U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0126 BLA

MICHAEL W. KIBLINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERFORMANCE COAL COMPANY	)	DATE ISSUED: 01/29/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harmon and Amy Jo Holley (Jackson Kelly PLLC) Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration (2013-BLA-05690) of Administrative Law Judge Scott R. Morris, rendered on a claim filed on July 10, 2012, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established thirty-four years of underground coal mine employment. In addition, the administrative law judge determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[1] The administrative law judge further found that employer did not rebut the presumption and accordingly awarded benefits.

Employer subsequently filed a Motion for Reconsideration, asserting that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Hippensteel and alleging that the standard for rebuttal that the administrative law judge applied was too high. The administrative law judge issued an Order Denying Employer's Motion for Reconsideration, finding that the bases for the motion were not supported by the record.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge applied the incorrect burden of proof on rebuttal and erred in finding that

[1] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(a).

employer did not successfully rebut the presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), states that the Board should reject employer's request that it vacate the award and deny benefits, as there is sufficient evidence to support an award benefits.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[4] 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).

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

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1).

[2] Employer also maintains, for appellate purposes, that the limitations on rebuttal set forth in Section 411(c)(4) only apply to the Secretary of Labor, such that the "rule out" and "no part" standards cannot be applied to operators. Employer's Brief at 27 n.6. Employer acknowledges that the Board previously rejected this argument in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013) (Niemeyer, J., concurring), but states that the United States Court of Appeals for the Fourth Circuit did not reach this issue in its affirmance of the Board's decision. We continue to reject employer's arguments. The Fourth Circuit has also held that the rebuttal provisions at 20 C.F.R. §718.305 constitute a reasonable exercise of agency authority applicable to any party opposing entitlement, including coal mine operators. *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137-40, BLR (4th Cir. 2015); *see also Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring and dissenting).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had thirty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; or 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In this case, the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), as the three pulmonary function studies of record, dated September 24, 2012, April 17, 2013, and August 7, 2013, did not produce qualifying values for total disability.[5] Decision and Order at 11; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1. At 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge determined that the blood gas studies dated September 24, 2012, and April 17, 2013, did not produce qualifying values at rest or after exercise. Decision and Order at 12; Claimant's Exhibit 1; Employer's Exhibit 1. With respect to the blood gas study obtained by Dr. Rasmussen on August 7, 2013, the administrative law judge found that only the post-exercise values were qualifying. Decision and Order at 12; Director's Exhibit 10. The administrative law judge stated, "[a]s Dr. Rasmussen exercised the Claimant longer and harder, in the absence of other factors, I give greater weight to his test results."[6] Decision and Order at 12. However, the administrative law judge then indicated that he gave little weight to the results of the August 7, 2013 study because both Dr. Rasmussen and Dr. Zaldivar, who reviewed the study results, commented that the lower results could have been due to the lingering effects of pneumonia, and the regulations provide that studies should not be performed "soon after an acute respiratory or cardiac illness." Decision and Order at 13, *quoting* 20 C.F.R. Part 718, Appendix C; *see* Claimant's Exhibits 1, 3; Employer's Exhibit 5. Therefore, the

[5] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge noted, "Dr. Zaldivar's [April 17, 2013] test only reached a 4% grade on the treadmill while both of Dr. Rasmussen's tests resulted in angles at least 2.5 times greater than that. Further Dr. Rasmussen exercised the Claimant at least twice as long as Dr. Zaldivar." Decision and Order at 12; *see* Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1.

administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 13. Under 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge determined that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially acknowledged that, unlike Drs. Hippensteel and Zaldivar, Dr. Rasmussen was not Board-certified in pulmonology, but further stated, "Dr. Rasmussen's expertise in pulmonary impairments of coal miners is well[-]established." Decision and Order at 21 n.34, *citing* 1972 U.S. Code Cong. Adm. News, 2305, 2314. Accordingly, the administrative law judge found that the physicians' opinions were entitled to "equal weight. . . considering only their professional credentials." Decision and Order at 21. When addressing the substance of the opinions of Drs. Rasmussen, Zaldivar and Hippensteel, the administrative law judge focused on their identification of the cause of any possible respiratory impairment, rather than whether they actually diagnosed a totally disabling respiratory or pulmonary impairment. *Id*. at 21-24.

The administrative law judge credited Dr. Rasmussen's diagnosis of a totally disabling respiratory impairment caused, at least in part, by coal dust exposure/pneumoconiosis, because he addressed claimant's obesity, smoking, and other potential risk factors in rendering his findings. Decision and Order at 22; Director's Exhibit 10; Claimant's Exhibits 1, 3. The administrative law judge gave little weight to Dr. Zaldivar's opinion, that claimant can perform his usual coal mine employment or arduous manual labor, because he "dismissed Claimant's thirty-plus years of exposure to underground coal dust as a potential contributing cause of Claimant's impairment" and, instead, attributed claimant's mild diffusion abnormality to cigarette smoking, secondhand exposure to tobacco smoke and smoke from the burning of organic matter as a child. Decision and Order at 22-23; Employer's Exhibits 1, 8. In addition, the administrative law judge indicated that Dr. Zaldivar's opinion, "that nothing prevents Claimant from returning to [his job as a purchasing agent] is of no value in my analysis[,]" as the administrative law judge determined that claimant was not engaging in coal mine employment when he held that position.[7] Decision and Order at 23. The administrative law judge also gave little weight to Dr. Hippensteel's opinion, that claimant does not have a permanent respiratory disability, because he did not explain why he excluded coal dust exposure as a contributing factor and did not cite any authority for

[7] The administrative law judge observed that claimant's last position with employer was as a purchasing agent and dispatcher but, prior to that, he worked as a continuous miner operator, service man, miner helper, and construction foreman, which required heavy manual labor. Decision and Order at 3, 23; Director's Exhibits 3-4.

his criticism of the articles cited by Dr. Rasmussen. *Id*.; Employer's Exhibits 6, 7. The administrative law judge concluded that the medical opinion evidence, and the preponderance of the evidence as a whole, established that claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 23-24.

Employer argues that the administrative law judge erred in finding Dr. Rasmussen's qualifications to be equal to those of Drs. Zaldivar and Hippensteel, when he is not Board-certified in pulmonary disease, and his citation to a Senate committee report recognizing Dr. Rasmussen's expertise is from 1972. Employer also alleges that the administrative law judge erred in analyzing the issues of total disability and total disability causation together, when they "are separate and distinct issues, for which different standards and burdens of proof attach." Employer's Reply Brief at 3. In addition, employer contends that the administrative law judge selectively analyzed the opinions of Drs. Zaldivar and Hippensteel concerning total disability and improperly relied on Dr. Rasmussen's opinion as "he failed to reach a reliable diagnosis." *Id*. at 17.

Claimant responds and contends that the medical opinion evidence is sufficient to establish total disability. The Director acknowledges that "[d]etermining the validity of the [administrative law judge's] award in this case is difficult, especially because the [administrative law judge] mixed his total respiratory disability analysis with his causation analysis." Director's Letter Brief at 2. However, the Director indicates that the Board should reject employer's request to vacate the award and deny benefits, as there is "sufficient evidence to award benefits." *Id*.

We hold that employer's allegations of error have merit. As the Director and employer contend, the administrative law judge should not have combined his consideration of the issues of total disability and total disability causation under 20 C.F.R. §718.204(b)(2) because they represent distinct questions of fact to which distinct standards apply. 20 C.F.R. §718.204(b), (c). Moreover, the administrative law judge's approach prevented him from rendering a definitive finding on whether claimant actually established total disability pursuant to 20 C.F.R. §718.204(b)(2). This error has added significance in this case, where claimant can establish invocation of the Section 411(c)(4) presumption if he proves that he is suffering from a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), shifting the burden to employer to rebut the presumed existence of pneumoconiosis or the presumed causal relationship between claimant's total disability and pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), (ii). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015).

Consequently, we must vacate the administrative law judge's findings that claimant established total disability under 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption, and remand the case to the administrative law judge for

reconsideration. Although the Director suggests that the administrative law judge's finding that claimant proved that he has a totally disabling respiratory impairment can be affirmed as supported by substantial evidence in the form of Dr. Rasmussen's opinion, whether this opinion is sufficient to satisfy claimant's burden under 20 C.F.R. §718.204(b)(2) is a matter for the administrative law judge to determine in his role as fact-finder. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012).In the interest of judicial economy, we will next address employer's arguments challenging the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1).

II. Rebuttal of the Presumption

In order to rebut the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), employer must affirmatively prove that claimant does not suffer from legal and clinical pneumoconiosis,[8] or establish that "no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 143; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring & dissenting).

In considering whether employer established rebuttal of the presumed existence of pneumoconiosis, the administrative law judge stated:

> Given the interpretations of Claimant's X-rays demonstrating clinical pneumoconiosis and all of the doctors[']opinions that Claimant has clinical pneumoconiosis, I find that Claimant suffers from pneumoconiosis. Therefore, if Employer is to rebut the presumption, it must show that no part of his pulmonary impairment arose out of his coal mine employment.

[8] "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).

Decision and Order at 29. Concerning total disability causation, the administrative law judge observed:

> All of the doctors agree that smoking and obesity are contributing factors to Claimant's pulmonary impairment. However, there was also evidence to support the conclusion that the Claimant's pulmonary disability is due in part to his coal dust exposure as well. . . . Employer cannot establish that no part of the Claimant's disability was caused by pneumoconiosis as defined in § 718.201. Consequently, I find that the Claimant has established, by a preponderance of the evidence, this element of entitlement.

Id.

Employer argues that the administrative law judge erred in failing to make a separate determination concerning rebuttal of the presumed existence of legal pneumoconiosis, and in presenting "an incomplete and insufficient analysis concerning disability causation." Employer's Reply Brief at 9. Claimant responds, contending that substantial evidence supports the administrative law judge's finding that employer did not rebut the presumption. The Director maintains:

> The opinions of Drs. Hippensteel and Zaldivar, *if credible*, are sufficient to rebut the presumption, for they assert that there is no relationship, substantial or otherwise, between Claimant's respiratory condition and his coal mine employment. The [administrative law judge], however, may reasonably find that the opinions of those [physicians] are not credible.

Director's Brief at 4.

Due to the administrative law judge's omission of a separate consideration of legal pneumoconiosis, and his combined consideration of total disability and total disability causation, we cannot discern whether the administrative law judge has provided a valid rationale for his finding that employer did not establish rebuttal of the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii).[9] Accordingly, we must vacate the administrative law judge's determination and remand the case to him for reconsideration of this issue in addition to the issue of total disability.

[9] Employer is also correct that the administrative law judge erroneously relied on findings concerning rebuttal of the 20 C.F.R. §718.203(b) presumption, that claimant's clinical pneumoconiosis arose out of coal mine employment, to conclude that employer failed to disprove total disability causation. *See* Decision and Order at 29-30.

III. Remand Instructions

On remand, the administrative law judge must first determine whether the medical opinion evidence is sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). In assessing the probative weight to which the medical opinions are entitled, the administrative law judge must consider the physicians' qualifications, the documentation underlying their medical judgments, all relevant portions of their opinions, and the sophistication of and bases for their conclusions, taking into account all other relevant evidence.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Regarding the physicians' qualifications, the administrative law judge should identify support for his determination that "Dr. Rasmussen's expertise in pulmonary impairments of coal miners is well[-]established" that is more contemporary than the legislative report in the 1972 United States Code and Administrative News. Decision and Order at 21 n.34; *see Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988). With respect to the extent to which the physicians' opinions on total disability are documented, the administrative law judge must consider the extent to which each physician was aware of the job requirements of claimant's last coal mine job.[11] *See Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-44 (4th Cir. 1991); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997).

[10] Employer argues that the administrative law judge selectively analyzed the medical opinions of Drs. Zaldivar and Hippensteel concerning total disability and total disability causation. However, because the administrative law judge will be reweighing their opinions, as a whole, on remand, we decline to address each of employer's specific assertions.

[11] Employer states that the administrative law judge erred in discrediting Dr. Hippensteel's opinion because the administrative law judge "disagreed with Dr. Hippensteel concerning [claimant's] last coal mine employment, specifically, whether he had a sedentary job or whether he had to perform manual labor." Employer's Brief at 13. The administrative law judge determined that claimant's job as a purchasing agent did not constitute work as a "miner." Decision and Order at 8-9. Employer does not provide any contradictory evidence to this finding. Therefore, we affirm the administrative law judge's determination that claimant was not doing the work of a "miner" during the time period where he served as a purchasing agent for employer. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

If the administrative law judge determines that claimant is unable to establish total disability, an essential element of entitlement, then the administrative law judge must deny benefits in this miner's claim. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). However, if the administrative law judge finds that the evidence is sufficient to establish total disability, he may reinstate his finding that the miner invoked the rebuttable presumption at 20 C.F.R. §718.305(b).

If, on remand, the administrative law judge determines that claimant has invoked the Section 411(c)(4) presumption, he must reconsider his finding that employer did not rebut the presumption. The administrative law judge should first consider whether employer has affirmatively established the absence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), regardless of his finding that employer could not prove that claimant does not suffer from clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i).[12] Performing the full rebuttal analysis, in the order set forth in the regulation, satisfies the statutory mandate to consider all relevant evidence, and provides a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(1)(ii), the second rebuttal prong. *See Minich*, slip op. at 10-11. Because the definition of legal pneumoconiosis encompasses only those diseases or impairments that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," employer must prove that these prerequisites are absent to establish that claimant's obstructive impairment is not legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Once the administrative law judge renders his findings on the issue of legal pneumoconiosis, he must consider whether employer has rebutted the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii) by proving that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." The United States Court of Appeals for the Fourth Circuit has held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *Bender*, 782 F.3d at 143; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Minich*, slip op. at 11 (To rebut the presumed causal relationship between

[12] We affirm the administrative law judge's finding that employer cannot rebut the presumed existence of clinical pneumoconiosis because it has not been challenged on appeal. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis."). Because we have affirmed, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the presumed existence of clinical pneumoconiosis, he must specifically consider whether employer can demonstrate that no part of claimant's totally disabling respiratory impairment was due to clinical pneumoconiosis, regardless of any finding he makes concerning rebuttal of the presumed existence of legal pneumoconiosis. If employer proves that no part of claimant's disabling obstructive impairment was caused by legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9. When rendering his findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale, as required by the Administrative Procedure Act, 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1985).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge