U.S. Department of Labor

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

BRB No. 19-0478 BLA

GARNIE N. SYKES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 10/30/2020
ISLAND CREEK COAL COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Garnie N. Sykes, Davenport, Virginia.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer/Carrier.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2017-BLA-05282) rendered on a claim filed on September 24, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although the administrative law judge credited Claimant with at least fifteen years of underground coal mine employment, he found Claimant did not establish total disability. He therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge therefore denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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.[3] 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).

[1] On claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Claimant's coal mine employment occurred in Virginia. Hearing Transcript at 24. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals

In order to prove entitlement, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant in establishing the elements of entitlement, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[4] *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 pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant 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).

Pulmonary Function Studies

When considering pulmonary function studies, an administrative law judge must

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for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge found Claimant's usual coal mine employment was working as a "mucker operator." Decision and Order at 29. He found this job required Claimant to climb thirteen flights of stairs up to ten times per day. *Id*. Claimant also had to lift fifteen to twenty bags of dust that weighed fifty pounds each and timbers that weighed one-hundred pounds each. *Id*. Thus the administrative law judge found Claimant's usual coal mine employment was "very strenuous" and "required exceptional lung function to accomplish his daily responsibilities." *Id*.

[5] The administrative law judge accurately found no evidence of complicated pneumoconiosis in the record. Decision and Order at 23. We therefore affirm his finding that Claimant cannot 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); 20 C.F.R. §718.304.

determine whether they are in substantial compliance with the quality standards.[6] 20 C.F.R. §§718.101(b), 718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). Compliance with the quality standards in 20 C.F.R. Part 718, Appendix B "shall be presumed" unless there is "evidence to the contrary." 20 C.F.R. §718.103(c).

The administrative law judge considered five studies. Decision and Order at 7-9. The January 22, 2015, May 7, 2015, October 21, 2015, and January 8, 2018 studies produced qualifying results.[7] Director's Exhibit 17; Claimant's Exhibits 4, 5; Employer's Exhibit 2. The January 29, 2018 study produced non-qualifying results. Employer's Exhibit 1. Because the administrative law judge found none of the pulmonary function studies are valid, he found the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 28. We are unable to affirm the administrative law judge's finding.

January 22, 2015 Study

The January 22, 2015 study was conducted as part of Claimant's Department of Labor (DOL)-sponsored complete pulmonary evaluation. The technician who administered the study indicated Claimant gave good effort and was cooperative. Director's Exhibit 17. Dr. Michos reviewed the study and opined that the pre-bronchodilator vents are acceptable. Director's Exhibit 15. Dr. Forehand, who conducted the DOL-sponsored evaluation, opined that the study is valid because "[e]ach forced vital capacity maneuver had a sharp peak and a smooth curve with descent to baseline for at least 6 seconds without premature termination. The curves as a whole did not vary in shape. No curve had an irregular, rounded, or flat peak or a peak shifted to the right." Director's Exhibit 16 at 2. He also noted it was administered "by a registered respiratory therapist, NIOSH-certified in [pulmonary function tests], met the [European Respiratory

[6] An administrative law judge must consider a reviewing physician's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an administrative law judge's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

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

Society (ERS)/American Thoracic Society (ATS)] standard for acceptability, and was validated for the Department of Labor by [Dr. Michos]." *Id*. at 2 n.1. Dr. Fino opined that the study is not valid because Claimant stopped exhaling around three and one-half to four seconds. Employer's Exhibit 13 at 13.

The administrative law judge noted the applicable quality standards for FEV1 and FVC testing state: "The [miner] will then make a maximum inspiration from the instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least [seven] seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort." Decision and Order at 25 n.14, *quoting* Appendix B to 20 C.F.R. Part 718.

The administrative law judge erred, however, in the reasoning he used to credit Dr. Fino's opinion over Dr. Forehand's. Decision and Order at 25. He credited Dr. Fino's opinion because he found it is "supported by [a] volume-time curve," which he stated is on page 8 of Director's Exhibit 17, reflecting "a sudden decrease in volume at some point less than five seconds into the test, which is consistent with Dr. Fino's opinion that [Claimant] did not sustain his effort for seven seconds." *Id*. at 25 n.15. Conversely, the administrative law judge found Dr. Forehand "did not opine one way or the other whether Claimant attained the seven-second requirement under Part 718, Appendix B." *Id*. at 25.

It is not clear that the document the administrative law judge referenced to credit Dr. Fino's opinion reflects Claimant's testing values as opposed to instrument calibration results. The volume-time graph the administrative law judge cites is contained in a section titled "Vmax Flow Volume Calibration," which sets forth data as to whether an inhalation and exhalation target of 3.00 liters was met; a section titled "Pressure Calibration," in turn, immediately follows the graph. Director's Exhibit 17 at 8; *see* 20 C.F.R. Part 718, Appendix B, paragraphs (1)(vii), (2)(iv) (requiring pulmonary function testing instruments to be calibrated each day before use, "using a volume source of at least three liters"). Exhibit 17 does, however, contain a volume-time curve graph on page 11 that includes multiple trials. Director's Exhibit 17 at 11. Because the administrative law judge did not explain his reliance on page 8 of Director's Exhibit 17 in light of potentially relevant evidence at page 11, we must vacate his crediting Dr. Fino's opinion over Dr. Forehand's with respect to the validity of the January 22, 2015 study. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Decision and Order at 25.

Moreover, pulmonary function testing complies with the quality standard the administrative law judge identified if Claimant exhaled for seven seconds *or* if "a plateau

has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort." Appendix B to 20 C.F.R. Part 718. While the administrative law judge found Claimant's testing did not meet the requirement to exhale for seven seconds (a finding we have vacated), he did not address whether the testing is otherwise in substantial compliance based on attainment of the requisite plateau. In that regard, he did not consider whether the medical opinions constitute contrary evidence undermining the presumption of compliance with that requirement. 20 C.F.R. §718.103(c). It is the role of the trier of fact to make such determinations and properly explain them. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune*, 6 BLR at1-998 (Board lacks the authority to render factual findings to fill gaps in the administrative law judge's opinion). Based on the foregoing errors, we vacate the administrative law judge's finding the January 22, 2015 study invalid.[8]

May 7, 2015 Study

Dr. Fino invalidated the May 7, 2015 qualifying study because he opined that Claimant stopped exhaling after about four to four-and-one-half seconds. Claimant's Exhibit 4; Employer's Exhibit 13 at 16. The administrative law judge summarily found Dr. Fino's opinion is well-reasoned.[9] Decision and Order at 26. Because the administrative law judge did not adequately explain his basis for finding Dr. Fino's opinion well-reasoned, his credibility finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[10] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[8] Having found the DOL-sponsored pulmonary function study did not comply with the quality standards, the administrative law judge failed to consider the applicability of the requirement at 20 C.F.R. §725.456(e) to "remand the claim to the district director with instructions to develop only such additional evidence as is required" to remedy the defect or "allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing."

[9] Although Dr. Castle also invalidated the May 7, 2015 study, *see* Employer's Exhibit 5, the administrative law judge permissibly rejected his opinion because the doctor did not adequately explain the basis for his conclusion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); Decision and Order at 26.

[10] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

We therefore vacate the administrative law judge's determination that the May 7, 2015 qualifying study is invalid. Decision and Order at 26.

October 21, 2015 Study

Dr. Fino opined that the October 21, 2015 qualifying study reflects premature termination to exhalation, a lack of reproducibility in the expiratory tracings, and a lack of an abrupt onset to exhalation. Employer's Exhibit 2. He also testified Claimant stopped exhaling after about two and one-half to three seconds. Employer's Exhibit 13 at 12. Thus he opined that the study is invalid. Employer's Exhibits 2, 13 at 12. Dr. Forehand reviewed the study and indicated "each forced vital capacity maneuver met the ATS/ERS criteria for acceptability. The curves were smooth and had sharp peaks and smooth descents to baseline for at least 6 seconds without premature termination." Director's Exhibit 16. He also noted the "curves as a whole did not vary in shape" and "[n]o curve had an irregular, rounded or flat peak or a peak shifted to the right." *Id*. Thus he opined that the study is valid. *Id*.

In resolving the conflict in the evidence with respect to this pulmonary function study, the administrative law judge noted "Dr. Fino is Board-certified in Internal Medicine, with a subspecialty in Pulmonary Disease, whereas Dr. Forehand is Board-certified in Pediatrics and Allergy & Immunology, and is Board-eligible, but not Board-certified, in Pediatric Pulmonary Medicine." Decision and Order at 26-27; *see* Director's Exhibit 11; Employer's Exhibit 2 at 23. He assigned greater weight to Dr. Fino's opinion because "he possesses superior credentials in the field of pulmonary medicine." Decision and Order at 26-27. Although the administrative law judge may give more weight to Dr. Fino's opinion based on his superior qualifications, the administrative law judge must first evaluate whether his opinion is adequately reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (administrative law judge must examine the reasoning employed in a medical opinion); *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997). Because the administrative law judge failed to make this necessary finding, his conclusion that the October 21, 2015 study is invalid does not satisfy the APA, and therefore we vacate it. *See Addison*, 831 F.3d at 256-57; *Hicks*, 138 F.3d at 533; *Wojtowicz*, 12 BLR at 1-165.

January 8, 2018 Study

The January 8, 2018 study produced qualifying results, and the administering technician noted Claimant gave good effort and had good cooperation. Claimant's Exhibit

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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).

5. Dr. Rosenberg opined that it is invalid based on incomplete effort. Director's Exhibit 12. He explained the flow-volume curves do not reflect uninterrupted exhalation. *Id*. He also opined that the MVV values are not valid because the test included only one MVV curve rather than three. *Id*. The administrative law judge permissibly found Dr. Rosenberg's opinion more persuasive than the administering technician's notations.[11] Decision and Order at 27-28; *Hicks*, 138 F.3d at 530; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (technicians' notations of good cooperation do not amount to substantial evidence that they succeeded in producing a valid test in the face of competent opinions that the results show the contrary). Because it is supported by substantial evidence, we affirm the administrative law judge's finding the January 8, 2018 qualifying study invalid.

April 3, 2017 Study

Finally we note Claimant's treatment records include an April 3, 2017 pulmonary function study that is non-qualifying for total disability. Employer's Exhibit 9. The administrative law judge erred by failing to weigh this relevant evidence.[12] 30 U.S.C. §923(b); *Addison*, 831 F.3d at 256-57; *McCune*, 6 BLR at 1-998.

Based on the foregoing errors, we vacate the administrative law judge's finding that the pulmonary function study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i). We remand the case for further consideration of the validity of the January 22, 2015, May 7, 2015, and October 21, 2015 qualifying pulmonary function

[11] Dr. Fino also opined that the study is not valid because Claimant stopped exhaling around three-and-one-half seconds. Employer's Exhibit 13 at 16. Because we affirm the administrative law judge's crediting of Dr. Rosenberg's opinion, any error by the administrative law judge in summarily crediting Dr. Fino's opinion is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] The quality standards do not apply to pulmonary function studies conducted as part of a claimant's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An administrative law judge must still determine, however, if the pulmonary function study results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

studies.[13] In weighing the medical opinions that address the validity of these studies, the administrative law judge must fully explain the reasons for his credibility determinations in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40.

To the extent the administrative law judge finds any of these studies are valid, he must weigh them against the non-qualifying April 3, 2017 pulmonary function study, unless he finds that study unreliable. Employer's Exhibit 9. When reconsidering whether the pulmonary function study evidence establishes total disability, he must fully explain his basis for resolving the conflict in this evidence. *See Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The administrative law judge accurately found Claimant's arterial blood gas studies conducted on January 22, 2015, October 21, 2015, and January 29, 2018 are non-qualifying.[14] Decision and Order at 9, 28; Director's Exhibit 17; Employer's Exhibits 1, 2. Thus we affirm his finding the blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 28.

Cor Pulmonale

The administrative law judge also accurately found no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 28. We therefore affirm

[13] The administrative law judge permissibly found the January 29, 2018 non-qualifying study is invalid because the administering technician indicated it did not "produce Acceptable and Reproducible Spirometry data" and Dr. Fino opined that Claimant stopped exhaling after two-and-one-half to three seconds. Decision and Order at 28; *see Hicks*, 138 F.3d at 530; *Lane*, 105 F.3d at 172; Employer's Exhibits 1, 13.

[14] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 28.

Medical Opinions

The administrative law judge next weighed Dr. Forehand's opinion that Claimant is totally disabled from his usual coal mine employment and Dr. Fino's opinion[15] that he is not.[16] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22-24; Director's Exhibits 16, 17; Employer's Exhibits 2, 13. He found both of their opinions well-reasoned and documented.[17] Decision and Order at 29-30. He assigned greater weight to Dr. Fino's opinion because of his superior qualifications and because his conclusion is based on a "more complete review of Claimant's diagnostic testing." *Id*. Because the administrative law judge's improper assessment of the pulmonary function study evidence affected the weight he accorded the conflicting medical opinions, we vacate his findings at 20 C.F.R. §718.204(b)(2)(iv). We also vacate his finding that the relevant evidence weighed together does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 30.

On remand, the administrative law judge must reconsider whether the pulmonary function study and medical opinion evidence establishes total disability. 20 C.F.R.

[15] Based on his January 22, 2015 examination, Dr. Forehand opined that Claimant has insufficient residual ventilatory capacity to perform his usual coal mine employment as his pulmonary function testing reflected. Director's Exhibit 17. In an October 22, 2016 supplemental report, Dr. Forehand indicated he reviewed the October 21, 2015 pulmonary function study and reiterated his finding that Claimant is totally disabled. Director's Exhibit 16. Dr. Fino opined that Claimant has no evidence of any respiratory or pulmonary impairment because all the pulmonary function studies of record are invalid. Employer's Exhibit 2. Thus he opined that Claimant is not totally disabled from his usual coal mine employment as a "mucker man" requiring very heavy manual labor. *Id*.

[16] Dr. McSharry opined that Claimant is not totally disabled. Employer's Exhibit 1. The administrative law judge permissibly found his opinion not well-reasoned because it is internally inconsistent and inadequately explained. *Hicks*, 138 F.3d at 530; *Lane*, 105 F.3d at 172; Decision and Order at 29-30.

[17] When weighing the medical opinions, the administrative law judge indicated he found the January 22, 2015 pulmonary function study Dr. Forehand conducted "reliable." Decision and Order at 29-30. As discussed above, however, when weighing the pulmonary function studies, he found this study invalid because he credited Dr. Fino's opinion that Claimant did not give adequate effort over the opinions of Drs. Michos and Forehand. On remand, the administrative law judge should resolve this inconsistent finding.

§718.204(b)(2)(i), (iv). If the administrative law judge finds total disability established based on either type of evidence or both, he must determine whether Claimant is totally disabled taking into account any contrary probative evidence. *See Shedlock*, 9 BLR at 1-198. If the administrative law judge determines on remand that Claimant is totally disabled, Claimant will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If the administrative law judge finds the evidence does not establish total disability, he must deny benefits. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge