BRB No. 12-0109 BLA

BOBBY R. HICKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THREE OAKS MINING, INCORPORATED	)	DATE ISSUED: 11/26/2012
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits in Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, D.C., for employer.

Jonathan Rolfe (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits in Subsequent Claim (2010-BLA-05570) of Administrative Law Judge Christine L. Kirby, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that claimant worked at least fifteen years in underground coal mine employment, and adjudicated this subsequent claim, filed on June 19, 2009,[1] pursuant to the regulations contained in 20 C.F.R. Part 718. Based on employer's concession, and her consideration of the evidence, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Based on the filing date of the claim and the fact that claimant established fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the administrative law judge determined that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption by proving either that claimant does not have pneumoconiosis, or that claimant's total disability did not arise out of, or in connection with, his coal mine employment. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed an initial claim for benefits on April 19, 2000, which was denied by the district director on July 31, 2000, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on September 4, 2002, which was denied by the district director on October 28, 2003, because claimant did not prove any element of entitlement. Director's Exhibit 2. Claimant took no action with regard to the denial until filing his current subsequent claim. Director's Exhibit 4.

[2] On March 23, 2010, amendments to the Act contained in the Patient Protection and Affordable Care Act (PPACA) were passed, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption of total disability due to pneumoconiosis, if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4).

On appeal, employer argues that the amended Section 411(c)(4) presumption is invalid. Employer also contends that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment for invocation of the presumption,[3] and erred in weighing the evidence relevant to whether employer rebutted the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the validity of amended Section 411(c)(4). Employer has also filed a reply brief, reiterating its contentions.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. AMENDED SECTION 411(c)(4) PRESUMPTION[5]

A. Invocation – Length of Coal Mine Employment

We first address employer's contention that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. In order to invoke the amended Section 411(c)(4) presumption, a miner must initially establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See*

[3] The administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] We reject employer's argument that the PPACA is unconstitutional and that, because amended Section 411(c)(4) is not severable from the PPACA, it is also invalid as the United States Supreme Court has upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427819 (June 28, 2012).

Kephart v. Director, OWCP, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984).

The length of a miner's coal mine employment must be determined pursuant to 20 C.F.R. §725.101(a)(32), which provides, in pertinent part:

> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act.
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> * * *
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> (ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
>
> * * *
>
> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mining employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(i)-(iii); *see* 20 C.F.R. §725.301.

There is no regulatory requirement that an administrative law judge apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of a miner's coal mine employment. Rather, the use of the formula is discretionary. 20 C.F.R. §725.101(a)(32)(iii). An administrative law judge may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In this case, the administrative law judge noted that in each of claimant's three claims, the district director determined that claimant had fifteen years of coal mine employment, based on a review of claimant's Social Security Administration Earnings Record. Decision and Order at 6. The administrative law judge stated, "I have also reviewed the Social Security Earnings Record and agree that it establishes [fifteen] years of coal mine employment." *Id*. at 7. The administrative law judge then considered claimant's hearing testimony that he worked for National Mines Corporation (National Mines) from July 1974 to either June or July 1987 and with Three Oaks Mining Company (Three Oaks) from approximately June 1987 until July 1989. Decision and Order at 7. The administrative law judge stated that claimant's testimony is "consistent with his Social Security Earnings record." *Id*.

Additionally, the administrative law judge addressed arguments raised by employer in its post-hearing brief that claimant had less than fifteen years of coal mine employment, based on claimant's admission at the hearing that he spent periods of time out of work on a strike or on unemployment and also could not recall specifically how much time elapsed between leaving National Mines and being hired by Three Oaks.[6] The administrative law judge rejected employer's argument and concluded:

> Employer does not reference any evidence of record other than Claimant's vague testimony on the dates and duration of such periods. I find that Claimant's memory of the dates and length of strikes was foggy. Also, Claimant could not recall specifically how much time elapsed between jobs in 1987. I therefore place greater weight on Claimant's Social Security Earnings Record. This record established that Claimant has at least [fifteen] years of coal mine employment. Based on Claimant's credible testimony, in conjunction with his Social Security Earnings Record, I find that Claimant worked at least [fifteen] years in underground coal mine employment.

Decision and Order at 7.

Employer maintains that the administrative law judge failed to consider relevant evidence and has not explained the basis for her finding that claimant worked "at least" fifteen years in underground coal mine employment, in accordance with the Administrative Procedure Act (APA).[7] *See* Decision and Order at 7. Employer contends

[6] Claimant testified that he may have been on strike for three to four months in 1984 and for three months in 1976 or 1977. Hearing Transcript at 26.

[7] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5

that the administrative law judge was required to determine the specific beginning and ending dates of claimant's coal mine employment pursuant to 20 C.F.R. §725.101(a)(32), and to explain how claimant's testimony supported her finding of fifteen years. Employer also asserts that the administrative law judge erred by not making the appropriate deductions for the time claimant admitted to being on strike or on unemployment." Employer's Brief in Support of Petition for Review at 11.

As an initial matter, we reject employer's assertion that the administrative law judge erred in according little weight to claimant's testimony regarding the amount of time he was out on strike or was unemployed. The credibility of witnesses and the weight to be accorded hearing testimony is within the discretion of the administrative law judge. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). The administrative law judge permissibly determined that claimant did not provide reliable testimony as to the periods of time he was on strike or the amount of time that elapsed between his jobs in 1987. Decision and Order at 7.

We agree with employer, however, that the administrative law judge has failed to properly explain how the Social Security Administration Earnings record supports her finding of fifteen years of coal mine employment, since that record does not establish the precise beginning and ending dates of claimant's employment and reflects only annual earnings beginning in 1978. Furthermore, although the administrative law judge stated the claimant's testimony was consistent with the Social Security Administration Earnings record, she did not identify what specific testimony supported her finding of at least fifteen years of coal mine work.

Additionally, the administrative law judge did not resolve the conflicts in the record regarding the length of claimant's coal mine employment. Claimant prepared an employment history form indicating that he was employed with National Mines from July 21, 1974 to December 24, 1986 and with Three Oaks from April 9, 1987 to June 29, 1989. Director's Exhibit 7; *see also* Hearing Transcript at 22, 26. Employer argues that this evidence, if fully credited, establishes fourteen years and ten months of coal mine employment, and not the requisite fifteen years for invocation of the presumption at amended Section 411(c)(4).

U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Because the administrative law judge has not identified the bases for her determination that claimant established "at least" fifteen years of coal mine employment, in accordance with the APA, and she did not address all of the relevant evidence, we vacate her length of coal mine employment finding, and her determination that claimant invoked the presumption at amended Section 411(c)(4). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (*en banc*). We, therefore, vacate the award of benefits and remand the case for further consideration.

B. Rebuttal of the Presumption

In the interest of judicial economy, we will address employer's arguments regarding the administrative law judge's evaluation of the rebuttal evidence. The administrative law judge explained that in order to rebut the amended Section 411(c)(4) presumption, employer was required to establish either that the claimant does not have pneumoconiosis, or that his disability did not arise out of, or in connection with coal mine employment. Decision and Order at 14.

The administrative law judge first considered whether employer disproved the existence of clinical pneumoconiosis,[8] based on the x-ray evidence. Decision and Order at 15-16. The administrative law judge noted that the parties submitted eleven interpretations of four chest x-rays in conjunction with the current subsequent claim. Decision and Order at 16. The administrative law judge noted that an August 28, 2009 x-ray was read as positive by Drs. DePonte and Alexander, dually qualified as Board-certified radiologists and B readers, and read as negative by Dr. Meyer, also dually qualified.[9] *See* Decision and Order at 16; Director's Exhibits 14, 16; Claimant's Exhibit 5. Based on the preponderance of the positive readings, the administrative law judge found the August 28, 2009 x-ray positive for pneumoconiosis. Decision and Order at 16.

The administrative law judge found that a December 31, 2009 x-ray was interpreted by Dr. Jarboe, a B reader, as negative for pneumoconiosis, while Dr.

[8] 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). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

[9] Dr. Barrett read the August 28, 2009 film for quality purposes only.

Alexander read the film as positive. *See* Decision and Order at 16; Director's Exhibit 17; Claimant's Exhibit 1. The administrative law judge indicated that she gave greater weight to readings by dually-qualified radiologists and found that the December 31, 2009 x-ray was positive for pneumoconiosis. Decision and Order at 16.

A February 1, 2010 film was interpreted as negative by Dr. Dahhan, a B reader, but as positive by Dr. Alexander. *See* Decision and Order at 16; Claimant's Exhibit 2; Employer's Exhibit 1. Based on Dr. Alexander's qualifications, the administrative law judge found that the February 1, 2010 x-ray was positive for pneumoconiosis. Decision and Order at 16. Finally, the administrative law judge considered a February 25, 2011 x-ray to be in equipoise as to the existence of pneumoconiosis, since that x-ray had one positive reading by Dr. DePonte and one negative reading by Dr. Meyer. *See* Decision and Order at 16; Claimant's Exhibit 3; Employer's Exhibit 3. The administrative law judge concluded that employer was unable to rebut the presumption that claimant has pneumoconiosis, as a preponderance of the x-ray evidence was positive for the disease.[10]

We reject employer's contention that the administrative law judge erred in weighing the x-ray evidence, as she permissibly relied on the positive readings by the dually-qualified physicians and concluded that three of the four x-rays of record were positive for pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). We also specifically reject employer's assertion that Dr. Alexander's positive readings for pneumoconiosis were not credible because Dr. Alexander is the only physician to find a Category A large opacity.[11] The administrative law judge properly found that Dr. Alexander identified small opacities consistent with simple pneumoconiosis and she had discretion to rely on his readings. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

The administrative law judge also found that employer failed to rebut the amended Section 411(c)(4) presumption by disproving a causal relationship between claimant's disabling respiratory condition and his coal mine employment. Decision and Order at 20.

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[10] The administrative law judge gave diminished weight to the medical opinions of Drs. Dahhan and Jarboe, that claimant does not have clinical pneumoconiosis, finding that they based their diagnoses, in part, on their own negative x-ray readings of the films she credited as being positive for pneumoconiosis. Decision and Order at 17-18.

[11] The administrative law judge properly observed that Dr. Alexander specifically identified opacities consistent with simple pneumoconiosis and only noted that there was a large opacity present that could represent Category A complicated pneumoconiosis, cancer or heterotopic ossification.

The administrative law judge noted that, although employer relied on the opinions of Drs. Jarboe, Dahhan, and Meyer to rebut the presumption, none of these physicians rationally explained why coal dust exposure did not contribute to claimant's respiratory disability. As noted by the administrative law judge, Dr. Jarboe opined that claimant's pulmonary impairment has been caused by smoking-induced chronic bronchitis, with an asthmatic component, and pulmonary emphysema. Director's Exhibit 17. Dr. Jarboe explained that he eliminated coal dust exposure as a causative factor for claimant's chronic bronchitis because claimant last worked in the mines in 1989, but continued to smoke cigarettes. Employer's Exhibit 4. The administrative law judge rejected Dr. Jarboe's opinion, finding that it was at odds with the regulatory definition of pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 19, *quoting* 20 C.F.R. §718.201(a)(2)(c).

Dr. Dahhan also opined that claimant's disabling obstructive respiratory impairment was unrelated to coal dust exposure, noting that claimant had stopped work in 1990, "which is a duration of absence sufficient to cause cessation of any industrial bronchitis [claimant] might have had." Employer's Exhibit 1. In addition, Dr. Dahhan opined that, because claimant was being treated with bronchodilators, his treating physician must have concluded that he was "amenable" to such treatment, which Dr. Dahhan said was "inconsistent with the permanent adverse affect of coal dust on the respiratory system." *Id*.

The administrative law judge gave Dr. Dahhan's opinion little weight because she considered his rationale to be at odds with the Department of Labor's determination that impairment from coal dust exposure may occur after a latent period. Decision and Order at 20; *see* 20 C.F.R. §718.201(c). The administrative law judge further stated:

> Dr. Dahhan also infers that because Claimant's treating doctor has tried treating him with bronchodilator agents, then therefore Claimant's physician believes that his condition is amenable to such treatment and is therefore inconsistent with coal workers' pneumoconiosis. I find no evidence of record indicating such a belief by Claimant's physician and find that Dr. Dahhan is simply speculating as to the motivation of Claimant's treating physician. Dr. Dahhan also states that there are other causes for Claimant's respiratory impairment and alteration in blood gas exchange, but he fails to specify what these causes are. I therefore do not find that statement to be helpful. I also find that Dr. Dahhan does not explain why he has ruled out coal mine dust as being a contributor, albeit not the sole cause of Claimant's pulmonary impairment.

Decision and Order at 20.

Employer argues that the administrative law judge did not properly address the prior claim evidence, relevant to rebuttal of the presumption, and that she erred in weighing the medical opinions of Drs. Jarboe and Dahhan. We reject employer's arguments as they are without merit.

Contrary to employer's assertion, the administrative law judge specifically noted that she reviewed the evidence submitted in claimant's two prior claims and agreed with the district directors' findings that the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Decision and Order at 5. The administrative law judge, however, permissibly relied on the evidence submitted in conjunction with this subsequent claim in rendering her findings on rebuttal, since she found the evidence submitted in the previous claims was significantly older and not as probative of claimant's current condition. *Id*.; *see Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*) (McGranery, J., concurring and dissenting); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990).

We also reject employer's argument that the administrative law judge failed to provide valid reasons for rejecting the disability causation opinions of Drs. Jarboe and Dahhan. The administrative law judge permissibly gave the opinions of Drs. Jarboe and Dahhan little weight, as they expressed views that were at odds with the findings of scientific studies on which the regulation was based, but did not provide documented reasons for rejecting these study findings. Decision and Order at 19-20; *A & E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 at *3-4 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, F.3d , No. 11-3500, 2012 WL 3194224 at *7-8 (6th Cir. 2012). The administrative law judge also acted within her discretion in finding that Drs. Jarboe and Dahhan did not persuasively explain how they ruled out coal dust exposure as a contributing factor in claimant's disability. Decision and Order at 19-20; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553, *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We, therefore, affirm the administrative law judge's finding that employer failed to affirmatively establish that claimant's respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

II. REMAND INSTRUCTIONS

On remand, the administrative law judge must determine the length of claimant's coal mine employment and explain the bases for her findings in accordance with the APA. If the administrative law judge finds that the evidence is insufficient to establish the beginning and ending dates of claimant's coal mine employment or she finds that any

of claimant's work lasted less than a calendar year, the administrative law judge may apply the formula at 20 C.F.R. §725.101(a)(32)(iii) or any reasonable method in calculating the length of claimant's coal mine work. If the administrative law judge finds that claimant has established fifteen years of qualifying coal mine employment, she may reinstate her finding that claimant is entitled to the invocation of the amended Section 411(c)(4) presumption. If claimant is unable to establish the fifteen years of qualifying coal mine employment necessary for invocation of the amended Section 411(c)(4) presumption, the administrative law judge must consider whether claimant has established entitlement pursuant to 20 C.F.R. Part 718.

Accordingly, the Decision and Order Awarding Benefits in Subsequent Claim is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons expressed in my dissent in *Snider v. Consolidation Coal Co.*, BRB No. 11-0727 BLA (July 30, 2012) (unpub.) (Boggs, J., concurring and dissenting), but mindful that there is now precedent to the contrary, I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge