U.S. Department of Labor

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

BRB No. 22-0504 BLA

WANDA F. THOMPSON (o/b/o HAROLD THOMPSON) Claimant-Respondent v. GEUPEL CONSTRUCTION COMPANY, INCORPORATED, d/b/a FREEMAN BRANCH MINING and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/23/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2017-BLA-06112) rendered on a miner's claim filed on June 28, 2022,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with seventeen years of qualifying coal mine employment and found Claimant[2] established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. It also argues she erred in finding it did not rebut the presumption.[4] Claimant responds, urging affirmance of the

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[1] The Miner filed a prior claim, which was denied, and the record was destroyed in accordance with the Department of Labor's records retention policy. Director's Exhibit 1. Thus, the ALJ noted there is no information from the Miner's prior claim available for consideration in this claim. Decision and Order at 3 n.5.

[2] Claimant is the widow of the Miner, who died on October 14, 2019, while his claim was pending. Director's Exhibits 9, 40. She is pursuing the miner's claim on his behalf.

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

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

ALJ's decision.[5] The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption: Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(1). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work.[7] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found the pulmonary function studies[8] and arterial blood gas studies do not establish total disability and there is no evidence of cor pulmonale with right-sided

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[5] On March 8, 2023, the Benefits Review Board granted Claimant's motion to file her response brief out of time. On March 27, 2023, Claimant filed her response brief, which the Board hereby accepts as part of the record.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[7] We affirm, as unchallenged, the ALJ's finding that the Miner's usual coal mine employment as a mechanic required heavy labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[8] Employer contends the ALJ erred in discrediting Dr. Rosenberg's opinion regarding the validity of the pulmonary function studies and vaguely asserts this alleged error "may have impacted" the ALJ's evaluation of "the overall credibility" of Dr. Rosenberg's opinion. Employer's Brief at 5-7. However, as the ALJ correctly determined,

congestive heart failure, but the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 8-11, 20-21. Weighing the evidence as a whole, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 21.

The ALJ considered the medical opinions of Drs. Forehand, Cohen, and Go that the Miner was totally disabled and the opinions of Drs. Spagnolo and Rosenberg that he was not. Decision and Order at 11-21; Director's Exhibits 13, 19, 20; Claimant's Exhibits 3-5; Employer's Exhibits 4, 6-8. Although the ALJ assigned at least some weight to all the physicians' opinions, she assigned the most weight to Dr. Forehand's opinion because she found it is "especially well-reasoned." Decision and Order at 20. Thus, "based on the majority of [the medical] opinions," including the "best reasoned opinion" of Dr. Forehand, the ALJ found the medical opinion evidence supports a finding of total disability. *Id.* at 20-21.

Employer contends the ALJ erred in crediting Dr. Forehand's opinion and in determining the medical opinion evidence supports a finding of total disability. Employer's Brief at 9-14. We disagree.

Dr. Forehand examined the Miner on September 16, 2016. Director's Exhibit 13. Although the arterial blood gas study performed on the same day did not produce qualifying values, he noted the Miner's pO2 dropped to sixty-seven while performing only a "modest" amount of work, which he opined demonstrated a "significant, work-limiting respiratory impairment" that would prevent the Miner from performing the physical demands of his last coal mining job.[9] Director's Exhibit 13 at 3-6; Claimant's Exhibit 5 at 11-16. He further explained the Miner's exercise study provided a better estimate of his capacity to perform the duties of his coal mining work than did the January 16, 2017 resting

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all the pulmonary function studies are non-qualifying and do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10-11. Moreover, as the ALJ did not discredit Dr. Rosenberg's opinion regarding total disability, Employer has not explained how the ALJ's alleged error undermines her credibility determinations. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *see also Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 20.

[9] Dr. Forehand calculated the Miner performed fifty-three watts of work during his exercise study, which he estimated is half of what the Miner performed during his usual coal mine employment. Claimant's Exhibit 5 at 13-16.

blood gas study conducted by Dr. Rosenberg. Claimant's Exhibit 5 at 14-15. Dr. Forehand therefore opined the Miner was totally disabled. Director's Exhibit 13 at 4; Claimant's Exhibit 5 at 12.

We reject Employer's assertion that the ALJ erred in crediting Dr. Forehand's opinion because he relied on a non-qualifying arterial blood gas study that she had determined was insufficient to support a finding of total disability. Employer's Brief at 7, 9-10. The regulations specifically provide that total disability may be established based on a physician's reasoned opinion that a miner could not perform his usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying.[10] 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995). We therefore see no error in the ALJ's finding that Dr. Forehand "thoroughly explained why the non-qualifying [blood gas study] that showed a significant drop with exercise demonstrates that Claimant was totally disabled . . . ." Decision and Order at 19-20.

We are also unpersuaded by Employer's assertion that the ALJ failed to address Dr. Rosenberg's opinion that the exercise blood gas study Dr. Forehand relied on did not demonstrate total disability because the Miner's oxygen saturation remained above ninety percent. Employer's Brief at 10 (citing Employer's Exhibit 6 at 4). The ALJ noted Dr. Rosenberg's opinion and determined it is entitled to at least some weight, Decision and Order at 20, but permissibly found Dr. Forehand's opinion to be the "best-reasoned" and thus entitled to more weight. Decision and Order at 21; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 802-03 (4th Cir. 1998); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

Employer further asserts the ALJ failed to resolve the conflict between the opinions of Drs. Forehand, Cohen, and Go that the Miner was disabled and those of Drs. Spagnolo and Rosenberg that he was not.[11] Employer's Brief at 10-11. We disagree. Although the

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[10] We thus likewise reject Employer's assertion that the ALJ erred in crediting Drs. Cohen's and Go's opinions because they relied, in part, on the non-qualifying arterial blood gas studies. Employer's Brief at 14, 16; 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); Claimant's Exhibits 3 at 23-24; 4 at 8.

[11] We reject Employer's assertions that the ALJ should have found the opinions of Drs. Forehand, Cohen, and Go undermined by Drs. Rosenberg's and Spagnolo's opinions

ALJ determined Drs. Spagnolo's and Rosenberg's opinions are "entitled to weight" because they explained how the data they relied upon supports their conclusions, she nevertheless permissibly found the majority of opinions, especially Dr. Forehand's "best-reasoned" and "thoroughly explained" opinion, support a finding of total disability. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 20-21.

Employer's arguments on total disability are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established total disability based on the medical opinion evidence and the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 21.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

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attributing the Miner's hypoxemia during exercise to conditions other than pneumoconiosis as well as Drs. Cohen's and Go's concessions that the Miner's medication may have impacted the exercise study. Employer's Brief at 11-16, 20-21; Claimant's Exhibits 3 at 23-24; 4 at 8; Employer's Exhibits 4 at 12-13; 7 at 28-30; 8 at 24-25. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of that pulmonary impairment is a separate inquiry, which is addressed at 20 C.F.R. §718.204(c) or in consideration of whether Employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(ii).

[12] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Spagnolo and Rosenberg that the Miner did not have legal pneumoconiosis.[13] Decision and Order at 25-27; Employer's Exhibits 4, 6-8. The ALJ found both opinions poorly documented and therefore found Employer did not rebut legal pneumoconiosis. Decision and Order at 26, 29.

Employer contends the ALJ erred in discrediting Drs. Rosenberg's and Spagnolo's opinions.[14] Employer's Brief at 11-14, 17-21. We disagree.

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[13] The ALJ accurately found the opinions of Drs. Forehand, Cohen, and Go diagnosing legal pneumoconiosis do not aid Employer in meeting its burden on rebuttal. Decision and Order at 25; Claimant's Exhibits 3-5. Thus, we decline to address Employer's arguments regarding the ALJ's weighing of their opinions. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13-20.

[14] Employer also argues the increase in the Miner's resting pO2 from the September 6, 2016 blood gas study to the January 16, 2017 study suggests his impairment was improving, and therefore a finding of pneumoconiosis is inconsistent with the regulatory definition of pneumoconiosis as a progressive disease that worsens over time. Employer's Brief at 7 (referencing Director's Exhibits 9, 13). However, the relevant inquiry at rebuttal of legal pneumoconiosis is whether the Miner had any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by" coal mine dust exposure. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Drs. Spagnolo and Rosenberg do not dispute the existence of the Miner's pulmonary impairment but instead only challenge its cause, and, as explained *infra*, the ALJ permissibly discredited their opinions on this point. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 26-27; Director's Exhibit 19; Employer's Exhibits 4, 6-8. Moreover, to the extent Employer

Drs. Rosenberg and Spagnolo attributed the Miner's impairment to amiodarone toxicity[15] and underlying cardiac disease. Employer's Exhibit 4, 6-8. Dr. Spagnolo opined amiodarone toxicity is associated with symptoms of weakness, cough, dyspnea, weight loss, occasional pleuritis, and pleural effusion while "severe cases" may produce diffuse rales, hypoxemia, and respiratory distress. Employer's Exhibit 4 at 13. He further opined the Miner's decrease in pO2 during his exercise blood gas study is most consistent with impaired left heart function and stated "any disability [the Miner had was] related to his age and his cardiac disease." *Id.* at 12-13. Dr. Rosenberg agreed with Dr. Spagnolo and opined the restrictive component of the Miner's impairment was related to fibrotic lung disease due to amiodarone toxicity. Employer's Exhibit 8 at 17. He opined that fluid backup due to muscle abnormalities in the Miner's left ventricle caused gas exchange abnormalities during exercise. *Id.* at 23.

The ALJ accurately noted the Miner's treatment records do not contain diagnoses of amiodarone toxicity or congestive heart failure and thus permissibly found Drs. Rosenberg's and Spagnolo's diagnosis of amiodarone toxicity to be poorly documented.[16] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 26. Further, the ALJ permissibly discredited their opinions because neither "adequately addressed the

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is arguing the later blood gas study is entitled to greatest weight because it is the most recent, we note it is irrational to credit evidence solely on the basis of recency where it suggests the miner's condition has improved. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, BLR , BRB No. 22-0024/A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023).

[15] The Miner's treatment records reflect that he began taking the medication amiodarone in 2009 to treat cardiac irregularities and arrhythmia. Employer's Exhibits 2, 3. Dr. Thompson discontinued his amiodarone treatment on May 29, 2015, but did not explain her reasons for doing so. Employer's Exhibit 3 at 54.

[16] Employer contends the ALJ acted beyond her authority as a factfinder and "asks too much to see a diagnosis of amiodarone toxicity in the treatment records" in discrediting the diagnoses of Drs. Rosenberg and Spagnolo. Employer's Brief at 17-18. The ALJ has broad discretion to weigh the evidence and make appropriate credibility determinations. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997). We thus see no error in the ALJ's finding that Drs. Rosenberg's and Spagnolo's diagnoses are not supported by the Miner's treatment records. Decision and Order at 26.

possibility of pneumoconiosis as an additional contributory diagnosis, in addition to [their] poorly supported diagnoses of amiodarone toxicity and/or congestive heart failure, especially in light of" Claimant's years of coal mine dust exposure.[17] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 26.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.[18] *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 29. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[19] *See* 20 C.F.R. §718.305(d)(1).

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner'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); *see* Decision and Order at 30-31. She found the opinions of Drs. Spagnolo and Rosenberg unpersuasive on the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Toler v. E. Assoc. Coal*

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[17] Although the ALJ found the Miner had seventeen years of qualifying coal mine employment in evaluating whether Claimant invoked the Section 411(c)(4) presumption, the ALJ found Claimant established the Miner worked thirty-one total years in coal mines. Decision and Order at 5-6.

[18] Employer generally asserts it was "prejudiced" by the destruction of the Miner's prior claim file. Employer's Brief at 12-13. However, aside from speculating that Dr. Forehand's opinion might change had the prior file shown normal lung function and x-rays, Employer does not explain how it has been prejudiced by the destruction of the prior claim file. *See Shinseki*, 556 U.S. at 413. Employer's speculation provides no basis for remand. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *see also Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009).

[19] Because Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis, we need not address its allegations of error regarding the ALJ's findings on clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 20.

Corp., 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 31; Employer's Exhibits 4, 6-8. Employer does not challenge this finding apart from its contention that the Miner did not have legal pneumoconiosis, which we have rejected. We thus affirm the ALJ's finding that Employer failed to prove no part of the Miner's total respiratory disability was due to legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge