BRB No. 00-0622 BLA

NOAH W. VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FAITH COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order On Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

John D. Maddox and W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, McGRANERY and McATEER, Administrative Appeals Judges.
PER CURIAM:

Employer appeals the Second Decision and Order On Remand (86-BLA-4122) of Administrative Law Judge Daniel F. Sutton awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for the fourth time.[2] The

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. Claimant contends that pursuant to the revised regulation at 20 C.F.R. §718.2, the amended regulations at 20 C.F.R. Part 718 *et seq.* are applicable to claims filed after March 31, 1980, as well as claims that were not approved under 20 C.F.R. §727.203. Both employer and the Director, Office of Workers' Compensation Programs, contend that because this claim was adjudicated and/or approved pursuant to the regulations at Section 727.203, which were not revised, the regulations at issue in this lawsuit will not affect the outcome of the case.

Contrary to claimant's contention, only technical changes were made to the regulation at Section 718.2 and it is not one of the challenged, revised regulations at issue in the lawsuit before the United States District Court. Inasmuch as the instant claim was filed prior to April 1, 1980, and claimant established more than ten years of coal mine employment, the claim was properly adjudicated pursuant to regulations at Section 727.203, which were not revised, and the claim was approved pursuant to Section 727.203. In any event, even if entitlement were not established pursuant to Section 727.203, then entitlement under the permanent criteria at 20 C.F.R. Part 410, Subpart D, but not the amended regulations at Part 718, is applicable in this case arising within jurisdiction of the United States Court of Appeals for the Fourth Circuit, *see Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). Consequently, based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.

[2]Claimant filed a claim on July 6, 1978, Director's Exhibit 1. In a Decision and Order issued on November 20, 1990, Administrative Law Judge John H. Bedford found thirty-one years of coal mine employment established and adjudicated the claim pursuant to the interim presumption at 20 C.F.R. §727.203. Judge Bedford found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), but not pursuant to 20 C.F.R. §727.203(a)(2)-(4). Judge Bedford further found that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(2) and that entitlement was not established under the permanent criteria at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

Claimant appealed and the Board affirmed Judge Bedford's findings as to the length of claimant's coal mine employment, that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) and that entitlement was not established under the permanent criteria at Part 410, Subpart D, as unchallenged, but vacated Judge Bedford's finding that rebuttal of the interim presumption was established pursuant to Section 727.203(b)(2). *Vandyke v. Faith Coal Co.*, BRB No. 91-0490 BLA (Feb. 25, 1993)(unpub.). Nevertheless, the Board held that Judge Bedford's findings of fact that the evidence of record established that claimant suffers from no respiratory or pulmonary impairment were sufficient to establish rebuttal pursuant to Section 727.203(b)(3) as a matter of law. Accordingly, the Board affirmed Judge Bedford's Decision and Order denying benefits.

Claimant appealed and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, vacated the Board's holding that Judge Bedford's findings of fact were sufficient to establish rebuttal pursuant to Section 727.203(b)(3) as a matter of law. *Vandyke v. Director, OWCP*, No. 93-1465 (4th Cir., Mar. 10, 1995)(unpub.). Specifically, the Fourth Circuit held that while the opinions of Drs. Stewart, Employer's Exhibits 1, 3, 12, and Endres-Bercher, EX 2, 11, 19, may ultimately support a finding of subsection (b)(3)rebuttal, as they attributed claimant's pulmonary problems to heart disease, they do not establish the absence of any respiratory or pulmonary impairment , and therefore do not establish subsection (b)(3) rebuttal as a matter of law. Thus, the Fourth Circuit remanded the case for the administrative law judge to consider rebuttal pursuant to subsection (b)(3).

On remand, the case was reassigned to Administrative Law Judge Charles P. Rippey. In a Supplemental Decision and Order On Remand issued on March 12,1996, Judge Rippey found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) and, therefore, awarded benefits. Employer appealed and the Board reaffirmed the finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) as law-of-the-case, but vacated Judge Rippey's finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) and remanded the

case for reconsideration. *Vandyke v. Faith Coal Co.*, BRB No. 96-0882 BLA (Apr. 15, 1997)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Daniel F. Sutton (hereinafter, the administrative law judge). In a Decision and Order On Remand issued on February 17, 1998, the administrative law judge found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) and, therefore, awarded benefits. Employer appealed and the Board vacated the administrative law judge's finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3). *Vandyke v. Faith Coal Co.*, BRB No. 96-0882 BLA (Apr. 15, 1997)(unpub.). In addition, in light of changes in law enunciated in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) and *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), relevant to the weighing of the x-ray evidence of record pursuant to Section 727.203(a)(1), and inasmuch as employer , as the prevailing party at that time, need not have challenged Judge Bedford's original finding that invocation of the interim presumption was established pursuant to subsection (a)(1), the Board held that an exception to the law of the case doctrine was established. Thus, the Board vacated Judge Bedford's subsection (a)(1) invocation finding as well and remanded the case for reconsideration.

administrative law judge found that invocation of the interim presumption was established by the x-ray evidence pursuant to 20 C.F.R. §727.203(a)(1) and that rebuttal of the interim presumption was not established pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding invocation of the interim presumption established by the x-ray evidence on remand pursuant to Section 727.203(a)(1) and in finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3). Claimant responds, urging that the administrative law judge's Second Decision and Order On Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge considered the x-ray evidence of record pursuant to Section 727.203(a)(1), which he noted consisted of 104 readings of twenty x-rays. Second Decision and Order On Remand at 8-9. Invocation must be established by a preponderance of the evidence, *see Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). The administrative law judge gave greater weight to the readings by those physicians who were both B-readers[3] and board-certified radiologists and, given that they were "nearly evenly divided along party lines," *i.e.*, readings submitted by claimant were positive and readings submitted by employer were negative, "with the exception of Dr. Scott" who provided positive readings that were submitted by employer, *see* Employer's Exhibit 8, and found it "more likely than not" that

[3]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

pneumoconiosis was present in the x-ray evidence. Second Decision and Order on Remand at 9. Thus, the administrative law judge found that a preponderance of the x-ray evidence established the existence of pneumoconiosis and, therefore, invocation pursuant to subsection (a)(1).

Employer contends that the administrative law judge cannot credit or discredit x-ray evidence based upon the party affiliation of the physician who interpreted the x-ray without a showing of bias. Contrary to employer's contention, however, the administrative law judge in the instant case did not assume that the physicians were biased based on party affiliation. Rather, after properly considering the quantity and quality of the x-ray evidence, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992),[4] the administrative law judge noted the difference of opinion between the readings of the same x-rays from the most qualified physicians of record submitted by claimant, as opposed to those submitted by employer, with the exception of the positive readings submitted by employer from Dr. Scott, and concluded that the positive x-ray readings submitted by employer from Dr. Scott demonstrated a lack of bias as they supported claimant's case. Thus, the administrative law judge, within his discretion, found that the positive x-ray readings submitted by employer from Dr. Scott, in addition to the positive x-ray readings submitted by claimant, tipped the balance in favor of a finding that the x-ray evidence "more likely than not" established the existence of pneumoconiosis.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the

[4]Contrary to employer's contentions, the administrative law judge accurately summarized the x-ray evidence and properly noted that an x-ray reading from Dr. Hawkins indicated that the x-ray read was dated April 20, 1980, *see* Director's Exhibit 21. Employer also contends that the administrative law judge erred in finding x-ray readings classified as 0/1 for pneumoconiosis were "not completely negative for pneumoconiosis" and "just below the minimum threshold to constitute positive radiographic evidence of pneumoconiosis," Second Decision and Order On Remand at 8-9. However, any error by the administrative law judge in this regard was harmless, as the administrative law judge ultimately found such x-ray readings were insufficient to establish the existence of pneumoconiosis and considered them to be contrary to the positive readings of record when weighing the x-ray evidence, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

administrative law judge when his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). It was not irrational for the administrative law judge to give greater weight to a medical interpretation which is demonstrably unbiased. *See generally Richardson v. Perales*, 402 U.S. 389, 402-03 (1971). Consequently, based on the record before us, we affirm the administrative law judge's finding that the existence of pneumoconiosis was established by a preponderance of the x-ray evidence, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Mullins, supra,* and, therefore that invocation of the interim presumption was established pursuant to Section 727.203(a)(1).

Next, the administrative law judge found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3). In order to establish rebuttal pursuant to subsection (b)(3), in this case arising within the jurisdiction of then Fourth Circuit, employer must rule out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). An employer can accomplish this task with a medical opinion that states, without equivocation, that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), or that such impairment was not caused in whole or in part by his coal mine employment, *see Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The Board previously remanded the case for the administrative law judge to reconsider Dr. Fino's opinion and to determine whether Dr. Fino stated unequivocally that claimant has no respiratory or pulmonary impairment, *see Grigg, supra*. *Vandyke*, BRB No. 98-0817 BLA at 6. Dr. Fino reviewed the evidence of record and stated that while claimant has simple coal workers' pneumoconiosis, he has no respiratory impairment or disability, but may be disabled due to arthritis and coronary artery disease, but not due to claimant's coal mine employment or simple coal workers' pneumoconiosis, Employer's Exhibit 10. Dr. Fino did find evidence of mild resting hypoxia, which he found was not significant or disabling and caused no impairment, " or at least no clinically significant impairment," *id*. Dr. Fino found that claimant's shortness of breath was not due to his hypoxia or lung disease, but was explained by claimant's angina, atherosclerosis, age and deconditioning.

The administrative law judge found Dr. Fino's statement that claimant's mild resting hypoxia caused "no clinically significant impairment" to be "at best ambiguous" and "short of the requisite unequivocal statement" that claimant has no respiratory or pulmonary impairment of any kind, especially in light of a medical dictionary definition of hypoxia cited by the administrative law judge which, according to the administrative law judge, established that hypoxia involves a pulmonary impairment. Second Decision and Order On Remand at

11-14. Employer contends that the administrative law judge erred, and denied employer due process, by taking judicial or official notice of, and relying on, a medical dictionary to rebut Dr. Fino's opinion without providing prior notice to employer. Employer contends that the administrative law judge thereby acted as his own medical expert.

An administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). Thus, the administrative law judge did not take proper judicial notice of the medical dictionary he relied on, inasmuch as the administrative law judge did not give employer adequate notice and/or an opportunity to respond, *see Maddaleni, supra*. Nevertheless, the administrative law judge also found, within his discretion, that Dr. Fino's opinion that claimant's mild resting hypoxia caused "no clinically significant impairment" to be too "ambiguous" and/or equivocal (*i.e.*, "short of the requisite unequivocal statement") to support a finding that claimant has no respiratory or pulmonary impairment of any kind pursuant to subsection (b)(3) rebuttal, *see Grigg, supra; Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record, draw his own conclusions and inferences therefrom, *see Maddaleni, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson, supra*; *Worley, supra*. Thus, as the administrative law judge, within his discretion, provided a valid, alternative reason for his finding, any error by the administrative law judge in relying on a medical dictionary to find Dr. Fino's opinion insufficient to establish, without equivocation, that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg, supra*, is harmless, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's finding that Dr. Fino's opinion is insufficient to establish, without equivocation, that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg, supra*.

The Board also previously remanded the case for the administrative law judge to reconsider the opinion of Dr. Fino, as well as the opinions of Drs. Endres-Bercher and Stewart, and to determine whether they ruled out the causal relationship, in whole or in part, between the miner's total disability or impairment and his coal mine employment by attributing claimant's pulmonary problems to heart disease, *see Lockhart, supra; Massey, supra*. *Vandyke*, BRB No. 98-0817 BLA at 5. Dr. Endres-Bercher found mild resting hypoxemia and attributed claimant's pulmonary complaints to heart disease, Employer's Exhibits 2, 11, 19. Dr. Stewart diagnosed mild resting hypoxemia and attributed claimant's dyspnea to heart disease, and not coal mine employment or coal workers' pneumoconiosis,

in light of claimant's normal pulmonary function study results, Employer's Exhibits 1, 3, 12. Finally, Dr. Fino diagnosed mild, resting hypoxia; he opined that claimant's shortness of breath was not due to his hypoxia or lung disease, but was explained by claimant's angina, atherosclerosis, age and deconditioning, Employer's Exhibit 10. In addition, Dr. Fino stated that claimant may be disabled due to arthritis and coronary artery disease, but not due to claimant's coal mine employment or simple coal workers' pneumoconiosis, *id.*

The administrative law judge found that, although Drs. Stewart, Endres-Bercher and Fino attributed claimant's pulmonary symptoms and complaints to his heart disease, none of them specifically addressed the etiology of claimant's hypoxia or, therefore, attribute this "pulmonary impairment" to sources other than coal mine employment. Second Decision and Order On Remand at 14. Thus, the administrative law judge found their opinions insufficient to meet employer's burden of ruling out any causal relationship between claimant's total disability and his coal mine employment in order to establish rebuttal under subsection (b)(3).

Employer contends that Drs. Stewart, Endres-Bercher and Fino excluded hypoxia as a cause of claimant's pulmonary problems and, therefore, were not required to address the etiology of claimant's hypoxia. As claimant contends, Dr. Stewart attributed claimant's dyspnea to heart disease based solely on claimant's normal pulmonary function study results, but did not address claimant's blood gas study results which revealed mild resting hypoxemia, Employer's Exhibit 3. Blood gas studies and pulmonary function studies measure different types of impairment and an administrative law judge may find a physician's opinion to be unreasoned and/or entitled to less weight when the opinion does not address the conflicting results between a blood gas study and a pulmonary function study which the physician administered, *see Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984)(a medical opinion of no impairment based only on a pulmonary function study does not necessarily rule out existence of an impairment); *see also Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984).

Nevertheless, the administrative law judge found that the diagnosis of hypoxia by Drs. Stewart, Endres-Bercher and Fino established the existence of a "pulmonary impairment." The administrative law judge cited a medical dictionary defining hypoxia "as a reduction in oxygen supply," Second Decision and Order On Remand at 11-12, and concluded, therefore, that "hypoxia, by definition, involves an impairment in oxygen transfer," Second Decision and Order On Remand at 13, which he ultimately characterized as a "pulmonary impairment," Second Decision and Order On Remand at 14. However, contrary to the administrative law judge's finding, there is no evidence in the record to support the administrative law judge's characterization that claimant's hypoxia necessarily is a "pulmonary impairment," *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). As employer contends, Drs. Endres-Bercher and Fino attributed claimant's pulmonary symptoms

or complaints to heart disease and/or factors other than a pulmonary or respiratory impairment, including claimant's hypoxia, and/or claimant's coal mine employment. Moreover, in characterizing claimant's hypoxemia as a "pulmonary impairment," the administrative law judge relied on a medical dictionary definition without taking proper judicial notice of the medical dictionary he relied on, inasmuch as the administrative law judge did not give employer adequate notice and/or an opportunity to respond, *see Maddaleni, supra*. Consequently, the administrative law judge's finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) is vacated. If the administrative law judge finds invocation of the interim presumption established pursuant to Section 727.203(a)(1) on remand, he should then reconsider whether rebuttal is established pursuant to Section 727.203(b)(3). The administrative law judge, within his discretion, may reopen the record on remand if he finds that further development of the evidence is warranted, *see* 20 C.F.R. §725.456(e); *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). If the administrative law judge finds that entitlement is not established pursuant to Section 727.203 on remand, then entitlement under the permanent criteria at Part 410, Subpart D, is applicable in this case arising within the jurisdiction of the Fourth Circuit, *see Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). However, if the administrative law judge finds rebuttal established under Section 727.203(b)(3) on remand, entitlement under Part 410, Subpart D, is precluded, *see Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *Lefler v. Freeman United Coal Co.*, 6 BLR 1-579 (1983).

Accordingly, the administrative law judge's Second Decision and Order On Remand awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge