at 2, 9, 12. The Notice of Hearing alone does not involve any consideration of the merits, nor would it be expected to influence the administrative law judge's consideration of the merits of the case. It simply reiterates the statutory and regulatory requirements governing the hearing procedures. *See Noble v. B & W Resources, Inc.*, BLR , 18-0533 BLA, slip op. at 4 (Jan. 15, 2020). Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision while not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect the administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand. *See Noble*, BRB No. 18-0533 BLA, slip op. at 4.

administrative law judge.[10] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. 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). The petition for review must also contain "an argument with respect to each issue presented," and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause). Moreover, Employer has not explained how the holding in *Free Enterprise* undermines the administrative law judge's authority to hear and decide this case.[11] Thus, we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

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[10] To support its Motion to Place Claim in Abeyance before the administrative law judge, Employer indicated that given the Solicitor General's brief in *Lucia*, "it appears likely that the Supreme Court will address whether the procedure for appointment and removal of Administrative Law Judges under the Appointments Clause [is constitutional]." Employer's Motion to Place Claim in Abeyance at 3. However, it did not specifically challenge the constitutionality of 5 U.S.C. §7521 at any point before the administrative law judge, including in its brief.

[11] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 14-15; Employer's Reply Brief at 4-8. It notes that in *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court expressly stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 7. Further, the majority opinion in *Lucia* declined to address the removal

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 22-23. 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 therefore urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*. *Id.*

During the briefing stage of this case, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020).[12] Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has

provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Employer cites part of Justice Breyer's concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members." Employer's Brief at 15, *quoting Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). The Director contends that contrary to Employer's assertion, Justice Breyer's opinion actually "casts doubt on that decision's ramifications" because he "pointedly noted that '*Free Enterprise Fund's* holding may not invalidate the removal protections applicable to [ALJs] even if the judges are inferior officers of the United States for purposes of the Appointments Clause.'" Director's Brief at 7, *quoting Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring and dissenting) (internal quotations omitted). Employer replies that the Director's reliance on this statement is misplaced because "it ignores the entirety of Justice Breyer's discussion in *Lucia* with respect to removal." Employer's Reply Brief at 7. We need not resolve this argument, however, as even if, as Employer suggests, Justice Breyer's remarks could be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the majority in *Lucia.*

[12] Employer filed its brief on September 30, 2019, and its reply brief on February 27, 2020. The Director filed her brief on January 31, 2020, and Claimant filed his brief on November 4, 2019. The Fifth Circuit issued its decision on December 18, 2019.

declined to hold cases in abeyance pending resolution of legal challenges to the ACA.[13] *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). We, therefore, reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

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

Length of Coal Mine Employment

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 length of coal mine employment determination if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). The administrative law judge determined Claimant established 16.95 years of underground coal mine employment.[14] Decision and Order at 15-17.

Employer argues that in calculating Claimant's length of coal mine employment, the administrative law judge impermissibly relieved Claimant of his burden of proof by crediting him with a half a year of coal mine employment from 1962-1965 for each quarter his Social Security Administration (SSA) Earnings Statement showed earnings of more than fifty dollars. Employer's Brief at 17-18; Employer's Reply Brief at 11. It also asserts the administrative law judge failed to consider all the evidence of record concerning the starting and ending dates of Claimant's work with National Mines, and erred in crediting Claimant with continuous employment from 1987-1992 based on the testimony of

[13] The Supreme Court granted certiorari in *Lucia* to resolve conflicting decisions from the United States Courts of Appeals for the Tenth Circuit and the D.C. Circuit. *See Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016); *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017).

[14] Employer has not challenged the administrative law judge's determination that all of Claimant's coal mine employment occurred underground, and we therefore affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 17.

Claimant and his wife. Employer's Brief at 19; Employer's Reply Brief at 11. Employer's arguments are without merit.

Observing Claimant's inability to independently recall his specific employment dates, the administrative law judge permissibly found his Social Security Administration (SSA) earnings records the most reliable evidence concerning the length of Claimant's coal mine employment.[15] *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003) (crediting SSA records over the miner's statements is permissible); Decision and Order at 15; Director's Exhibits 6-8. We also affirm, as unchallenged, the administrative law judge's crediting Claimant with a full year of coal mine employment for each of the years from 1976-81 and 1984 for a total of seven years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 16. In addition, contrary to Employer's contention concerning Claimant's employment from March 1987-December 1992, the administrative law judge permissibly relied on the uncontradicted testimony from Claimant and his wife, which he found credible and supported by Claimant's Employment History form, to explain "the markedly reduced earnings reported . . . in comparison with prior years when Claimant was engaged in similar coal mine employment."[16] Decision and Order at 16; *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984); Employer's Brief at 19. Thus, we also affirm his finding of 5.75 years of uninterrupted coal mine employment from March 1987 to December 1992. *See* Decision and Order at 16-17.

[15] The administrative law judge noted Claimant "relied heavily on his wife, whom he married in 1968 ([Director's Exhibit] 10), to help fill in gaps in his memory." Decision and Order at 15.

[16] Claimant and his wife testified that the coal mines operated as J & N Mining Company, D M & M Coal Company, and DBH Coal Company, where Claimant worked from March 1987 to December 1992, were all owned by the same person using primarily the same equipment, but different foremen and supervisors. Director's Exhibit 34 at 9-15. Claimant's wife questioned whether Claimant's SSA records accurately reflect his earnings from these companies because the owner did not always pay his employees by check: "What happened is he didn't pay—he paid them—he didn't cut them half the time. He didn't cut no taxes." *Id*. at 11. In addition, as the administrative law judge noted, Claimant's Employment History form, CM-911a, "shows that his employment with these three companies [J & N Mining Company, D M & M Coal Company, and DBH Coal Company] commenced in March of 1987 and continued without gaps to December of 1992." Decision and Order at 16; Director's Exhibit 3.

Concerning Employer's contention that the administrative law judge failed to consider specific beginning and ending dates when calculating Claimant's coal mine employment for National Mines during 1975, 1982, 1983, and 1986, remand is not required on this basis as Claimant meets his burden either way.[17] *See* Employer's Brief at 19; Employer's Reply Brief at 11. For 1975, Employer objects to the administrative law judge crediting Claimant with a full year of coal mine employment because Claimant did not start his employment until February 25, 1975. *Id*. However, Employer does not challenge, and we therefore affirm, that Claimant had at least three-quarters of a year of coal mine employment in 1975. *See Skrack*, 6 BLR at 1-711. Relying on Employer's assertions that Claimant only worked until October 22, 1982; did not begin working again until April 5, 1983; and only worked from February 6, 1986 until December 26, 1986, still results in at least 2 years of additional coal mine employment, bringing the total to at least 15 years of qualifying coal mine employment.[18] *See* Employer's Brief at 5, 19. Thus, Employer has not explained how the administrative law judge's failure to consider Claimant's specific dates of employment with National Mines would have made a difference to the administrative law judge's determination that Claimant established at least fifteen years of underground coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Consequently, we affirm that Claimant established at least fifteen years of underground coal mine employment.[19]

[17] The administrative law judge credited Claimant with a full year of coal mine employment in 1975 and 1986, .76 of a year in 1982, and .82 of a year in 1983. Decision and Order at 16.

[18] Employer does not challenge, and we therefore affirm, that Claimant established at least nine months of coal mine employment in 1982, at least eight months in 1983, and at least nine months in 1986, resulting in at least two years and two months of additional coal mine employment. *See Skrack*, 6 BLR at 1-711; *see* Employer's Brief at 19. Adding this to the previously affirmed total of 7 years of coal mine employment established from 1976-1981 and 1984, 5.75 years from March 1987 to December 1992, and the .75 of a year in 1975, results in a total of over fifteen years of coal mine employment.

[19] Based on this determination, it is not necessary to address Employer's remaining contentions that the administrative law judge erred in crediting Claimant with a half of a year of coal mine employment from 1962 to 1965. *See* Employer's Brief at 17-19.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work.[20] 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).

The administrative law judge found Claimant did not establish total disability based on the pulmonary function study evidence as the only study with qualifying values was invalid and the two subsequent studies were non-qualifying.[21] 20 C.F.R §718.204(b)(2)(i); Decision and Order at 8, 21; Director's Exhibits 12, 15, 27. He also determined Claimant did not establish total disability based on the blood gas study evidence because it was inconclusive given that there was one qualifying and one non-qualifying study. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 8, 21; Director's Exhibits 12, 17. He further found no evidence of cor pulmonale with right-sided congestive heart failure to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 22.

The administrative law judge next considered the medical opinions of Drs. Alam and Dahhan, and found them sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9-12, 22-23; Director's Exhibits 12, 21, 27; Claimant's Exhibit 3. In addition, weighing the evidence as a whole, he concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the Section 411(c)(4) presumption. Decision and Order at 22-23.

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[20] The administrative law judge found Claimant did not establish complicated pneumoconiosis under 20 C.F.R. §718.304, and therefore did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); Decision and Order at 17-19.

[21] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer asserts the administrative law judge erred in finding Claimant established total disability based on the medical opinion evidence and on a weighing of the evidence as a whole. Employer's Brief at 19-22; Employer's Reply Brief at 11-12. We disagree.

Contrary to Employer's assertion, Dr. Alam's opinion that Claimant is totally disabled did not rest "exclusively" on his finding of complicated pneumoconiosis. Employer's Brief at 20. In response to a question asking if he would consider Claimant to be totally disabled even without considering the x-ray evidence of complicated pneumoconiosis, the administrative law judge accurately noted Dr. Alam testified Claimant would not be able to perform the exertional requirements of his last coal mine employment "because the PO2 is only 68 on room air" and "the FEV1, at his best, was fifty percent. So if we just take these two values, then he will not . . . [be able to] go back to work in the mines with that kind of physical requirement we just talked about." Claimant's Exhibit 3 at 17-18; *see* Decision and Order at 22. As Employer asserts, however, the administrative law judge did not explain his crediting of Dr. Alam's opinion when the pulmonary function study he relied on was invalidated.[22] Employer's Brief at 20; Decision and Order at 22. As explained below, however, remand is not required on this basis.

Contrary to Employer's contention, Dr. Dahhan's opinion that Claimant is totally disabled from performing his previous coal mine employment due to a secondary pulmonary disability and severe disabling hypoxemia shown on his blood gas study results is not undermined by his diagnosis of additional disabling non-respiratory conditions. Decision and Order at 22, 24 n.15; Employer's Brief at 21. To the contrary, entitlement is not precluded if Claimant suffers from a combination of disabling conditions; the relevant issue at 20 C.F.R. §718.204 is whether he suffers from a disabling pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Dr. Dahhan diagnosed Claimant with "moderately severe hypoxemia at rest" and specifically opined "he *does not retain the respiratory capacity* to

[22] Dr. Alam conducted Claimant's DOL-sponsored examination and obtained a February 8, 2016 pulmonary function study. Director's Exhibit 12. Dr. Gaziano reviewed this study for quality purposes only and reported the results were not acceptable due to less than optimal effort, cooperation, and comprehension. Director's Exhibit 13. A second study was performed on May 3, 2016. Director's Exhibit 15. Dr. Alam reviewed the May 3, 2016 study when preparing his supplemental report. Director's Exhibit 21. When testifying concerning whether Claimant had a totally disabling respiratory impairment, without considering the x-ray evidence of complicated pneumoconiosis, however, Dr. Alam relied on the FEV1 value obtained in conjunction with the initial February 8, 2016 pulmonary function study. Claimant's Exhibit 3 at 17.

return to his previous coal mining work or job of comparable physical demand."[23] Director's Exhibit 27 (emphasis added); *see* Employer's Brief at 20-21. Further, it is evident from Dr. Dahhan's opinion that he was aware of the exertional requirements of Claimant's usual coal mine employment when forming his opinion.[24] *See* Director's Exhibit 27. We therefore also reject Employer's argument that the administrative law judge's decision did not factor in the exertional requirements of Claimant's usual coal mine work when concluding he has a totally disabling respiratory impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order at 22; Employer's Brief at 21.

Moreover, contrary to Employer's contention, the administrative law judge permissibly found that although the conflicting blood gas studies are inconclusive, they could still support the opinions of Drs. Alam[25] and Dahhan that Claimant is totally disabled based on the results of those studies. *Cornett*, 227 F.3d at 577 (a physician may reasonably opine that a miner is totally disabled even if the objective studies are non-qualifying); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); Decision and Order at 22; Employer's Brief at 20. We also reject Employer's assertion the administrative law judge "ignored altogether" Claimant's treatment records and that "[t]he absence of any support for a finding of any respiratory disease or impairment in the treatment records is substantial evidence of the absence of any respiratory disease or impairment." Employer's Brief at 19-20; Employer's Reply Brief at 11. The administrative law judge reviewed Claimant's treatment records, noting they contained diagnoses of chronic obstructive

[23] Employer is correct that Dr. Dahhan stated Claimant has "normal respiratory mechanics," but he went on to say this was "confirmed by the spirometry due to poor performance" and then separately discussed the respiratory impairment he diagnosed based on Claimant's hypoxemia. Director's Exhibit 27; *see* Employer's Brief at 20-21.

[24] Dr. Dahhan reported Claimant worked exclusively underground, operated a belt line, scoop and shuttle car, and worked in coal as high as forty inches. Director's Exhibit 27.

[25] Dr. Alam was made aware that the arterial blood gas study conducted by Dr. Dahhan showed qualifying results and said it would be considered in the "differential diagnosis." Claimant's Exhibit 3 at 31. However, even if Dr. Alam's opinion as to total disability were not considered, the opinion of Dr. Dahhan would support the administrative law judge's finding that the medical opinion evidence, if considered in isolation, would establish disability, since the finding as to Dr. Dahhan's opinion is affirmable and there is no contrary medical opinion evidence. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni*, 6 BLR at 1-1278.

pulmonary disease, hypoxemia, bullous emphysema, and dyspnea on exertion and the use of supplemental oxygen. Decision and Order at 12-14; *see* Director's Exhibit 26; Employer's Exhibits 3-4. Moreover, Employer's reliance on *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988) is misplaced. Employer's Brief at 19. In *Burns*, the Section 411(c)(4) presumption was invoked and the employer was arguing the record, including the miner's treatment records, provided "a complete picture of [the miner's] physical condition prior to his death, and that given this detailed record, the lack of any mention of pneumoconiosis gives rise to a reasonable inference that none was present." 855 F.2d at 501. That is not true in the instant case as Claimant's treatment records contain numerous references to respiratory issues and also mention the existence of coal workers' pneumoconiosis. *See* Director's Exhibit 26; Employer's Exhibits 3-4. In addition, contrary to Employer's contention, the administrative law judge permissibly observed that because they measure different types of impairment, non-qualifying pulmonary function studies do not call into question the validity of blood gas study results demonstrating impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 22; Employer's Brief at 21-22. Thus, we affirm the administrative law judge's finding Drs. Alam's and Dahhan's opinions are sufficient to establish total disability. Decision and Order at 22. As there is no contrary medical opinion evidence, we also affirm his determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

We further affirm, as supported by substantial evidence, the administrative law judge's finding the weight of the evidence established total pulmonary disability. *See Shedlock*, 9 BLR at 1-198; Decision and Order at 22-23. Contrary to Employer's assertion, the administrative law judge considered all of the evidence of total disability from all categories together. Employer's Brief at 21-22. Employer's challenge to this finding is essentially a request to re-weigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 21-22.

In light of our affirmance of the administrative law judge's findings that Claimant established over fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 22-23.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[26] 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 rebut the presumption by either method. Decision and Order at 23-25. Employer does not challenge the administrative law judge's determinations that it failed to rebut the presence of clinical and legal pneumoconiosis and we therefore affirm them. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 24.

Disability Causation

At the outset, there is no merit in Employer's contention that the administrative law judge created "an impossible burden of proof" by applying the "no part" standard when considering rebuttal of the presumption of total disability causation. Decision and Order at 24-25; Employer's Brief at 23-24. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has stated:

> Simply put, the "play no part" or "rule-out" standard and the "contributing cause" standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must "rule-out" coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability. Because the burden here is on the [employer], the [employer] must show that the coal mine employment played no part in causing the total disability.

See Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1070-1071 (6th Cir. 2013). In addition, the "rule out" standard the administrative law judge applied is consistent with the regulation implementing amended Section 411(c)(4), which provides that the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary

[26] "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).

total disability was caused by pneumoconiosis as defined in [20 C.F.R. §]718.201." 20 C.F.R. §718.305(d)(1)(ii);[27] *see* Decision and Order at 24-25.

There is also no merit to Employer's contention that the administrative law judge erred in finding Employer did not rebut total disability causation. Employer's Brief at 24; Employer's Reply Brief at 11-12; *see* Decision and Order at 24-25. Contrary to Employer's assertion, Dr. Alam's opinion attributing twenty percent of Claimant's impairment to coal dust exposure, seventy-five percent to tobacco abuse, and the rest of it to other medical problems does not support rebuttal. Employer's Brief at 24. Dr. Alam consistently stated that Claimant's coal dust exposure substantially contributed to his totally disabling respiratory impairment, and we therefore affirm the administrative law judge's determination it does not support rebuttal. *See* Decision and Order at 24-25; Director's Exhibits 12, 21; Claimant's Exhibit 3 at 13-15, 29-31.

We also reject Employer's assertion that Dr. Dahhan's opinion is sufficient to establish rebuttal because he indicated Claimant's "other issues were self-sufficient causes of total disability." Employer's Brief at 24. The administrative law judge recognized Dr. Dahhan attributed Claimant's severe resting hypoxemia to non-coal mine employment related conditions of the general public, namely smoking, his old skull fracture, anxiety, hyperthyroidism, and gastroesophageal reflux disease (GERD). Decision and Order at 25; Director's Exhibit 27. He then permissibly discredited Dr. Dahhan's opinion because he did not adequately explain why Claimant's underground coal mine employment was not also a causal or contributing factor in his totally disabling pulmonary disability. *See* 20 C.F.R. §§718.201(a)(2), (b); *Ogle*, 737 F.3d at 1074; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 25. We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[28] *See* 20 C.F.R.

[27] The regulation at 20 C.F.R. §718.305(d)(1)(ii) effectuates the statutory language providing for rebuttal by establishing that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4).

[28] Employer again generally asserts the administrative law judge "ignored the treatment records that attributed [Claimant's] debility to his rheumatoid arthritis, not in any part to his pneumoconiosis or coal mine employment." Employer's Brief at 24. As explained earlier, however, the administrative law judge summarized Claimant's treatment records, noted they contained references to a respiratory impairment and coal workers' pneumoconiosis, and quoted that the "[p]rimary reason for visit was to review work injury

§718.305(d)(1)(i); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 25. Consequently, we further affirm the award of benefits.[29]

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year.[30] 20 C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district

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which is stable no new finding but end state lung and RA biggest debility now." Decision and Order at 13, *quoting* Director's Exhibit 26; *see supra*; Decision and Order at 12-13; Director's Exhibit 26; Employer's Exhibits 3-4. Thus, Employer has not explained how Claimant's treatment records as a whole support rebuttal, especially given that they include diagnoses for chronic obstructive pulmonary disease and hypoxemia, and reference a past history of coal workers' pneumoconiosis. *See Shinseki*, 556 U.S. at 413 (appellant must explain how the "error to which [it] points could have made any difference"); Director's Exhibit 26; Employer's Exhibits 3-4.

[29] Based on our affirmance of the administrative law judge's findings, we need not address the Director's assertion that the administrative law judge inadequately considered the relevant evidence regarding complicated pneumoconiosis. *See supra*; Director's Brief at 2 n.2.

[30] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

director to explain the reason for such designation. 20 C.F.R. §725.495(d). If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

The administrative law judge indicated the district director identified Employer (D M & M Coal Company) as the responsible operator in this claim because it was Claimant's employer during his last cumulative period of coal mine employment of not less than one year from 1988 through December 1, 1992, and it is financially capable of assuming liability. Decision and Order at 25; *see* Director's Exhibit 66. The district director noted Claimant's last employer was DBH Coal Company (DBH) from August 1992 through December 1992, but determined it could not be named as the responsible operator because it employed Claimant for less than a year.[31] *Id*. The administrative law judge stated Employer challenged its designation as the responsible operator, arguing that Claimant's testimony concerning the ownership of the two mines established a successor relationship between it and DBH and that in response, the Director asserted Employer was properly designated. Decision and Order at 25. The administrative law judge concluded that even if he assumed Claimant's testimony was sufficient to establish DBH is a successor, Employer failed to offer evidence that either DBH or Mr. Newsome, its owner, is capable of assuming liability. *Id*. Thus, he found Employer was the properly designated responsible operator. *Id*.

On appeal, Employer asserts the administrative erred in finding it is the properly designated responsible operator and therefore contends liability should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 16-17; Employer's Reply Brief at 9-11. The Director agrees the administrative law judge erred in his analysis of the responsible operator issue, but disagrees on the rationale, and requests the case be remanded for reconsideration of this issue. Director's Brief at 9-11.

[31] In its brief, the Director refers to DBH as "DMH Coal Company (DMH Coal)." Director's Brief at 9-11.

The administrative law judge concluded Employer is liable on the grounds it did not prove DBH is financially capable of paying benefits. Director's Brief at 10; *see* 20 C.F.R. §§725.494, .494(e) ("An operator may be considered a 'potentially liable operator'" if "[t]he operator is capable of assuming its liability for the payment of continuing benefits under this part."); Decision and Order at 26. In making his determination, the administrative law judge did not consider 20 C.F.R. §725.495(d), which provides "[i]n any case referred to the Office of Administrative Law Judges . . . in which the operator finally designated as responsible pursuant to [20 C.F.R.] §725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation[;]" that if the reason for the failure to designate the most recent operator is because it is not financially capable, "the record shall . . . contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer[;]" and that "[i]n the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming liability for a claim." Thus, as the Director concedes, because the record does not contain the required statement or any evidence to rebut the presumption, we must vacate the administrative law judge's finding Employer is liable because it failed to prove DBH is financially capable of paying benefits. *See* Director's Brief at 10.

However, we agree with the Director that to avoid liability, Employer must also show DBH satisfies the requirement at 20 C.F.R. §725.494(c) of being the most recent employer who employed Claimant "for a cumulative period of not less than one year." Employer does not dispute Claimant worked for DBH for less than a year, but rather argues Claimant's uncontradicted testimony establishes DBH was a successor of Employer and therefore the years he worked for the two companies may be aggregated to establish one year of employment.[32] Employer's Brief at 16-17; Employer's Reply Brief at 10-11. As the Director asserts, the administrative law judge did not resolve this issue. We therefore remand the case for the administrative law judge to make a determination. *See* Director's Brief at 10.

[32] Claimant and his wife testified that Donnie Newsome owned both mine companies, and that while he worked in different mines and had different bosses, it was with "mostly the same equipment." Director's Exhibit 34 at 12-14. In addition, Employer cites to Director's Exhibit 4 where Claimant indicated "[t]he same person owned the last 3 mines that I worked in being – J & N Coal Co. Dema, KY[,] D M & M Coal Co. Dema, KY[,] DBH Coal Co. Dema, KY." Employer also highlights Director's Exhibits 5 and 6, where the same address is listed for D M & M and DBH.

On remand, the administrative law judge must address the nature of the relationship between DBH and D M & M. If these companies operated as one entity or if DBH is determined to be the successor operator of D M & M, the administrative law judge must further determine whether Claimant worked as a coal miner for these companies for a cumulative period of not less than one year. 20 C.F.R. §725.494(c). If he determines Employer has proven it is not the potentially liable operator that most recently employed Claimant for at least one year, he must dismiss Employer as the responsible operator and transfer liability for the payment of benefits to the Trust Fund. 20 C.F.R. §§725.495(c)(2), 725.407(d).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge