BRB No. 97-1451

HERMAN S. PICEYNSKI	)	
	)	
Claimant-Petitioner	)	DATED ISSUED: _____
	)	
v.	)	
	)	
DYNCORP	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Director's Motion For Reconsideration of James W. Kerr, Jr, Administrative Law Judge, United Sates Department of Labor.

Gary B. Pitts (Pitts & Collard, L.L.P), Houston, Texas, for claimant.

Michael D. Murphy (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Director's Motion for Reconsideration (94-LHC-2387) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.* as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 19, 1991, claimant, a civilian working for employer, a company who had contracted with the Department of Defense to perform repair and maintenance of United States' Army helicopters, arrived in northeastern Saudi Arabia in the midst of Operation Desert Storm. While in Saudi Arabia, claimant lived in Damman and worked in Dhahran. Tr. at 40-42. Prior to going to Saudi Arabia, claimant had longstanding diabetes which he was able to control by diet alone, and longstanding hypertension requiring medication. Claimant testified that on March 6, 1991, while in Saudi Arabia, he experienced nausea, vomiting, diarrhea, weakness, and dehydration, and was hospitalized following a nearby SCUD explosion. It is undisputed that on or about April 19, 1991, claimant was sent back to the United States after sustaining a hairline fracture of his hand. Claimant, who has not been employed in any capacity since his return from Saudi Arabia, sought total disability compensation under the Act, arguing that since returning to the United States, he has suffered from numerous health problems related to his use of the anti-nerve gas pill, pyridostigmine bromide, and his exposure to six SCUD missile explosions, oil well smoke, and various other unknown toxic substances while working for employer in Saudi Arabia.[2]

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[1]On June 11, 1998, claimant filed a motion for modification of the administrative law judge's June 12, 1997, Decision and Order with the district director and informed the Board by copy of his cover letter and motion, that it wished to have this appeal stayed pending resolution of this petition. In the interest of administrative efficiency, and in light of the statutory one-year deadline for resolution of appeals, claimant's motion to stay the appeal is denied.

[2]Claimant's alleged health problems included the following: skin rashes over most of his body that leave permanent scars; bleeding gums and the loss of all his teeth; joint pain; dizziness and loss of balance; memory loss; poor concentration; chronic diarrhea and stomach problems; chronic headaches; redness of the eyes;

ringing in the ears; chronic fatigue; sexual impotence; chronic cough at night and loss of sleep; chronic muscle soreness and muscle spasms at night; and diabetes requiring medication.

In a Decision and Order filed on March 14, 1997, after finding that claimant was entitled to the Section 20(a), 33 U.S.C.§920(a), presumption and that employer had not produced specific and comprehensive evidence sufficient to establish rebuttal, the administrative law judge awarded him temporary and permanent total disability compensation, as well as permanent partial disability compensation commencing May 26, 1995. In addition, he awarded claimant medical benefits, and determined that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C.§908(f).

On March 21, 1997, employer filed a motion for reconsideration in which it asserted that as of January 1, 1992, claimant became partially disabled. In an Order dated March 27, 1997, the administrative law judge denied employer's motion, reiterating that as he found suitable alternate employment established based upon the May 26, 1995, report of employer's vocational expert, Mr. Stamcil, claimant remained totally disabled until that date.

On March 24, 1997, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration in which he requested that the administrative law judge modify his Decision and Order to reflect that claimant is covered under the Defense Base Act.[3] He also asserted that the administrative law judge's Decision and Order was in error in that it purported to address a question of reimbursement under the War Hazards Compensation Act, a question over which the Secretary has exclusive jurisdiction. *See* 42 U.S.C. §1704(a)(3).[4] With regard to the award of Section 8(f) relief, the Director asserted that the administrative law judge's Decision and Order was deficient in that it provided no explanation of his finding of permanency and contained conflicting or insufficient findings regarding which of claimant's pre-existing conditions were manifest pre-existing permanent partial disabilities and how those pre-existing conditions contributed to his disability.[5]

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[3]The administrative law judge's initial Decision and Order refers to the claim as falling under the Longshore Act itself rather than under the Defense Base Act extension.

[4]In the initial Decision, the administrative law judge stated: "claimant/carrier [sic] have obtained relief under Section 8(f) of the LHWCA, and are therefore precluded from obtaining relief under the War Hazards Compensation Act." Decision and Order at 13.

[5]The Director pointed out that in discussing Section 8(f), although the administrative law judge stated that claimant sustained a shoulder and neck injury while employed by employer on June 14, 1990, and referred to this injury as claimant's second injury, Decision and Order at 11, claimant had no such injury in

Moreover, he asserted that the decision failed to state or identify with particularity claimant's presently disabling second injury.

On April 25, 1997, the administrative law judge issued an Order in which he informed the parties that in light of the arguments raised in the Director's motion for reconsideration, he believed it was necessary for him to reevaluate whether there was an injury under the Act. Accordingly, he provided the parties until May 9, 1997 to submit briefs on this issue as well on as the Director's other arguments. In his subsequent decision, after reiterating that it was necessary to reevaluate the entire record, the administrative law judge found that claimant failed to establish that his medical problems were causally related to any unusual toxic poisoning or chemical/ bacterial deficiency and denied the claim accordingly. Claimant appeals the denial of benefits, arguing that the administrative law judge lacked jurisdiction to address causation in this decision or, alternatively, that he erred in determining on reconsideration that claimant's disabling medical conditions are not causally connected to his work for employer in Saudi Arabia during Operation Desert Storm. Employer responds, urging affirmance.[6] Claimant replies to employer's response brief.

Claimant initially contends that because the administrative law judge determined that he sustained a work-related injury in the original decision, and neither employer nor the Director specifically challenged that determination in their respective motions for reconsideration, the administrative law judge lost jurisdiction over this non-contested issue 30 days thereafter, rendering his subsequent contrary findings in his June 1997 Decision a legal nullity. We disagree. The Director specifically argued in his timely motion for reconsideration that the administrative law judge's initial Decision and Order was unclear in that it failed to identify the cause of claimant's present disability. In addition, the Director requested that the administrative law judge explain the basis for his determination that claimant's permanent disability was due to the combination of pre-existing conditions and a work injury and to identify claimant's disabling "second injury" with specificity. Inasmuch as the Director raised the issue of the cause of claimant's disability via

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this case.

[6]Employer correctly asserts that the evidence relating to exposure to toxic elements during Operation Desert Storm which claimant has affixed to his Petition for Review cannot be considered by the Board on appeal; the Board may only consider the evidence which the administrative law judge admitted into the formal record. *See Williams v. Hunt Shipyards, Geosource,* 17 BRBS 32 (1985); 20 C.F.R. §802.301(b).

the arguments he made in his motion for reconsideration, claimant's argument that the administrative law judge's initial causation finding was uncontested and thus became final after 30 days is rejected.[7] *See generally Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

[7]Even if the Director had not timely raised the issue of the cause of claimant's disability in his motion for reconsideration, we note that under Section 22, 33 U.S.C. §922, the administrative law judge can upon his own motion modify his prior award to correct mistakes of fact based upon "further reflection of the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971); 20 C.F.R. §702.373. The administrative law judge also preserved the parties' procedural due process rights by providing them with notice and the opportunity to be heard. *See generally Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993).

Pointing out that while working for employer during the air and ground war portions of Operation Desert Storm and their aftermath, he lived and worked in the same areas as the U.S. military, and that since returning to the United States he has suffered from many of the same maladies which numerous federal government studies now recognize as Gulf War Syndrome, claimant alternatively challenges the administrative law judge's finding on reconsideration that his disability is not work-related. Claimant specifically asserts that the administrative law judge erred in finding the Section 20(a) presumption rebutted based on Dr. Klein's testimony because Dr. Klein did not rule out claimant's work in Saudi Arabia as an aggravating factor in his chronic fatigue, diarrhea, sexual impotence, and diabetes, and provided no opinion regarding the cause of claimant's other conditions. Moreover, claimant argues the administrative law judge erred in crediting Dr. Klein rather than Dr. Wheeler, who is claimant's treating physician. Employer responds that the administrative law judge acted within his discretionary authority in rejecting claimant's emotionally charged argument that he was similarly situated to the unfortunate American military stationed overseas during the Gulf War, and in crediting the medical opinions of Drs. Klein and Salvaggio over that of Dr. Wheeler in light of their superior qualifications.[8] Moreover, it avers that although claimant argues that employer failed to refute or in any way contradict Dr. Wheeler's opinion that claimant's symptoms probably came about as a result of his working for employer in Saudi Arabia, Dr. Wheeler never expressed such an opinion; he testified only that the problems that claimant experienced since returning aggravated claimant's diabetes. RX-5 at 47. Claimant replies that his argument is compelling because it is based on fact, reiterates the credibility and rebuttal arguments he made previously, and asserts that contrary to employer's argument, Dr. Wheeler did in fact express a specific opinion that claimant's current maladies are causally related to his work in Saudi Arabia.[9]

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[8]Employer points out that while Dr. Wheeler is only Board-certified in internal medicine, Dr Salvaggio is certified in both internal medicine and allergy and immunology and Dr. Klein is Board-certified in internal medical and gastroenterology.

[9]Claimant points out that after being asked whether he believed based on reasonable probability that something happened to claimant in the Middle East that

caused his symptoms, Dr. Wheeler replied, "I think something had certainly happened to him in that time period." Dep. at 18.

Section 20(a) of the Act, 33 U.S.C.§920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either an accident occurred or working conditions existed on his job which could have caused or aggravated the harm. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175, 179 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In the present case, the administrative law judge properly found that claimant was entitled to the Section 20(a) presumption inasmuch as he suffered from numerous health problems and had introduced Congressional findings, Federal government studies, and the medical opinion of Dr. Wheeler to support his contention that exposure to toxic substances during Operation Desert Storm, including the use of the anti-nerve pill pyridostigmine bromide, six SCUD missile explosions, and oil well smoke, may have caused or aggravated his condition. In addition, the administrative law judge noted that Mr. Frazier, the site supervisor of employer's operation in Dhahran, documented that there was smoke in Dhahran after the oil fires started,[10] and found it well documented that there was a SCUD attack in Dhahran[11] based on claimant's

[10]The Presidential Advisory Committee on Gulf War Veterans' Illnesses reflects that the first oil fires started in Kuwait on January 20, 1991, and that the majority of the oil fires were ignited on February 19, 1991. CX-73 at 16. The burning wells were located in eastern Kuwait with the majority south of Kuwait City. Smoke plumes rose and combined in a superplume that could be seen for hundreds of kilometers and sometimes even partially blocked out the sun. *Id.* at 110. Mr. Frazier testified that smoke from the fires could be seen in Dhahran from March to August 1991. Tr. at 241.

[11]The Presidential Advisory Committee on Gulf War Veterans' Illnesses reflects that U.S. troops were killed during a SCUD attack in Dhahran on February 25, 1991. CX-73 at 16. Thus, despite employer's assertions to the contrary, the record reflects that claimant was in fact in Dhahran at the time of a SCUD missile attack. While employer also argues that claimant was either at home or in places remote from the area where the documented chemical exposures occurred, we need not address this assertion because it is not adequately briefed. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). Any error the administrative law judge may have made in this regard would be harmless in any event; in concluding that claimant established the working conditions element of his *prima facie* case, in addition to noting that he had been exposed to a SCUD missile attack in Dhahran, the administrative law judge also found that claimant had taken the anti-nerve pill pyridostigmine bromide and was

testimony and that of Mr. Weldon, employer's production control manager, Tr. at 197-198.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Manship,* 30 BRBS at 178-179; *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). It is employer's burden on rebuttal to present specific and comprehensive evidence to sever the causal connection between the injury and the employment. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 8 (1998). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In considering rebuttal, the administrative law judge noted initially with regard to claimant's gastrointestinal problems that a colonoscopy had been performed which Dr. Klein opined showed no evidence of serious inflammatory bowel disease, colon cancer, polyps, tumors, or any other significant colonic disorder which would account for claimant's chronic diarrhea. He further noted that Dr Klein opined that there was a probability that claimant was suffering from a spastic colon, and that his opinion did not establish that claimant was ever suffering from chronic diarrhea, having seen him only once.[12] In addition, he recognized that Dr. Klein testified that several of the drugs claimant was taking for his diabetes and resultant complications can produce nausea, diarrhea, constipation, fatigue, and allergic skin reactions, while Dr. Salvaggio diagnosed claimant with chronic diarrhea of an undetermined etiology, but possibly due to diabetic gastropathy or diverticulitis. He then noted Dr. Wheeler's testimony that the first entry of diarrhea in his records was on November 19,1992, and that claimant's diarrhea and impotency could possibly be explained by his pre-existing diabetes.

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exposed to smoke from oil fires, findings unchallenged by employer on appeal.

[12]Dr. Klein testified that in order to actually prove this condition existed, claimant would have to be hospitalized and monitored. Tr. at 143.

In addition, with regard to his chronic fatigue, the administrative law judge recognized that while Dr. Klein had opined to a reasonable medical probability that claimant had a reactivation of the Ebstein Barr (EB) virus based on the fact that his blood titre was four times the normal level, Dr. Wheeler believed that EB virus infection has been excluded as a cause of chronic fatigue and that a blood test is of little diagnostic value inasmuch as a great portion of the general population will test positive. Regarding claimant's skin rashes, the administrative law judge noted Dr. Klein's testimony that diabetics often have rashes and get ulcers and that uncontrolled hypertension could contribute to peripheral vascular disease which can cause ulceration and disease in the skin and legs. Moreover, he recognized that while Dr. Salvaggio had diagnosed claimant with probable necrobiosis lipoidica diabeticauirm skin lesions and some diabetic dermopathy, Dr. Wheeler believed that this diagnosis was erroneous because necrobiosis is predominately a lower extremity condition whereas claimant's skin condition was maculopapular, ulcerative and located predominately in the upper extremity and thigh region. In addition, the administrative law judge noted that Dr. Wheeler provided no explanation regarding claimant's bleeding gums and loss of teeth, and recognized that while Dr. Wheeler opined that claimant's problems since returning from the Gulf have aggravated his diabetes, Dr. Klein found no evidence that claimant's diabetes had been aggravated by a toxic agent, and attributed his worsening diabetic condition to age.

After setting forth this evidence, the administrative law judge found that the medical opinions of Drs. Klein and Salvaggio provided specific and comprehensive evidence sufficient to sever the presumed connection between any injury or aggravation of a pre-existing condition and claimant's working conditions. In so concluding, he specifically noted that while Dr. Wheeler had been claimant's treating physician since the 1970's, he never made a determination as to the cause of the conditions claimant exhibited after returning from Saudi Arabia; he merely concluded that because claimant went overseas and returned with some "bizarre" conditions which he could not diagnose, and which claimant did not previously have, there was some connection between his conditions and his working in Saudi Arabia. The administrative law judge further determined that, in contrast, Drs. Klein and Salvaggio were more specific in their conclusions. Dr. Klein opined that there was no evidence that showed that any toxin to which claimant may have been exposed caused any direct change in any of his pre-existing conditions or caused any new conditions to appear, and explained that claimant's blood tests did not reveal any evidence that he was exposed to any unusual toxic poisoning, and Dr. Salvaggio corroborated this opinion, finding no evidence of a chemical, bacterial, or viral induced immune deficiency. Having found rebuttal established, the administrative law judge proceeded to consider the causation issue based on the record as a whole, and crediting the medical opinions of Drs. Klein and Salvaggio over that of

Dr. Wheeler, found that claimant failed to establish causation.

We are unable to affirm the administrative law judge's denial of benefits in this case as his rebuttal analysis does not fully address claimant's medical condition consistent with case law and he did not discuss all of the relevant evidence in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A)(APA). Initially, the administrative law judge found rebuttal established based on Dr. Klein's opinion that there was no evidence that showed that any toxin to which claimant may have been exposed caused any **direct** change in any of his pre-existing conditions or caused any new conditions to appear. Where, as here, however, aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Bath Iron Works Corp. v. Director, OWCP,* 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *Cairns v. Matson Terminals,* 21 BRBS 252 (1988). Moreover, he also relied on Dr. Klein's discussion of alternate causes, as he attributed claimant's diarrhea to a spastic colon,[13] his chronic fatigue to reactivation of the Ebstein Barr virus and many of his other symptoms to side-effects from the drugs he was taking or from his diabetes itself, while Dr. Salvaggio diagnosed diarrhea of unknown etiology. The presumption, however, is not rebutted merely by suggesting an alternate way that claimant's injury might have occurred; employer must submit evidence that the employment was not a cause in order to sever the causal nexus. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). While the administrative law judge also noted that claimant's diarrhea was first recorded by Dr. Wheeler in November 1992, this fact alone cannot rebut the presumption. *See generally Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In addition, the administrative law judge also found rebuttal established based on Dr. Klein's testimony that there was no evidence that claimant's diabetes was aggravated by a toxic agent because his blood tests were normal. Decision and Order at 13. However, employer presented no evidence that poisoning would be expected to be detectable in claimant's blood tests 4 years later. In addition, Dr. Klein testified at the hearing that he was unaware of the Center for Disease

[13]Moreover, Dr. Klein also opined that there is a possibility that claimant's gastrointestinal tract problems could be due to diabetic gastropathy. Inasmuch, however, as he was unwilling to so state to a reasonable degree of medical probability, Tr. at 164, this testimony cannot rebut the Section 20(a) presumption. *See, e.g., Bath Iron Works Corp. v. Director, OWCP,* 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997).

Control's Study on Gulf War Syndrome (CX-44) released in June 1995, Tr. at 170, and that he had not read any of the studies about delayed toxic effects of chemical warfare agents, Tr. at 174, or the side effects of the pyridostigmine bromide experimental gas pills which claimant took while in the Gulf, Tr. at 177-178. In finding rebuttal established, the administrative law judge did not consider this evidence and its effect on Dr. Klein's opinion.

The APA requires that determinations under the Act be premised on consideration of all of the relevant evidence. The record in this case contains additional evidence, CX-6 at 154-155, which the administrative law judge did not consider which reflects that virtually any problem lumped under the heading of Gulf War Illnesses can be explained by other neurophysical and neuropsychiatric disorders, and that detection of these types of disorders may only be possible using highly sophisticated computer read electroencephalograms (EEG). We further note that because this evidence also reflects that detection of exposure to biotoxins and other biological agents requires that physicians and scientists have some

idea of what they are looking for,[14] and the use of sophisticated diagnostic procedures including DNA plasmid screening, bacteriological screening mycological screening, viral screening, and toxicological screening, it could, if credited, cast doubt on Dr. Klein's opinion that toxic exposure could be ruled out by a routine blood test. While Dr. Salvaggio did opine that claimant exhibited no signs of a chemical, bacterial or viral induced immune deficiency, EX-3, employer also did not introduce any evidence, and there is nothing in the studies of the Gulf War veterans admitted into the record, which suggests that Gulf War Syndrome may be explained by an immune deficiency.

Finally, in addition to the aforementioned, although the administrative law judge found that Dr. Klein's testimony provided substantial evidence sufficient to establish rebuttal of the Section 20(a) presumption with regard to all of claimant's conditions, Dr. Klein explicitly stated that he was not qualified and accordingly would not render an opinion regarding the cause of claimant's skin problems, Tr. at 161. Moreover, he testified that he was unaware of claimant's teeth and gum problems, memory loss and concentration, and eye, balance, and coughing problems. Tr. at 183-185. Before a medical opinion can establish the absence of a causal connection between claimant's condition and his work injury, the physician must be aware of its existence. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting). Finally, we note that even if the administrative law judge had properly determined that the Section 20(a) presumption had been rebutted, his finding that claimant failed to establish causation could not be affirmed because in so concluding he failed to consider or discuss the numerous studies and reports claimant introduced regarding the causes of Gulf War Syndrome, *see, e.g.,* CXS 6, 8, 39, 44, 73, 74, in violation of the APA. *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring). We therefore vacate his denial of benefits and remand for him to reconsider which, if any, of claimant's health problems are causally related to his work for employer in Saudi Arabia in light

[14]Dr. Klein testified that he did not know what claimant was exposed to and that he could only state that he could not finding in his examination or blood tests to suggest that claimant exhibited any kind of serious poisoning. Tr. at 66. He conceded, however, that if someone is truly exposed to chemical toxins it could aggravate an underlying diabetic condition. Tr. at 171.

of all of the relevant evidence consistent with the requirements of the APA and the controlling legal standards. In reconsidering the causation issue on remand, the administrative law judge should consider the evidence in the existing record as well as any other evidence which claimant introduces on modification under Section 22, 33 U.S.C. §922.

Accordingly, the causation findings contained in the administrative law judge's Decision and Order On Director's Motion For Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, this Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge