U.S. Department of Labor

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

BRB No. 21-0430 BLA

TOBEY DALE COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BEVINS BRANCH RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 10/31/2022
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	
	)	
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 Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2019-BLA-05815) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on July 3, 2018.[1]

The ALJ found Claimant established 15.25 years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment.[2] 20 C.F.R. §718.204(b)(2). Therefore, he concluded Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[4] The ALJ further found Employer did not rebut the presumption and thus awarded benefits.

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[1] Claimant filed an initial claim on November 27, 1995, which the district director denied on April 25, 1996, but the basis of the denial is unclear as the claim was administratively closed and the file destroyed in accordance with the Department of Labor's records retention policy. Director's Exhibit 1. Because Claimant's prior claim record is unavailable, the ALJ assumed the district director denied the claim for failure to establish any element of entitlement. Decision and Order at 7.

[2] The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; Decision and Order at 7-9.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the ALJ assumed the claim was denied for failure to establish any element of

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption.[5] Employer also argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, did not file a substantive response.

The Benefits Review 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[7] 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29

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entitlement, Claimant needed to submit new evidence establishing any element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 15.25 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-13.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8; Hearing Transcript at 28.

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

(1988); *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 Claimant established total disability based on the medical opinions and in consideration of the evidence as a whole.[8] Decision and Order at 34-35. Employer contends the ALJ did not adequately explain his credibility findings and erred in relying on Dr. Sikder's treatment notes to find Claimant totally disabled. We disagree.

Summary of Evidence

The ALJ considered four medical opinions. Dr. Forehand performed the Department of Labor's complete pulmonary evaluation of Claimant on August 31, 2018. Director's Exhibit 10. He obtained a pulmonary function study, which was non-qualifying, but showed "mixed restrictive-obstructive lung disease." *Id*. at 6. Dr. Forehand opined that with a "residual FEV1 of 66 [percent]" Claimant had "sufficient residual ventilatory capacity" to return to his last coal mine job as a dozer operator. *Id*. at 7.

The record also includes treatment notes from Dr. Sikder. In a progress note dated May 31, 2019, Dr. Sikder indicated she was seeing Claimant for a "Pulmonary Consult per Brian Hunter, PA for [Chronic Obstructive Pulmonary Disease (COPD)]."[9] Claimant's Exhibit 3 at 1. Dr. Sikder described Claimant as a 61-year old male smoker with "significant occupational exposure" who reported having a history of coal workers' pneumoconiosis and hypertension. *Id*. at 1-2. She further noted Claimant had worked fifteen years as a surface coal miner, was currently on breathing medications (Ventolin HFA and Symbicort), and described being able to walk only 150 feet on level ground and 100 feet uphill before having to stop due to shortness of breath. *Id*. at 1-3. Based on a qualifying May 23, 2019 pulmonary function study conducted at her request, Dr. Sikder diagnosed Claimant with "severe combined restrictive and obstructive airway disease . . .

[8] The ALJ found a preponderance of the valid pulmonary function studies did not support a finding of total disability, although he noted that he did not believe the non-qualifying studies necessarily refuted the qualifying studies. Decision and Order at 19, 35. He found none of the arterial blood gas studies qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 19-20.

[9] Brian Hunter is described as Claimant's primary care physician but appears to be a physician's assistant. Claimant's Exhibit 3 at 1.

very severe COPD." *Id*. at 3. She increased Claimant's medications and ordered a chest computed tomography (CT) scan. *Id*.

During a second office visit on February 12, 2020, Dr. Sikder's physical examination of Claimant's lungs revealed "fair air exchange" and that his chronic shortness of breath remained "unchanged." Claimant's Exhibit 7 at 4-5. She indicated Claimant's chest CT scan showed a nodule but a positron emission tomography scan was negative for cancer. *Id.* Dr. Sikder again cited the May 23, 2019 pulmonary function study results as showing "severe combined restrictive and obstructive airway disease with reduced lung volumes and diffusion which is non-reversible." *Id.* at 4.

On May 27, 2020, Claimant returned to Dr. Sikder for a follow-up examination. Claimant's Exhibit 7 at 1-3. She repeated her prior findings of COPD and indicated Claimant's lung nodule was stable. *Id*. at 1. She described that Claimant had "baseline dyspnea," "minimal cough," and "chronic wheezing," and on physical examination again noted "fair air exchange" along with "dry velcro crackles." *Id*. at 1, 2. She obtained a non-qualifying pulmonary function study, but the report of the study showed reduced values for FEV1, FVC, and FEV1/FVC; a decreased TLC; no significant response to bronchodilation; and reduced diffusion. Claimant's Exhibit 4 at 2. Dr. Sikder opined it demonstrated "moderate to severe COPD." *Id*. She prescribed refills of Claimant's breathing medications, noting his "poor" FEV1. Claimant's Exhibit 7 at 2.

Dr. Fino evaluated Claimant on December 10, 2019. Employer's Exhibit 5. He opined the spirometry portion of his pulmonary function study was invalid; the lung volumes, blood gas studies, and six-minute walk were normal; and the diffusing capacity was reduced. *Id*. at 7-8. Dr. Fino also reviewed Dr. Forehand's examination report and opined the August 31, 2018 pulmonary function study was invalid and the blood gas study was normal. *Id*. at 8-9. He concluded Claimant is neither partially nor totally disabled from returning to his last mining job as a dozer operator or a job requiring similar effort. *Id*. at 10.

In an August 11, 2020 supplemental report, Dr. Fino reviewed additional medical evidence, including Dr. Sikder's May 23, 2019 and May 27, 2020 pulmonary function studies, which he opined were invalid. Employer's Exhibit 6 at 1, 2. He also reviewed Dr. Sikder's treatment notes, but did not comment on them. *Id*. at 2. Dr. Fino reiterated that Claimant is not totally disabled. *Id*. at 4.

Dr. Tuteur evaluated Claimant on January 7, 2020. Employer's Exhibit 7. He found "no restrictive component and no impairment of oxygen gas exchange at rest or during exercise . . . ." *Id*. at 4. Because the pulmonary function study from his examination was invalid, he relied on Dr. Forehand's August 31, 2018 study to conclude Claimant has "no

significant obstruction" and no impairment in pulmonary function. *Id*. Dr. Tuteur did not, however, review Dr. Sikder's treatment notes or pulmonary function studies.

ALJ Findings and Analysis

The ALJ initially found Claimant's usual coal mine work as a dozer operator required "very heavy labor," which included working 10 to 12 hours per day, five or six days per week; climbing into and around cabs of "very large" dozers; regularly using his hands, arms, and legs to move the equipment; using shovels to remove mud and dirt from the tracks; and performing maintenance which required him to lift weights of "about 100 pounds" and at times "at least 200 pounds." Decision and Order at 4-5. We affirm these findings as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

Turning to the medical opinions, the ALJ found reasoned and documented Dr. Forehand's opinion that Claimant did not have a totally disabling respiratory or pulmonary impairment as of August 31, 2018. Decision and Order at 30. However, he also found "the record demonstrates that at some point in time after Claimant's October 25, 2018 deposition, Claimant developed a respiratory or pulmonary condition that prompted the physician assistant treating him, Brian Hunter, to refer him to Dr. Sikder for a pulmonary consultation."[10] *Id*. at 32. Relying on Dr. Sikder's treatment notes, the ALJ concluded that Claimant is totally disabled and rejected the contrary opinions of Drs. Fino and Tuteur as unpersuasive. *Id*. at 33-34; *see* 20 C.F.R. §718.204(b)(2)(iv). Weighing all of the evidence together, he determined Claimant is totally disabled:

> I find the medical opinion evidence, or in this case the medical opinion/treatment note evidence, more probative than the other types of evidence as it permits consideration of a more complete picture of an individual's health. In this case, Dr. Sikder rendered findings based on Claimant's relevant histories, respiratory symptoms, physical findings, and pulmonary function testing which I find reliable. Those findings when considered with the very heavy labor required of Claimant's usual coal mine job supports a finding of total disability.

Decision and Order at 34.

Employer argues that because Dr. Sikder did not specifically say Claimant is totally disabled, the ALJ erred in finding her treatment notes sufficient to support a finding that

[10] Claimant testified that he was not being treated by a pulmonary specialist and was not taking any medication for his lungs or breathing. Employer's Exhibit 10 at 13, 17-18.

Claimant cannot perform the very heavy labor required of his previous coal mine work. Employer's Brief at 12-14. We disagree.

A medical opinion need not be phrased specifically in terms of "total disability" to support such a finding. Rather, an ALJ must consider all relevant evidence concerning a miner's respiratory capacity and may rationally conclude a miner is totally disabled based on a physician's report as to the extent of a miner's impairment. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("In determining whether total disability has been established, an ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("It is not essential for a physician to state specifically that an individual is totally impaired.").

Substantial evidence supports the ALJ's conclusion that Claimant's respiratory condition deteriorated subsequent to Dr. Forehand's August 31, 2018 evaluation, prompting Claimant's referral to Dr. Sikder for a pulmonary evaluation. Decision and Order at 32; Claimant's Exhibits 3, 4, 7. Furthermore, although Dr. Sikder did not specifically state that Claimant is "totally disabled," she provided sufficient information from which the ALJ could conclude that fact. Based on the detailed treatment notes, Dr. Sikder's description of Claimant's respiratory condition, his need for multiple breathing medications, chronic shortness of breath, and severe or moderate-to-severe respiratory impairment evidenced on pulmonary function studies, the ALJ permissibly concluded that Claimant does not have the respiratory capacity to perform the very heavy manual labor his usual coal mine work required. *See Cornett*, 227 F.3d at 578; *see also Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995); *Raines*, 758 F.2d at 1534 (medical opinion need not be phrased in terms of "total disability" in order for total disability to be established); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988) (ALJ may infer disability by considering together the doctor's description of the miner's condition and the exertional requirements of the miner's former coal mine employment); Decision and Order at 34; Claimant's Exhibits 2 at 2; 3 at 1, 3; 4 at 2; 7 at 1-3, 5.

We also disagree with Employer that the ALJ erred in giving little weight to the opinions of Drs. Fino and Tuteur regarding whether Claimant is totally disabled. Employer's Brief at 14, 15, 17, 19. The ALJ accurately found that while both physicians indicated Claimant has some degree of diffusion impairment, neither specifically addressed whether it would prevent Claimant from performing the very heavy manual labor of a dozer

operator.[11] Decision and Order at 33 and n.41; Employer's Exhibits 5 at 7, 9-10; 7 at 5. The ALJ also permissibly found Dr. Fino's opinion less credible because he believed Claimant had no valid pulmonary function tests, contrary to the ALJ's finding that both of Dr. Sikder's pulmonary function studies were valid. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc) (reliability of a physician's opinion may be "called into question when the diagnostic tests upon which the physician based his diagnosis have been undermined"); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Employer's Exhibit 6 at 1, 2.

Moreover, the ALJ observed correctly that Dr. Fino did not comment on Dr. Sikder's treatment notes and Dr. Tuteur did not review them. Decision and Order at 34, 38; Employer's Exhibits 5-7. He thus permissibly found their opinions undermined because they did not address the moderate to severe impairment identified by Dr. Sikder. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986) (ALJ may reasonably question the validity of a physician's opinion that varies significantly from the remaining medical opinions of record); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985) (ALJ must consider factors that tend to undermine the reliability of a physician's conclusions before accepting it).

Finally, to the extent Drs. Fino and Tuteur opined Claimant's normal resting blood gas studies did not show total disability, the ALJ permissibly found the blood gas studies did not refute Claimant's impairment seen on the pulmonary function studies as they measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 33-35; Employer's Exhibits 5 at 9; 6 at 3; 7 at 4.

Furthermore, the ALJ permissibly found Drs. Fino and Tuteur did not explain why Claimant's ability to perform a six-minute walk supported their opinions that Claimant could perform the very heavy work required of his usual coal mine job.[12] *See Rowe*, 710

[11] As the ALJ noted, Dr. Fino indicated Claimant has a diffusion impairment but did not discuss whether Claimant could perform his usual coal mine job in view of that impairment. Decision and Order at 31, 33; Employer's Exhibit 5 at 7, 9-10. Similarly, the ALJ found that while Dr. Tuteur reported less than normal predicted values on the diffusion capacity test he performed, he did not address whether those below-normal predicted values would allow Claimant to perform his usual coal mine work. Decision and Order at 33 n.41; Employer's Exhibit 7 at 4, 5.

[12] Dr. Fino reported that Claimant's results were "normal" during a six-minute walk, but Claimant had to stop after two minutes due to leg pain. Employer's Exhibit 5 at 8. Dr.

F.2d at 255; Decision and Order at 33; Employer's Exhibits 5 at 7-8; 7 at 3, 4. Lastly, the ALJ correctly noted neither physician discussed the significance of Claimant's use of breathing medication to his respiratory capacity. *See Rowe*, 710 F.2d at 255; Decision and Order at 33; Employer's Exhibits 5 at 2; 7 at 3.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer's arguments on appeal amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus, we affirm the ALJ's findings that Claimant established total disability by a preponderance of the evidence, established a change in an applicable condition of entitlement, and invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

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Tuteur stated Claimant experienced no desaturation during an "oxygen assessment" six-minute walk. Employer's Exhibit 7 at 2.

[13] "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 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).

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.[14]

To disprove legal pneumoconiosis, Employer must establish Claimant does 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). The United States Court of Appeals for the Sixth Circuit requires Employer to show that [the miner's] "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 597-99, 600 (6th Cir. 2014)).

Employer argues that because the ALJ erred in finding Claimant totally disabled, he also erred in finding that it did not disprove legal pneumoconiosis. Employer's Brief at 19. Having affirmed the ALJ's finding of total disability, and because Employer does not otherwise explain why the ALJ's credibility findings are erroneous,[15] we affirm the ALJ's conclusion that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have either legal or clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We further affirm, as unchallenged, the ALJ's conclusion that Employer did not establish no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711.

[14] The ALJ's determination that Employer did not disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Decision and Order at 39-44. However, we address Employer's challenge to the ALJ's finding that Employer did not disprove legal pneumoconiosis as it is relevant to rebuttal of the presumed fact of disability causation.

[15] The ALJ found Dr. Fino's opinion that Claimant does not have legal pneumoconiosis unpersuasive because he asserted Claimant has no respiratory or pulmonary impairment (having invalidated all of the pulmonary functions studies, contrary to the ALJ's determination). Decision and Order at 37; Employer's Exhibit 5 at 10. Similarly, the ALJ found that Dr. Tuteur failed to consider all of the evidence of record indicating Claimant has COPD and thus did not provide a credible opinion that Claimant does not have legal pneumoconiosis. Decision and Order at 38; Employer's Exhibit 7 at 4.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge