U.S. Department of Labor

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

BRB No. 16-0514 BLA

JO ANN ASHBY (o/b/o of JAMES V. ASHBY)	)	
Claimant-Respondent	)	
v.	)	
SEXTET MINING CORPORATION	)	
and	)	
	)	DATE ISSUED: 06/26/2017
SECURITY INSURANCE OF HARTFORD	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Modification Awarding Benefits (2013-BLA-05675) of Administrative Law Judge Timothy J. McGrath, rendered on employer's request for modification of an award of benefits on a claim filed on February 27, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). This case, which involves a miner's subsequent claim,[1] is before the Board for the third time.

In its previous decision in this case, the Board vacated Administrative Law Judge Daniel F. Solomon's findings that the miner had clinical and legal pneumoconiosis, and a totally disabling respiratory or pulmonary impairment due to his pneumoconiosis. *Ashby v. Sextet Mining Corp.*, BRB No. 10-0283 BLA, slip op. at 3-12 (Jan. 26, 2011) (unpub.). The Board therefore vacated Judge Solomon's award of benefits and remanded the case for further consideration. *Id*. at 12-14. The Board also instructed Judge Solomon to consider whether Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] applied to this case. *Id*. at 12-13.

On remand, in a Decision and Order issued on December 20, 2011, Judge Solomon awarded benefits, finding that the miner invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and that employer failed to rebut the presumption. Employer timely requested modification,[3] which the district

[1] The miner died on March 27, 2013. Claimant's Exhibit 4. Claimant, the miner's widow, is pursuing his claim. *Id*. The miner's first claim, filed on July 5, 2000, was denied by the district director on October 17, 2000, because the miner failed to establish any element of entitlement. Director's Exhibit 1. The miner's second claim, filed on August 18, 2003, was denied by the district director on May 18, 2004, for failure to establish any element of entitlement. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Modification of an award of benefits may be granted "on grounds of a change in conditions or because of a mistake in a determination of fact[.]" 20 C.F.R. §725.310(a).

director denied on February 28, 2013. Employer requested that the claim be forwarded to the Office of Administrative Law Judges for a formal hearing.

The case was assigned to Judge McGrath (the administrative law judge), who, in a Decision and Order issued on May 17, 2016, found that the miner had at least thirty-three years of underground coal mine employment[4] and a totally disabling respiratory or pulmonary impairment, and thus found that claimant invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.[5]

On appeal, employer contends that the administrative law judge erred in finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

[4] The miner's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The administrative law judge noted that he corrected "several mistakes of fact" in Judge Solomon's decision, and thus granted employer's request for modification "to the extent I found a mistake in the determination of those facts." Decision and Order at 6. For instance, the administrative law judge noted that Judge Solomon determined that Dr. Selby diagnosed a totally disabling respiratory or pulmonary impairment and suggested that the miner had industrial bronchitis, both of which were contrary to the Board's characterization of Dr. Selby's opinion in its previous decision. *Id*. at 20, 35. However, the administrative law judge found that employer "has not established a mistake of fact or a change in an applicable condition of entitlement such that [c]laimant's entitlement to benefits is defeated," and consequently found claimant entitled to benefits. *Id*.; *see* 20 C.F.R. §725.310(a).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had at least thirty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that the miner was totally disabled. Employer's Brief at 10-16. A miner is considered to have been totally disabled if he had a respiratory or pulmonary impairment which, standing alone, prevented him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function testing evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure,[7] and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of 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). In this case, the administrative law judge found that the pulmonary function testing evidence did not support a finding of total disability because a preponderance of the testing produced non-qualifying results.[8] Decision and Order at 12. However, the administrative law judge found that the miner was totally disabled "based on the blood gas study evidence and Dr. Simpao's reasoned and documented opinion[.]" Decision and Order at 21.

With respect to the arterial blood gas study evidence, the administrative law judge considered three studies administered between 2006 and 2007 and three studies administered between 2011 and 2012. The administrative law judge noted that only one of three studies conducted before 2011 was qualifying, but that two of three studies conducted since 2011 were qualifying, including the most recent one, conducted by Dr. Repsher in 2012.[9] Decision and Order at 13. Employer argues that the "frequent

[7] The record contains no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 15.

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

[9] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-

variations" in the miner's testing prevent the blood gas study evidence from establishing total disability. Employer's Brief at 10-11. We disagree. Observing that the three earlier studies were conducted in 2006 and 2007, more than four years before the newer studies, the administrative law judge permissibly gave more weight to the more recent studies, including Dr. Repsher's, and found that the blood gas study evidence supported a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993); *see also Worley v. Blue Diamond Coal*, 82 F.3d 419 (6th Cir. Apr. 15, 1996) (unpub.); Decision and Order at 13.

Employer further contends that the administrative law judge erred by relying on Dr. Repsher's 2012 blood gas study to find that the miner was totally disabled because Dr. Repsher attributed the results to obesity hypoventilation, or "Pickwickian syndrome,"[10] which Dr. Repsher stated is not a respiratory disease. Employer's Brief at 11; Director's Exhibit 80 at 4-5. Dr. Repsher thus concluded that the miner did not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 80 at 4-5.

Employer's argument lacks merit. Dr. Repsher's blood gas study was qualifying and therefore is evidence of total disability. 20 C.F.R. §718.204(b)(2)(ii). Dr. Repsher's explanation for the qualifying result addresses the *cause* of the miner's disabling respiratory or pulmonary impairment, which is not relevant at 20 C.F.R. §718.204(b)(2), but is properly addressed at 20 C.F.R. §718.204(c) or, if claimant invokes the Section 411(c)(4) presumption, on rebuttal at 20 C.F.R. §718.305(d)(1)(ii). *See* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."). We therefore affirm the administrative law judge's finding that the arterial blood gas study evidence supports a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(ii).

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qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[10] Obesity hypoventilation syndrome, sometimes referred to as Pickwickian syndrome, is a breathing disorder that affects some obese people by preventing proper gas exchange, which raises the level of carbon dioxide in the blood and decreases the oxygen level. *What Is Obesity Hypoventilation Syndrome?*, NATIONAL HEART, LUNG, AND BLOOD INSTITUTE, https://www.nhlbi.nih.gov/health/health-topics/topics/ohs (last updated Jan. 27, 2012).

Employer also argues that the administrative law judge erred in weighing the medical opinion evidence regarding total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief at 14-16. The administrative law judge considered the opinions of Drs. Simpao, Selby, Baker, and Repsher, along with treatment records from Dr. Chavda. Decision and Order at 16-21. Drs. Simpao, Baker, and Chavda concluded that the miner was totally disabled; Drs. Selby and Repsher concluded that he was not. *Id.* Discounting every other opinion, the administrative law judge found Dr. Simpao's opinion to be reasoned and documented, and found that it, along with the blood gas study evidence, established that the miner was totally disabled. *Id.*[11] Employer contends that the administrative law judge erred by crediting Dr. Simpao's opinion. Specifically, employer argues that Dr. Simpao erroneously based his opinion on the qualifying pulmonary function test he conducted when he examined the miner in 2006, and contends that Dr. Simpao's opinion was "impeached" by the non-qualifying pulmonary function test conducted by Dr. Repsher in 2012. Employer's Brief at 14-15.

We disagree. Dr. Simpao did not rely solely on the pulmonary function test he conducted to conclude that the miner was totally disabled. To the contrary, he based his opinion that the miner had "a severe pulmonary impairment" on the miner's "[pulmonary function testing], physical findings and symptomatology." Director's Exhibit 13 at 25. Dr. Simpao took note of the requirements of the miner's last mining job as a belt foreman — which required the miner to pull on belts, lift rollers that weighed about sixty pounds, and crawl to feed the belt when assembling headers — and documented the miner's symptoms during his examination. Director's Exhibit 13 at 21-25. He observed that the miner "wheeze[d] with exertion such [as] walking" and experienced shortness of breath after walking approximately 200 feet, with accompanying chest pain. *Id.* at 25. Dr. Simpao concluded that the miner was totally disabled with "a severe loss of lung function," opining that he did not have the "pulmonary capacity to perform as a belt foreman" and did not have the "respiratory capacity to [lift] weight or crawl." *Id.* Dr. Simpao's reasoned judgment, based on his observations of the miner and his understanding of the miner's work requirements, supports a finding of total disability. *See* 20 C.F.R. §718.204(b)(1), (2)(iv); *Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

[11] We therefore reject employer's argument that the administrative law judge erred by relying on Dr. Chavda's opinion. Employer's Brief at 15. Contrary to employer's contention, the administrative law judge did not rely on Dr. Chavda's opinion to find that the miner was totally disabled, but in fact discounted it because Dr. Chavda's credentials were not in the record, and because "there [was] no indication he had an accurate understanding of the miner's usual [coal mine employment]." Decision and Order at 20.

In addition, the administrative law judge permissibly found Dr. Simpao's opinion to be sufficiently documented and reasoned, despite Dr. Repsher's non-qualifying 2012 pulmonary function test and the administrative law judge's own finding that the pulmonary function testing evidence as a whole did not support a finding of total disability. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge explained why he determined that the weight of the pulmonary function testing evidence was "not fatal" to Dr. Simpao's opinion:

> He based his conclusion, that the miner was totally disabled, not only on [pulmonary function testing] values but also on the miner's symptoms, medical history, physical examination, and a largely accurate understanding of the miner's usual [coal mine employment]. It is error to discredit a physician's finding regarding disability solely because of his or her reliance on non-qualifying testing *where the physician also relied on other factors such as* a physical examination, work and medical histories, and symptoms of the miner.

Decision and Order at 19-20 (emphasis in original). Because the administrative law judge adequately explained his credibility determination, *see Peabody Coal Co. v. Hill*, 123 F.3d 412, 416, 21 BLR 2-192, 2-198 (6th Cir. 1997), we affirm his decision to credit Dr. Simpao's opinion that the miner was totally disabled.

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Repsher's opinion that the miner was not totally disabled. Employer's Brief at 15-16. Employer contends that Dr. Repsher adequately explained that the hypoxemia and CO2 retention seen in the miner's qualifying blood gas study were attributable to the miner's obesity and heart condition, and were not caused by pneumoconiosis. *Id.* This argument lacks merit, however, because as explained above, the cause of a disabling respiratory or pulmonary impairment is distinct from the issue of whether such an impairment exists.[12]

[12] The administrative law judge determined that Dr. Repsher's opinion was "not supported by the medical data and was inadequately explained." Decision and Order at 21. Dr. Repsher concluded that the miner's blood gas study results were an indication of obesity hypoventilation. The administrative law judge noted that Dr. Repsher stated in his report that patients with obesity hypoventilation are in "permanent chronic respiratory failure," but also stated that it is "not a respiratory disease." Decision and Order at 21; Director's Exhibit 80 at 5. The administrative law judge reasoned that if Dr. Repsher believed the miner's blood gas studies revealed a disability unrelated to his respiratory or pulmonary condition, then the opinion was undermined by Dr. Repsher's statement that

Finally, with respect to the pulmonary function testing, employer argues that the administrative law judge "erred by not giving more weight to the most recent [non-qualifying] pulmonary function test" conducted by Dr. Repsher in 2012. Employer's Brief at 12-14. We disagree. As an initial matter, the administrative law judge did credit Dr. Repsher's 2012 test in finding that "a preponderance of the [pulmonary function tests] produced non-qualifying results" and therefore "[c]laimant cannot establish total disability by [pulmonary function testing] evidence." Decision and Order at 12. Moreover, the fact that the miner's 2012 pulmonary function test was non-qualifying does not preclude a finding of total disability on the strength of other evidence, pursuant to 20 C.F.R. §718.204(b)(2). As the administrative law judge acknowledged, pulmonary function testing and arterial blood gas studies measure different types of impairments. *Id*., *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000) (a physician may reasonably opine that a miner is totally disabled even if the objective studies are non-qualifying). Thus, in light of our affirmance of the administrative law judge's findings that the blood gas study and medical opinion evidence establish that the miner was totally disabled, we see no error in the administrative law judge's conclusion that "[d]espite the 2012 [pulmonary function test] producing non-qualifying results, I do not agree that the miner . . . did not have a totally disabling respiratory or pulmonary impairment." *Id*.

Because the administrative law judge reasonably weighed all of the evidence and determined that the arterial blood gas study evidence and Dr. Simpao's opinion established that the miner was disabled from performing his usual coal mine employment, we affirm the administrative law judge's finding that claimant established total disability. *See* 20 C.F.R. §718.204(b)(2). Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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

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obesity hypoventilation results in permanent chronic respiratory failure. Decision and Order at 21. Conversely, the administrative law judge reasoned, if Dr. Repsher believed that the miner had even a mild respiratory impairment, he failed to adequately explain how he concluded that the impairment did not prevent the miner from performing his regular coal mine work, which required heavy labor. *Id*. We affirm the administrative law judge's credibility determination as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither clinical nor legal pneumoconiosis,[13] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to rebut the presumption by either method. Decision and Order at 22-42.

In considering whether employer established that the miner did not have legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Simpao and Baker, who concluded that the miner had legal pneumoconiosis, against the opinions of Drs. Selby and Repsher, who concluded that he did not. Decision and Order at 26-39. The administrative law judge determined that the opinions of Drs. Selby and Repsher were "poorly reasoned" and inadequately explained, and gave greater weight to the opinions of Drs. Simpao and Baker, which he found "adequately documented and reasoned."[14] *Id*. at 35-38. Recognizing that it was employer's burden to establish that the miner did not have legal pneumoconiosis, the administrative law judge found that Drs. Selby and Repsher "did not offer adequately reasoned and documented opinions," and thus found that employer failed to prove that the miner did not have legal pneumoconiosis. *Id*. at 39.

Employer contends that the administrative law judge erred in discrediting Dr. Repsher's opinion and in crediting the opinions of Drs. Simpao and Baker.[15] Employer's Brief at 19-20. The administrative law judge discounted Dr. Repsher's opinion because

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[13] "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). "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).

[14] The administrative law judge also considered but discounted Dr. Chavda's opinion, found in treatment notes, that the miner had legal pneumoconiosis. Decision and Order at 32, 39; Director's Exhibit 83 at 5.

[15] We affirm, as unchallenged, the administrative law judge's decision to discredit Dr. Selby's opinion that the miner did not have legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 35-37.

he diagnosed the miner as having chronic obstructive pulmonary disease (COPD), but failed to explain why the COPD was not due to, or substantially aggravated by, the miner's coal mine dust exposure. Decision and Order at 37-38. Employer contends that discrediting Dr. Repsher's opinion for that reason was "irrational" because, based on Dr. Repsher's 2012 pulmonary function testing, the miner "had normal pulmonary function and did not have any significant COPD." Employer's Brief at 20.

Employer's argument lacks merit. As previously discussed, the fact that the miner's pulmonary function testing did not support a finding of total disability did not foreclose the possibility that the miner had a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2). Indeed, we have already affirmed the administrative law judge's finding that the miner was totally disabled based on the arterial blood gas studies and Dr. Simpao's opinion. Moreover, employer's contention that Dr. Repsher's testing established that the miner did not have COPD, and that the administrative law judge therefore erred in discrediting Dr. Repsher's opinion, fails because Dr. Repsher himself diagnosed the miner with COPD. Director's Exhibit 80 at 5-6, 9. Given the presumption that the miner had legal pneumoconiosis, which is defined to include any chronic obstructive impairment arising out of coal mine employment, 20 C.F.R. §718.201(a)(2), (b), the administrative law judge reasonably discredited Dr. Repsher's opinion for failing to explain why coal mine dust exposure did not cause or substantially aggravate the miner's COPD.[16] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073-74, 25 BLR 2-431, 2-450-52 (6th Cir. 2013); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 37-38.

Because the administrative law judge permissibly discredited the opinions of Drs. Selby and Repsher, the only two medical opinions to conclude that the miner did not have legal pneumoconiosis, we affirm his determination that employer failed to establish that the miner did not have legal pneumoconiosis.[17] As a result, we affirm the administrative law judge's finding that employer failed to rebut the presumption by proving that the

[16] Furthermore, the administrative law judge discredited Dr. Repsher's opinion for failing to explain how the hypoxemia and CO2 retention he observed in the miner's arterial blood gas study results were unrelated to coal dust exposure. Decision and Order at 38. We affirm that credibility determination, which employer has not challenged on appeal. *See Skrack*, 6 BLR at 1-711.

[17] Therefore, we need not address employer's contentions regarding the opinions of Drs. Simpao and Baker.

miner did not have pneumoconiosis.[18] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 39.

Finally, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's totally disabling impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discredited the opinions of Drs. Selby and Repsher because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); Decision and Order at 40-42.

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

SO ORDERED.

[18] Consequently, we need not consider employer's arguments regarding the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge