



In the Matter of:

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,**

ARB CASE NO. 97-127

ALJ CASE NO. 87-OFC-20

PLAINTIFF,

DATE: December 21, 1999

v.

KEEBLER COMPANY,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

L. Denise Galambos, Esq., Pamela A. Gibbs, Esq., Richard L. Gilman, Esq., Diane A. Heim, Esq., Willie M. Alexander, Esq., James D. Henry, Esq., Henry L. Solano, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Defendant:

Edward Katze, Esq., Rosemary C. Lumpkins, Esq., *Constangy, Brooks & Smith, Atlanta, Georgia*

FINAL DECISION AND ORDER

This case arises under §503 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 393; Pub. L. 95-602, 92 Stat. 2987 (amended 1992). 29 U.S.C. §793 (1985).^{1/} Section 503 requires federal contractors to implement affirmative action programs for the benefit of, and refrain from discriminating against, their employees based on disability.

^{1/} The text of §503 and its implementing regulations were amended several times in ways relevant to this case. The current and earlier versions of text often occupy the same or very similar sections of the C.F.R. or U.S. Code. To avoid confusion about which version of text is being referred to, this opinion provides a date for each citation to §503 and its implementing regulations.

In 1985, the Keebler Company terminated Monica DeAngelis from her job as a production attendant at Keebler's Raleigh, North Carolina plant. The termination occurred after DeAngelis, who has epilepsy, had several partial complex psychomotor seizures while on duty. Keebler gave two reasons for the decision to terminate. First, Keebler asserted, DeAngelis had falsified her employment application by withholding the fact that she had epilepsy. Second, her seizures put her at heightened risk of serious injury which could not be eliminated by reasonable accommodation.

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP" or "the Department") charged Keebler with violating §503. OFCCP contended that DeAngelis' on-the-job seizures were extremely rare and did not put her at greater risk than other production attendants. The Administrative Law Judge (ALJ) who conducted the hearing in this case recommended that the complaint be dismissed on the merits. ALJ Rec'd Dec. No. 87-OFC-20 (March 4, 1991).

However, while DeAngelis' case was still before the ALJ, the Department acquiesced in a ruling by the United States District Court for the District of Columbia in an unrelated §503 case, *Washington Metropolitan Area Transit Authority v. DeArment*, 55 Empl. Prac. Dec. ¶ 40,507, available in 1991 WL 185167 (D. D.C., Jan. 3, 1991) ("WMATA"). The WMATA decision raised issues about coverage that called into question whether DeAngelis was covered by §503. WMATA also precipitated statutory and regulatory amendments that eventually affected this case.

The ALJ's 1991 recommendation to dismiss was appealed, but in 1994 was remanded. Thereafter, the ALJ recommended that the complaint be dismissed for lack of jurisdiction. ALJ Rec'd Dec., No. 87-OFC-20 (July 20, 1995). We have jurisdiction to review the ALJ's recommended decisions pursuant to 41 C.F.R. §§60-30.27, 60-30.28; 60-741.65(b)(3) (1999).

Our decision is organized as follows.

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I. BACKGROUND

A. The Department long construed §503 to apply to all employees of a federal contractor

As originally enacted and when this case arose in 1985, §503(a) of the Rehabilitation Act of 1973 provided:

(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any contract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Pub. L. 93-112, 87 Stat. 393, 29 U.S.C. §793(a) (1985).

From the Act's inception, the Department understood Congress to mean that any employer operating under a federal contract must take affirmative action for the benefit of all its employees with handicaps and is prohibited from discriminating against any employee based on handicap.^{2/} Accordingly, the Department's implementing regulations required employers entering into a contract of \$2,500 or more with the Federal Government to agree "not [to] discriminate against **any** employee or applicant for employment because of physical or mental handicap in regard to **any** position for which the employee or applicant for employment is qualified." 39 Fed. Reg. 20,567 (1974), codified at 20 C.F.R. §741.3 (1975) (emphasis added). Under this "all employee" approach, even employees who did not directly perform work on the federal procurement contract were protected by §503's anti-discrimination provisions.

^{2/} The Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4334 (Oct. 29, 1992), amended the Rehabilitation Act of 1973, 29 U.S.C. §§701-797b, substituting the term "individuals with disabilities" for "individuals with handicaps." Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101-12117 (1994) also addresses "disabilities," which "represents an effort by [Congress] to make use of up-to-date, currently accepted terminology." S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 50-51 (1990). The revision does not reflect a change in definition or substance. *Id.* In this decision we will use the terms "disabilities" and "handicaps" interchangeably.

There were only two exceptions to blanket coverage. A federal contractor operating under a national security waiver might be excepted from compliance. 29 U.S.C. §793(c). And contractors could secure waivers for facilities that were operated independently of the federal contract. 41 C.F.R. §§60-741.3(a)(5), 60-741.4 (1992). (The regulatory provisions dealing with coverage, including coverage of all employees except those in facilities operating under waivers, were commonly referred to as the “waiver” rules, and for ease of reference will sometimes be referred to in that way in this decision.)

The Department’s broad view of §503 coverage went largely unquestioned during the first 17 years of the Act’s existence. In one of the few cases during that period in which an employer did challenge all-employee coverage, the Assistant Secretary of Labor squarely rejected anything less than all-employee coverage. The employer in that case argued that the clause in §503(a), “in employing persons to carry out such contract,” required the Department to distinguish between employees working on the federal contract and employees not so engaged and to limit §503’s protections to the former. The Assistant Secretary concluded that, except in the case of separately operated facilities, the federal contract would have systemic, or “ripple,” effects throughout the enterprise that would make a distinction between contract and noncontract employees unworkable and unrealistic:

[B]y operation of the Act and applicable regulations, a federal contractor’s affirmative action clause obligations are not limited solely to federal contract jobs, but extend to **any position** he seeks to fill for any of his operations unless . . . a waiver from the requirements of the clause for facilities not connected with federal contracts is requested and granted. Such provisions recognize that, excepting those facilities not connected with federal contracts, all of a contractor’s operations contribute to the overall execution and satisfaction of his federal contracts in a significant way through such common support and other benefits as are provided by collective bargaining agreements, the lease or purchase procurement [sic] of plant and equipment, the formulation and execution of the contractor’s policy, practice and procedures, and related management and administrative functions.

OFCCP v. E.E. Black, Ltd., 19 Fair Empl. Prac. Cas. (BNA) 1624, 1634 (1979), *aff’d on other grounds sub nom., E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1100 (D. Haw. 1980).

When OFCCP received DeAngelis’ complaint in 1985, it applied its long-standing view of coverage -- DeAngelis came within the ambit of §503 if Keebler held a federal contract at the relevant times.^{3/} Keebler readily admitted that when it terminated DeAngelis it was producing Tato Skins under both federal and private contracts and the Raleigh plant was not operating under a waiver. Accordingly, Keebler, OFCCP, and the ALJ assumed that the complaint was

^{3/} Another limit on coverage was the monetary value of the contract. Inasmuch as monetary value of the contract is not an issue in this case, we will generally omit references to it for brevity’s sake.

properly within the scope of §503. For this reason, the ALJ issued a recommended decision that focused solely on the merits of the case. He recommended that the complaint be dismissed because DeAngelis' on-the-job seizures raised a reasonable probability that she would seriously injure herself, and reasonable accommodation was not available. ALJ Rec'd Dec. (March 4, 1991).

B. In 1991, WMATA held that all-employee coverage was precluded by the "plain meaning" of the statutory text

Shortly before the ALJ issued his recommendation that the complaint against Keebler be dismissed on the merits, the United States District Court for the District of Columbia ruled that §503 did not apply to all employees of a federal contractor. *WMATA, supra*.

In rejecting OFCCP's view that §503 applied to all employees of federal contractors, the district court in *WMATA* focused on the "contract clause" in §503(a): "Any contract in excess of \$2,500 entered into by any Federal department or agency [for procurement of goods or services] shall contain a provision requiring that, **in employing persons to carry out such contract** the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . ." 29 U.S.C. §793(a) (1985) (emphasis added). In the district court's view, the contract clause showed that Congress expected that some employees would be engaged in contract work (and protected under §503) and others not; Congress did not assume that the federal contract's effects would permeate the employer's entire enterprise. "All employees of the contractor are not swept in, which is basically what Labor is trying to do by their waiver provision. The Act itself says, employing persons to carry out such contract are the people who are covered and Labor's reading is far too broad. They mean to include the janitor for the entire fleet of buses when Metro operates a bus fleet and leases a few to the government on a shuttle bus contract." *WMATA*, 1991 WL 185,167 *1.^{4/}

OFCCP elected to acquiesce in *WMATA* and began rulemaking to delete the waiver rules and replace them with rules for coverage based on the job category, or position, the employee holds. Shortly after the proposal was issued, Congress revised §503 itself to restore all-employee coverage. President Bush signed the amendments into law in November 1992. 28 WEEKLY COMP. PRES. DOC. 2198 (Nov. 2, 1992). Among other things, the amendments deleted the "working on the contract" clause from §503(a) and added to the text of §503(b) the

^{4/} The Washington Metropolitan Area Transit Authority (WMATA) provided shuttle bus service under contract to eight or more federal agencies, including the Department of Defense, the Department of Labor, and the Department of the Navy. These shuttle busses were housed in a garage with other WMATA busses and the two kinds of busses were not segregated in the garage. The complainant in the case was a carpenter who applied but was rejected for a position that would repair and maintain the communal garage.

waiver provisions from the implementing regulations. The amendments became effective on October 29, 1992. 29 U.S.C. §793 note (1999).

As a result of the statutory amendments, OFCCP ultimately issued a final rule that prescribed all-employee coverage for cases arising after October 29, 1992, and position-based coverage for cases that originated before the 1992 statutory amendments went into effect.

C. Procedural history

When the ALJ's 1991 recommendation concerning the merits of DeAngelis' complaint reached the Assistant Secretary of Labor for Employment Standards ("the Assistant Secretary") for review,^{5/} the Assistant Secretary questioned whether the Department had jurisdiction over the case, absent evidence that DeAngelis personally worked on the federal contract. Ass't Sec'y Order (Dec. 21, 1994). OFCCP argued, consistent with its rulemaking proposal, that *WMATA* required adoption of a coverage standard based on job category or position. The Assistant Secretary disagreed, and read *WMATA* as limiting coverage to **individuals** personally working on the federal contract. *Id.* Thus, the Assistant Secretary reasoned, DeAngelis would not be a covered employee unless OFCCP proved that she personally worked on production of Tato Skins for the federal contract; it would not be enough to show that production assistants like DeAngelis did so.

Further, the Assistant Secretary stated, the question whether DeAngelis was a covered employee appeared to be a jurisdictional question. Accordingly, the Assistant Secretary remanded this case to the ALJ with instructions to permit the parties to supplement the record, to determine whether DeAngelis individually worked on production of Tato Skins for the federal contract, and on that basis decide whether the Department had jurisdiction over the case. *Id.*

On remand to the ALJ, OFCCP argued that DeAngelis was a covered employee because she held a position that worked on the Federal contract. The ALJ, however, applied the terms of the Assistant Secretary's remand order and stated that "the question presented here is whether OFCCP has met its burden of demonstrating that Monica DeAngelis was an individual employed by Keebler to carry out Government contracts during the period of her employment. . . ." ALJ Rec'd Dec. slip op. at 5 (July 20, 1995).

Based on additional evidence submitted by the parties, the ALJ concluded that OFCCP proved that DeAngelis held a position that worked on government contracts during the relevant time period, but did not prove that DeAngelis individually worked on the contract. Therefore,

^{5/} In 1974 the Assistant Secretary for Employment Standards was charged by the Secretary of Labor with responsibility for issuing final orders in cases in which one of the parties challenged the ALJ's recommended decision. Sec'y Order No. 8-74 (March 12, 1974).

the ALJ ruled, OFCCP had not proved that DeAngelis was a protected employee and recommended that the complaint be dismissed for lack of jurisdiction. *Id.*

OFCCP challenged this ruling, and the case came to this Board, which was established by the Secretary of Labor on April 17, 1996, and charged with responsibility for performing the adjudicatory function previously assigned to the Assistant Secretary for Employment Standards. Sec'y Order No. 2-96; 61 Fed. Reg. 19,978 (1996). OFCCP argued on review that the ALJ had applied the wrong coverage limit. Again OFCCP asserted that *WMATA* limited coverage under §503 based on category of position, not in individual job assignment.

However, like the Assistant Secretary, the Board understood *WMATA* to limit §503 coverage to employees personally engaged in fulfilling the federal contract. The supplemented record showed only that DeAngelis was as likely as any other production attendant at Keebler to have worked on filling the federal contract for Tato Skins. That, the Board concluded, was insufficient as a matter of law to prove individual involvement. On that basis the Board dismissed the case for lack of evidence of coverage. ARB Final Dec. & Ord. (Sept. 4, 1996).

One week later, OFCCP moved for reconsideration based on an intervening change in law. P. Mo. to Alter or Amend, Sept. 11, 1996. Just days before the Board dismissed the complaint for lack of evidence that DeAngelis personally worked on the federal contract, the new OFCCP regulations that defined §503 coverage based on job category had gone into effect. The new regulations specified that cases arising before Congress overrode *WMATA* in 1992 would be subject to job category limits (*i.e.*, position coverage); cases arising after the 1992 amendments would be subject to all-employee coverage. *See* 61 Fed. Reg. 19,336 (final rule announcement without effective date), codified at 41 C.F.R. Part 60-741 (1999); 61 Fed. Reg. 43,466 (1996) (announcing that the new regulations would be effective as of August 29, 1996).^{6/}

OFCCP now argued that once the new coverage provisions went into effect, the Board was bound to apply them. The Board had already found as fact that DeAngelis held a position -- production attendant -- that produced Tato Skins for Keebler's federal contract. Ergo, the Board must withdraw its dismissal order and issue a final order based on the current regulation.

The Board granted OFCCP's motion to reconsider and withdrew the order of dismissal. The Board concluded that the new provisions at §60-741.4(a)(2) did govern this case.^{7/} It found,

^{6/} The delayed effectiveness date was necessitated by the Paperwork Reduction Act as amended, 44 U.S.C. §3507 (Supp. 1999), which required a final clearance of the regulations' paperwork requirements by OMB after the final rule was published but before it could be implemented. The timing of OMB's clearance was necessarily in OMB's hands, and the Department of Labor could not forecast when the clearance would be issued.

^{7/} This ruling stands as law of the case. We note, however, that the regulation is retroactive, and that the justification for retroactivity spelled out in OFCCP's September 11, 1996 Motion to Amend (continued...)

based on the evidence, that DeAngelis had an equal chance with other production attendants of working on the federal contract. It concluded that she therefore was a covered employee. ARB Order Vacating Final Dec. & Ord. (Dec. 12, 1996).

The case was now ready for review on the merits. However, because of the long interval since the parties filed their briefs on the merits of the complaint, the Board's order also afforded the parties an opportunity to file supplemental briefs, which we now have before us.

II. CLARIFICATIONS

Before turning to the merits of this case, we pause to discuss three matters that are no longer in controversy, having been resolved by prior orders, but that we believe warrant fuller discussion. These are: whether the scope of §503 coverage was a jurisdictional issue, the flaws in the *WMATA* decision, and the nature of the framework within which this Board can best decide the validity of OFCCP's interpretation of §503. As the history of this case indicates, there was a good bit of uncertainty associated with the issues of jurisdiction and interpretation, issues which arise under various statutes administered by the Department of Labor and adjudicated by us. And the *WMATA* decision has never been thoroughly analyzed by us. We think it worthwhile, therefore, to offer some further guidance about the analytic framework for deciding when an issue is a jurisdictional one, to explain how the court erred in *WMATA*, and to describe the roles of OFCCP and this Board when faced with ambiguity in §503 text or with issues not addressed by Congress when it enacted and later revised § 503.

A. Scope of coverage is not a jurisdictional issue

In this case, both the Assistant Secretary and the ALJ questioned whether they had jurisdiction over the complaint absent evidence that DeAngelis was a covered employee. However, there can be no question that the ALJ and the Assistant Secretary had jurisdiction over this case at all times.

“Jurisdiction,’ it has been observed, ‘is a word of many, too many, meanings.’” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 1010 (1998) (internal quotation omitted) (listing common misuses of the word jurisdiction, including for example, statutes that say, “and the court shall have *jurisdiction* to grant all appropriate relief,” which is nothing more than a reference to the remedial power of the court). “Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits,

²(...continued)

appears inconsistent with *Landgraf v. USIFilm Prods.*, 511 U.S. 244, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510 (1994).

not for want of jurisdiction.” *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776 (1946). *Accord Montana-Dakota Utils Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694 (1951) (“As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. * * * If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has”).

The mere claim that Keebler violated §503 of the Rehabilitation Act by terminating DeAngelis because of her epileptic seizures conferred jurisdiction on the Department. The question whether DeAngelis was a covered employee turned on the meaning of the “working on the contract” clause in §503. This became a point of uncertainty because of *WMATA*, and its emergence in this case was not a matter of manipulation by anyone, nor was it a frivolous question. It was a serious question of law -- if §503 did not cover all employees of federal contractors, whom did it cover? Such issues are merits issues and their resolution by the adjudicator are rulings on the merits. *Cf. Steel Co.*, 523 U.S. at 89, 118 S.Ct. at 1010 (a court has jurisdiction “‘if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,’ . . . unless the claim ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous,’” citing *Bell v. Hood*).

B. *WMATA* erred in ruling that all-employee coverage was inconsistent with the “contract clause”

The *WMATA* decision rested on the incorrect premise that the contract clause, “in employing persons to carry out such contract,” had only one “plain” meaning, or purpose -- to limit the class of persons protected by §503. “All employees of the contractor are not swept in, which is basically what Labor is trying to do by their waiver provision. The Act itself says, employing persons to carry out such contract are the people who are covered and Labor’s reading is far too broad.” 1991 WL 185167 *1. However, by applying standard tools of statutory construction to the question of coverage, we can see that §503 was indeed meant to apply to all employees of a federal contractor.

1. The “contract clause” should have been construed in context.

One of the basic precepts of statutory construction is that words and phrases should not be parsed in isolation. *National Bank of Or. v. Independent Ins. Agents of Am., Inc.* 508 U.S. 439, 453, 113 S.Ct. 2171, 2182 (1993) (in expounding a statute, a court must not be guided by a single sentence or member of a sentence, but must look to the provisions of the law as a whole and to its object and policy). In fact, it is not “an unusual judicial problem to have to seek the meaning of a law expressed in words not doubtful of themselves, but made so by circumstances or the objects to which they come to be applied.” *United States v. American Sugar Ref. Co.*, 202 U.S. 563, 577, 26 S.Ct. 717, 719 (1906).

Section 503 was and is part of a set of provisions in the Rehabilitation Act by which Congress sought to assure that federal funds do not support enterprises that discriminate against persons with disabilities. Section 501(b) requires federal agencies to implement affirmative action plans for federal employees with disabilities. 29 U.S.C. §791(b). Section 504 prohibits discrimination based on disability by any program or activity receiving federal assistance. 29 U.S.C. §794. As the Supreme Court expressed it, “Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.” *Conrail v. Darrone*, 465 U.S. 624, 632 n.13, 104 S.Ct. 1248, 1253 n.13 (1984). Viewed in this context, the proposition that the contract clause was intended to exclude some employees from protection immediately becomes problematic, calling for deeper analysis.

2. The Act's legislative history did not support the notion that Congress intended to protect some but not all employees of a federal contractor.

Once §503 and the related provisions are properly understood as “power of the purse” mechanisms created by Congress to facilitate the employment of persons with disabilities, a number of subsidiary questions immediately formulate themselves. Is it even plausible that Congress was willing to contract with businesses that discriminated based on disability -- as long as the discrimination only involved certain employees? What other purpose, consistent with §503's remedial goal, would be served, or necessary balance struck, by limiting coverage in this way? What should be made of the fact that nowhere in the legislative history is there the slightest hint that Congress thought it was adopting a dual standard for employees of federal contractors? What should be made of the fact that there is absolutely no evidence that Congress thought the effects of a federal contract on an employer could actually be broken down and traced through the positions employees hold? What answer could there be to the Assistant Secretary's finding in *E. E. Black* that, as an empirical matter, all employees in a facility working on a federal contract are affected by that contract? These and similar questions stand in rebuttal to *WMATA*'s unexamined impulse.

3. The Rehabilitation Act in general and §503 in particular is remedial legislation that must be construed liberally

Another cardinal rule of statutory construction is that remedial legislation be construed liberally. “A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction.” *Sutherland Stat. Constr.* §60.01 (5th ed. 1992). The Rehabilitation Act as a whole, and §503 in particular, is nothing if not remedial. *Cf. Darrone*, 465 U.S. at 634, 104 S.Ct. at 1254 (“[A]pplication of § 504 to all programs receiving federal financial assistance fits the remedial purpose of the Rehabilitation Act to ‘promote and expand employment opportunities for the handicapped.’ 29 U.S.C. §701(8)”). Construing the contract clause to exclude some workers with disabilities from §503 protection is clearly restrictive, not liberal.

4. Rejecting the court's interpretation of the contract clause would not strip the clause of meaning

Refusing to construe the contract clause as a limitation on coverage does not render the clause surplusage. The contract clause still serves an important function. It acts as a temporal limit on employer liability under §503. It establishes that federal contractors would be liable for noncompliance with §503 during the life of the contract. Having been a federal contractor in the past would not be a basis for charges under §503 in the present. Nor would §503 eligibility depend on pre-contract employment decisions (assuming the effects of those decisions have ceased when a new federal contract commences).

Executive Order No. 11246, 42 U.S.C. §2000e note (1999), helps to clarify the point, because it was a model Congress used in developing §503.^{8/} Executive Order No. 11246 prohibits employment discrimination by Federal contractors based on race, creed, sex, color or national origin. And it expressly requires that covered contracts include the following provision: “**During the performance of this contract**, the contractor agrees as follows: (1) The contractor will not discriminate against **any** employee or applicant for employment because of race, creed, color, or national origin.” E.O. 11246 at §202; 30 Fed. Reg. 12,319 (1965) (emphasis added). By this particular formulation, the Executive Order is made to apply to **all** employees of the Federal contractor but only during the life of the contract.

5. Congressional ratification of the Department’s all-employee coverage regulations should have precluded the court’s narrower construction

The responsible congressional committees worked with the Department of Labor to develop the first §503 implementing regulations following enactment of the Rehabilitation Act in 1973. Their views of the implementing regulations are significant because they criticized the regulations in some respects, but did not criticize the waiver provisions. “In late 1973 and early 1974, at the request of Senator Cranston, several meetings were held between the staff of the Labor Department and the staff of the Senate Labor and Public Welfare Committee and House Education and Labor Committee for the purpose of clarifying the intent of Congress regarding section 503 and to offer suggestions and comments with respect to draft regulations which were then under consideration within the Department.” S. Rep. No. 1297 at Appendix, Letter dated Aug. 21, 1974, to Secretary of Labor Brennan from the Hon. Harrison A. Williams, Chairman of the Senate Committee on Labor and Public Welfare, the Hon. Jennings Randolph, Chairman, Senate Subcommittee on the Handicapped, and the Hon. Alan Cranston). These exchanges give the waiver regulations particular weight. *Cf. Darrone*, 465 U.S. at 634, 104 S.Ct. 1254 (“The regulations [implementing §504] particularly merit deference in the present case: the responsible

^{8/} That Congress did model §503 in part on Exec. Order No. 11246 is beyond question. Consider the criticisms Senators Williams, Randolph, Cranston and Stafford made of the Department’s first implementing regulations, promulgated on July 11, 1974. *See*, Letter to Labor Secretary Brennan (Aug. 21, 1974) (“there was never any contemplation by the Congress that the terms of the [§503] affirmative action clause would vary depending upon the length or dollar value of contracts generally. Certainly, this is not the case with the affirmative action clause required pursuant to Executive Order No. 11246. . . .”). S. Rep. No. 1297, 93th Cong., 2d Sess. (1974), Appendix.

And again, when Congress amended the Act in 1974 because it considered the Department’s coverage regulations too narrow, the Senate Report stated: “An acceptable affirmative action program must be aimed at the entire class of employable handicapped persons, with particular attention to those who are presently, actually, and significantly handicapped. This standard parallels the obligation of a Federal contractor under Executive Order No. 11246 to employ persons who might be discriminated against on the basis of national origin: the obligation extends to all ethnic groups within the available applicant pool. . . .” *Id.*

congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form”).

Even more significant are amendments Congress made in 1974, less than a year later, for the specific purpose of correcting what it considered the unduly narrow definition of handicapped employee in the Department’s regulations. This amendment clarified that Congress meant to protect not only employees who have disabilities but also those who are falsely perceived to have or have had disabilities. The “existing definition includes only an individual who has a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment and only if that individual can reasonably be expected to benefit in terms of employability from vocational rehabilitation services under the Act. This definition makes little sense when applied to either the very broad scope of the Office for Handicapped Individuals or the Architectural and Transportation Barriers Compliance Board, or to the section 501, 503 and 504 nondiscrimination programs and provisions.” S. Rep. No. 1297 at §111 - Misc. Amendments. But again, Congress left the waiver provisions intact.

“Where ‘an agency’s statutory construction has been “fully brought to the attention of the public and the Congress,” and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.’” *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 1925 (1982) (citation omitted); *accord Grove City College v. Bell*, 465 U.S. 555, 567-568, 104 S.Ct. 1211, 1218-1219 (1984). Thus *WMATA* repudiated an agency construction that Congress had ratified.

6. The court should not have relied on a Supreme Court analysis that Congress had rejected

The district court’s reliance in *WMATA* on the analytical approach used by the Supreme Court in *Grove City College*, a Title IX sex discrimination case, was inapposite. *Grove City* concerned Basic Educational Opportunity Grants (BEOGs) made by the Department of Education to students for use at participating schools. Title IX prohibited sex discrimination in “any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a) (1984). The Court ruled that the entire college was not subject to Title IX merely because some students paid for their tuition with federal grant money. “BEOGs clearly augment the resources that the College itself devotes to financial aid. [H]owever, the fact that federal funds eventually reach the College’s general operating budget cannot subject Grove City to institution wide coverage. * * * [It is only] the ‘program or activity’ -- the financial aid program -- that receives federal assistance and that may be regulated under Title IX.” *Grove City*, 465 U.S. at 571-572, 104 S.Ct. at 1220-1221. In other words, the Court recognized that the federal grants would have “ripple effects” throughout the college, but concluded the “programs or activities” language in the statute made those ripple effects legally irrelevant. The district court in *WMATA* reasoned that just as the terms “program or activity” ruled out institution-wide coverage under Title IX, so too the terms “working on the contract” ruled out all-employee coverage under §503.

The difficulty with this approach, however, was that Congress had already overruled *Grove City* by the time *WMATA* was decided, flatly rejecting the notion that the real-life ripple effects of federal assistance could be deemed legally irrelevant under Title IX's anti-discrimination provision, or for that matter, under Section 504 of the Rehabilitation Act, the Age Discrimination Act, and Title VI. "Contrary to the view of the Supreme Court that the language common to these statutes (*i.e.*, 'program or activity') should be given a limited interpretation, Congress intended institution wide coverage and the executive branch has historically insisted upon this view. It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation." S. Rep. No. 64, 100th Cong., 1st Sess. 1987 at §V. *Need For Legislation* (the "Civil Rights Restoration Act of 1987"). "The inescapable conclusion is that Congress intended that title [sic] VI as well as its progeny -- Title IX, Section 504, and the ADA -- be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination." *Id.* at §Conclusion. Under the circumstances, it was Congress' view of a comparable issue under comparable statutes that should have guided the court, not the Supreme Court's view.

In short, when we view the contract clause in light of §503 in its entirety and in relation to §§504 and 501, in light of the Act's overall scheme and purpose, and in light of the legislative history, we are able to see that the contract clause serves as a temporal limit on coverage and that Congress intended to protect all employees of federal contractors from disability discrimination during the life of the contract.

7. The District Court did not attempt to resolve the new interpretive question it had raised -- If everyone is not covered, who is? -- because that is a question the agency must answer in the first instance.

As reported in §IC, *supra*, OFCCP understood the *WMATA* ruling to require the agency to prove an employee's connection to the federal contract based on his or her job category, or position. The Assistant Secretary and successor Board understood *WMATA* to require OFCCP to prove the employee's personal involvement in accomplishment of the federal contract. In point of fact, the district court required neither. "Congress said, employing persons to carry out such contract, and while it might be more than the drivers of the individual shuttle busses -- and I won't try to define what the lines are more than the drivers of those individual shuttle busses on those shuttle bus contracts -- it clearly is not all the people that work for the bus fleet of Metro, much less all of the employees of Metro." 1991 WL 185167 *1. That the court did not purport to define the class of covered workers is underscored by the complete absence in the decision of the type of analysis that would be necessary to reinterpret §503 based on the premise that not all employees with disabilities are covered. For example, the court does not mention any principle by which an employee's connection to the contract might be determined. Nor are practical difficulties such as classifying workers who move in and out of coverage with changing tasks or assignments addressed.

The district court's decision to refrain from defining a subclass of covered workers and to leave that task to OFCCP was entirely correct. *See, FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S.Ct. 437 (1940) (once the reviewing court has corrected the agency's legal error, the court's task is at an end, and the agency must be left to take corrective action consistent with the judicial ruling and the full panoply of the agency's powers, *including the power of statutory interpretation*) (emphasis added).

C. Courts must defer to an agency's reasonable construction of ambiguous text in the statute it is authorized to administer

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778 (1984), is the leading case on the role of the courts when faced with a dispute about the meaning of a statute between the agency charged with responsibility for administering the statute and a private party. In that decision, the Supreme Court described the court's review as a sequential process. First, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843, 104 S.Ct. at 2781.

This inquiry always begins with the statutory text, and the question, "does the provision at issue have a plain meaning," "is its meaning clear on its face" with regard to the facts at issue. (Keeping in mind, of course, that "plain meaning, like beauty, is sometimes in the eye of the beholder." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 105 S.Ct. 1598, 1603 (1985).) If the text is not clear on its face, the court expands the range of information it considers to include related provisions in the statute, the statute's overall structure and purpose, its legislative history and anything else that throws light on Congress' intention. *See* discussion at Part IIB, *supra*.

In making this analysis, the court considers the agency's interpretive views in the same way it considers any party's argument on any dispositive issue -- for its persuasiveness. But the court acts *de novo*; it gives the agency's view no deference. After all, determining what statutes mean is one of the core tasks of the federal judiciary, and the federal judiciary has more expertise and experience in construing statutes than any agency construing only the legislation it administers. *Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929 (1990); *BATF v. FLRA*, 464 U.S. 89, 98 n. 8, 104 S.Ct. 439, 445 n. 8 (1983) (deciding what a statute means is "the quintessential judicial function"). If the court finds the agency view to be illogical, incomplete, or contrary to the act's overarching structure and purpose, the court must reject it. *See, e.g., In re 29 Cartons of an Article of Food*, 987 F.2d 33 (1st Cir. 1993) (FDA's construction of statutory term "food additive" rejected because it would "subvert the congressional purpose" by impermissibly "tilt[ing] a delicately balanced statutory scheme" for assigning burden of proof between food processors and the FDA). This stage of analysis is often referred to as "*Chevron I*" analysis.

If the *Chevron I* process yields no answer to the question “What did Congress mean?” either because the available information is insufficient to resolve a textual ambiguity or because Congress has given the agency authority to fill a gap, the court stops acting *de novo*. Now the court turns its attention to the agency’s interpretive view to determine whether that view reasonably effectuates what *is* known about congressional intent. The court judges the reasonableness of the agency’s view according to many factors, including the view’s compatibility with other aspects of the statutory scheme, structure and goals, the quality of the agency’s reasoning, whether the agency is being consistent and if not, its reasons for making a change. *Morton v. Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075 (1974). All the while the court draws on the same information it drew on in *Chevron I*-- the statutory text, structure, goals and purposes, legislative history, the agency’s prior practice, and so on. See discussion at §IIB, *supra*. This stage of review is usually referred to as “*Chevron II*” analysis.

If the court concludes that the agency’s resolution of the ambiguity, or its gap-filling reasoning is reasonably consonant with what is known of the legislative purpose and goals, it must affirm the agency.^{9/} If the court determines that the agency’s interpretive or interstitial reasoning is not reasonably consonant with the legislative purpose and goals, the court must remand the case for further agency action, or invalidate the agency action. The court cannot “fix” the problem for the agency by providing what it considers a reasonable accommodation. “If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or example.” *Florida Power & Light*, 470 U.S. at 744, 105 S.Ct. at 1607; *Pension Benefits Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 2680 (1990) (It is “clear that remanding to the agency is in fact the preferred course. See *Florida Power & Light v. Lorion*. . .”).

In confining our review to a judgment upon the validity of the grounds upon which the [SEC] itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct “although the lower court relied upon a wrong ground or gave a wrong reason.” * * * The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court’s decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like

^{9/} “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11.

considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459 (1943); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983) (“The reviewing court should not attempt itself to make up for . . . deficiencies [in the agency’s reasoning]; ‘We may not supply a reasoned basis for the agency’s action that the agency itself has not given.’ *SEC v. Chenery*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577. . .”). *Cf.*, *Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987), amended, 842 F.2d 194 (7th Cir. 1988) (after concluding that Congress did not speak to the question whether otherwise qualified citizen and alien children could be denied Aid to Families with Dependent Children because their parents are illegal aliens, the court invalidated HHS policy denying AFDC aid to children based on their parents’ alienage because the view was not reasonably consonant with the AFDC statutory purpose and structure).

There are several reasons why courts do not attempt to correct deficiencies in agency interpretive views. First, even though located in the Executive Branch, an agency possesses a modicum of legislative power that comes to it as part of the delegation of authority from Congress to implement the legislative program. The Judicial Branch, on the other hand, has no delegated legislative authority. “We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *Smiley v. Citibank*, 517 U.S. 735, 740-741, 116 S.Ct. 1730, 1733 (1996); *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782 (“the power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))”).

Moreover, the administering agency possesses “readily identifiable structural advantages” over courts in rendering authoritative interpretations of the statute it administers. *Martin v. OSHRC*, 499 U.S. 144, 152, 111 S.Ct. 1171, 1176 (1991) (*CF&I*). In holding that the Occupational Safety and Health Review Commission must defer to the Occupational Safety and Health Administration’s (“OSHA’s”) reasonable interpretation of its own regulation, the Court noted that “by virtue of [OSHA’s] statutory role as enforcer, [OSHA] comes into contact with a much greater number of regulatory problems than the Commission, which encounters only those regulatory episodes resulting in contested cases.” *Id.* Indeed, it is often the case that Congress assigns responsibility for implementing a particular legislative program to an agency because of its pre-existing expertise in the area. *Cf. Mourning v. Family Pubs. Serv., Inc.*, 411

U.S. 356, 365, 93 S.Ct. 1652, 1658 (1973). This logic holds whether the adjudicator is an Article III court or an Article II administrative adjudicator.

The practical obstacles to judge-made solutions for problems of statutory implementation are overwhelming. With respect to the §503 program, for instance, both the original waiver regulations and the position-based coverage regulations issued in 1996 demonstrate the immense real-life knowledge OFCCP brought to bear in translating the §503 ideals of affirmative action and nondiscrimination into a durable and fair enforcement program. On the outside, the program had to deal realistically with the esoterica of federal contracting and be flexible enough to accommodate change in business practices and federal contract needs. On the inside, the program had to be staffed, managed, and budgeted in light of all the agency's responsibilities, including responsibilities under other statutes, and be flexible enough to accommodate change in administration policies. It is understatement to say that courts have nowhere near the experience and expertise needed to develop *viable* solutions to specific interpretive and interstitial problems.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 837, 104 S.Ct. at 2793. "Indeed, the judgments about the way the real world works that have gone into [the agency policy under review] are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference." *LTV Corp.*, 496 U.S. at 651-652, 110 S.Ct. at 2679 (internal footnote omitted).^{10/}

^{10/} This is undoubtedly why, in a rare instance of a court purporting to resolve a statutory "ambiguity" without deference to the agency, the court ultimately reached its "independent" decision by relying on the agency's view. *O'Connell v. Shalala*, 79 F.3d 170, 179 (1st Cir. 1996). After asserting that the question to be decided required resolution of ambiguous statutory text and that the agency had failed to supply an authoritative interpretation, the court declared it would decide "without the [agency's] finger on the scale." But in actuality, the court ended up affirming the agency position on the ground that "Congress more likely intended the statute to be read as the Secretary urges." *Id.* A classic *Chevron* ruling.

D. *Chevron* analysis is an appropriate tool for the Board to employ when presented with OFCCP's view of the meaning of §503

We think these principles are equally applicable to agency adjudications when the department head has allocated agency functions in a manner similar to the allocations of functions among Article III courts, the Legislative Branch, and the Executive Branch. All authority and responsibility for implementing §503 was delegated by statute and by Presidential Order to the Secretary of Labor. 29 U.S.C. §793 (1988); Executive Order No. 11,758, 39 Fed. Reg. 2075 (1974). The Secretary of Labor in turn delegated the enforcement and rulemaking responsibilities to the Assistant Secretary for Employment Standards (who in turn delegated to OFCCP). Sec'y Order No. 75-2. Thus, OFCCP became the "administering agency" within the Department of Labor. Consistent with the delegation order, the implementing regulations provided that the head of OFCCP, acting as the Secretary's delegate, had the authority to supply necessary interpretive rulings. See 41 C.F.R. §60-741.54 (1984) ("[r]ulings under or interpretations of the Act and the regulations contained in this Part 741 shall be made by the Secretary or his or her designee"); 57 Fed. Reg. at 48,105 (proposing to amend the regulation to change "Secretary or his or her designee" to the "Director of OFCCP" "in order to reflect current OFCCP practice"), codified at 41 C.F.R. §60-741.83 (1999) (specifically naming OFCCP as the agency responsible for interpretative guidance under §503). As the administering agency, OFCCP fulfills its interpretive function by, when necessary, probing the implications of the statutory or regulatory text, the legislative goals and purposes, significant legislative history, and its own experience and expertise in administering §503 and other employee protection laws.

With respect to adjudicatory functions under §503, the Secretary delegated authority to conduct trial-type hearings to the Department's Office of Administrative Law Judges (OALJ). Cf. 43 Fed. Reg. 49,240, 49,262 (1978), codified at 41 C.F.R. §60-30.14 (1992). The Secretary of Labor at times reserved to him or herself authority to review appeals from the recommended decisions of the OALJ and to issue the Department's final order. At other times the Secretary delegated that authority to subordinates in the Department. Most recently, the Secretary delegated to this Board authority to review appeals from OALJ recommended decisions and to issue final orders in enforcement cases under §503. The Administrative Review Board shall "act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of . . . Section 503 of the Rehabilitation Act of 1973 as amended. . . ." Sec'y Order No. 2-96; 61 Fed. Reg. 19,978 (1996). Thus, ARB provides the adjudicative service for OFCCP within the Department of Labor that reviewing courts and independent administrative adjudicative agencies like the OSH Commission provide administering agencies in a larger arena.

When Congress has designated one agency to perform the rulemaking/enforcement function and a separate agency to perform the adjudicative function, the rulemaking/enforcement -- "administering" -- agency, not the adjudicating agency, is generally responsible for providing necessary interpretations of the statute and implementing regulations. In *CF&I*, for example, the Court held that OSHA's reasonable interpretations of the regulations it promulgated and enforced were binding on the Occupational Safety and Health Review Commission, which was

responsible solely for administrative adjudication. The Court characterized OSHA's "power to render authoritative interpretations" as a "necessary adjunct of its powers to promulgate and to enforce national health and safety standards." The OSHRC, by contrast, served as a "neutral arbiter" without policymaking powers. *CF&I*, 499 U.S. at 152-153. See also *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697, 111 S.Ct. 2524, 2533 (1991) (citing *CF&I* for the proposition that Secretary of Labor was entitled to deference with regard to her interpretations of the Black Lung Benefits Act for use in identifying and classifying medical eligibility criteria; thereby showing that the logic of *CF&I* applies to agency interpretations of its enabling statute as well as to agency interpretations of its own regulations).

The Supreme Court reached the same result under another statute administered by the Department of Labor, the Longshore and Harbor Workers' Compensation Act as amended, 33 U.S.C. §§901 *et seq.* (1986) (LHWCA). The LHWCA assigns responsibility for initial adjudication of disputed claims to Administrative Law Judges, 33 U.S.C. §919(d), appeals to the Benefits Review Board (BRB), *id.* at §921(b), and rulemaking and enforcement to the Secretary of Labor, *id.* at §939(a). The Secretary in turn delegated her responsibilities to the Office of Workers' Compensation Programs (OWCP). In *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 134, 115 S.Ct. 1278, 1287 (1995), the Court held that OWCP "retains the rulemaking power . . . which means that if [its] problem with [a] decision of the BRB is that it has established an erroneous rule of law . . . [OWCP] has full power to alter that rule." *Cf. Potomac Elec. Power Co. v. Director, OWCP*, 499 U.S. 268, 278 n.18, 101 S.Ct. 509, 514 (1988) ("*PEPCO*") ("It should also be noted that the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts"). See also *Energy West Mining Co. v. Federal Mine Safety and Health Review Commission*, 40 F.3d 457, 462 (D.C. Cir. 1994) (under Mine Act, which delegates rulemaking and enforcement to the Secretary of Labor and adjudication to the Federal Mine Safety and Health Review Commission, the Secretary's interpretation of Mine Act regulations is "'emphatically due' deference even when it conflicts with [the FMSHRC] interpretation"). *Accord Secretary of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 114-15 (4th Cir. 1996).

Thus, principles of *Chevron* deference appropriately could have been argued by OFCCP when the agency appeared before the Assistant Secretary in 1994 and before this Board in 1996. Under this view, OFCCP's "position-based" approach to §503 coverage should have received deference from Labor Department adjudicators, but only if OFCCP had provided a cogent and independent explanation for its position based on such factors as statutory language and goals, legislative history, etc., and not merely an unexamined interpretation of a district court decision. Our overview of the statutory and regulatory interpretive process, *supra*, is provided to resolve any confusion that may have existed among the parties to this case, and to bring greater clarity in any future litigation to the respective roles of Labor Department enforcement agencies and agency adjudicators.

III. DECISION ON THE MERITS

OFCCP charged Keebler with violating 41 C.F.R. §60-741.6(a) (1992) by failing to take affirmative action on DeAngelis' behalf, §60.741.6© (1992) by adhering to physical job qualification requirements which screened out DeAngelis as a qualified handicapped individual but were not job related or consistent with business necessity or the safe performance of the job, and §60-741.6(d) (1992) by failing to make reasonable accommodation to DeAngelis' physical limitations.

Keebler claimed that it terminated DeAngelis because her seizures created a reasonable probability that she would substantially harm herself and no reasonable accommodation was available. Keebler also asserted below that it would have fired her anyway when it discovered that DeAngelis did not report her epilepsy on her initial medical information form.

A. Burden of Proof and Standard of Review

Departmental regulations applicable to this case provide that “[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act. 5 U.S.C. 554; 29 C.F.R. §18.26 (1999). Under the APA, the standard of proof in administrative adjudications “is the traditional preponderance-of-the-evidence standard.” *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (construing the provision at 5 U.S.C. §556(d) (1996) that provides, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof”); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994) (reaffirming *Steadman* and repudiating statement in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469 (1983), that the proponent of the agency order has the burden of production and the respondent has the burden of persuasion). Our review is *de novo*. 5 U.S.C. §557(b) (1996).

B. Findings of Fact

DeAngelis applied for a position as a production assistant in Keebler's Raleigh, North Carolina plant in November 1984. The application process required her to complete an employment application form and a medical questionnaire and to undergo a physical examination. Under the heading “Medical History,” the application form asked, “Are there any physical limitations or health factors that may affect your performance in the job for which you are applying?” DeAngelis checked “no.” On the medical questionnaire, DeAngelis wrote “none” on the line for “serious injuries or illnesses.” During her pre-employment physical examination by the company physician, DeAngelis made no mention of having epilepsy or seizures. Resp. Exh. 6, 14, Tr. 234.

At the hearing, DeAngelis testified repeatedly that she did not tell Keebler or the examining physician about her epilepsy or seizures because she considered that irrelevant to her ability to work. “I didn't feel it relevant at the time and they didn't ask.” Tr. 22. “I do not have any physical limitations or health factors; and as far as the epilepsy, I wasn't planning on contracting mononucleosis. Therefore, it didn't pertain to me.” Tr. 30. (The reference to

mononucleosis reflects the fact that DeAngelis had mononucleosis while working at Keebler, which caused her to have more seizures than if she had not been ill.)

DeAngelis' job, production attendant, involved the packaging of snack foods. Packaging was accomplished in five steps at five work stations: inspection, box making, divider insertion, packing, and loading. At the inspection station, attendants inspected the loose snack pieces as they passed on a conveyor belt, picking out malformed, burned or broken pieces and any foreign material. At the box erector station, attendants fed large flat cardboard pieces into a machine that folded and glued the cardboard into boxes and replenished the glue pot as needed. At the insertion station, attendants inserted dividers into the boxes. At the packing station, attendants checked bags of snacks for leaks or other problems as they arrived by conveyor from the bagging machine and placed them into shipping cartons. At the take-off/stretch-wrap station, attendants loaded filled cartons onto large pallets, then pulled plastic wrap around each filled pallet and kept a production count. Resp. Exh. 3, 20, Tr. 306.

Production attendants were also responsible for unjamming equipment, keeping the area clear throughout the shift, and cleaning seasoning from three scales situated above the conveyor belts and work stations. The scales had to be cleaned two to five times per shift as different loose snack products arrived for packaging. Production attendants gained access to the scales and other overhead equipment by climbing stairs or a ladder to catwalks about ten feet above floor level and parallel to the production lines below. The catwalks had guardrails on the side facing away from the scales, but not on the side facing the scales. This meant that the attendants had to lean over open space between the catwalk and the scales to reach the scales for cleaning. A video tape of the packing operations shows that the open space between the scales and the catwalks varied in size, some spaces appearing large enough for a worker to fall through to the floor below, and smaller open spaces posing the risk that a worker accidentally stepping into the opening would pitch forward or sideways into the equipment below. Similarly, an attendant walking along the catwalk could accidentally slip or overstep into spaces between the catwalk edge and the equipment. Resp. Exh. 22, Tr. 292, 296-97.

Keebler required production attendants to rotate through the five work stations at least once or twice per shift in order to protect them from repetitive motion injury and to help keep them alert. Tr. 223, 241.

Production attendants were exposed to hazards in performing their work. The moving conveyor systems could pull fingers, hands or even hair into in-going nip points. The glue at the box erecting station was 325 to 350 degrees Fahrenheit, and over-sprays of hot glue had caused severe burns. The floors were sometimes slick from glue, dropped seasoning and snack pieces. The rotating table and mechanical arms at the boxing station were also dangerous. Heavy tow motor traffic was a constant hazard. The tow truck drivers' forward view was often obscured by the tall loads in front of them, and the trucks entered the packaging area through a curtain that prevented both the driver and production attendants from seeing each other before the truck entered the area. The high noise level made it difficult for workers to hear each other

or distinguish warning shouts or horns from general background noise. Resp. Exh. 22, Tr. 228, 241, 286, 288, 307-310, 312, 330.

Occupational injury and illness records for the years 1983 through 1986, which Keebler kept in compliance with OSHA regulations, show that the production attendants in Raleigh experienced 27 recordable injuries. These included broken and lacerated fingers, strained muscles, bruises, a broken wrist and an abraded eye. Resp. Exh. 9.

DeAngelis was first diagnosed with epilepsy at age two. For most of her life, including the time she worked at Keebler, DeAngelis took 250 mg. of an epilepsy medication called Mysoline four times a day. The Mysoline did not, however, prevent her seizures. DeAngelis testified at the hearing that during her five months as a Keebler employee, she had “possibly” 30 seizures. She testified that she had numerous seizures at subsequent short-term jobs: two to three a day at Hardees; one seizure at Eckerd’s; ten seizures at Burger King; a “couple” while working at Tons of Toys. Resp. Exh. 3, Tr. 71, 91-95.

DeAngelis testified that her partial complex psychomotor seizures are marked by a characteristic pattern of sensations and behavior. First, DeAngelis testified, she experiences an “aura,” which gives her a feeling like “fear . . . in the middle of my stomach to . . . just the whole area and the top of my arms sometimes.” Tr. 21. DeAngelis described her characteristic activity during a seizure as freezing in place, walking, bumping into things, walking into things she did not intend to walk into, talking, or engaging in a “picking” motion. DeAngelis believes that every seizure is preceded by an aura, but not all auras are followed by a seizure. The frequency of her seizures is affected by her general health. The number of seizures she experiences increases when she has a cold or is otherwise unwell and when she is pregnant. Tr. 18-20, 60-61, 65.

Co-workers described five incidents they witnessed in which DeAngelis appeared unaware of her surroundings and engaged in characteristic psychomotor seizure behaviors. On March 12, Chad Moore, DeAngelis’ supervisor, found her standing near the packing station while bags of product fell steadily to the floor. Moore approached her and asked her what was wrong. She seemed unable to communicate and looked “extremely pale, sweating quite a bit, and a really blank expression.” It was close to two minutes before he could see some movement and expression in her face, “but it was probably three or four minutes before she actually could talk to me.” Tr. 278. Then her speech was extremely vague; she could not answer questions except to shake her head and start to speak. When she was able to speak, DeAngelis told Moore she needed to sit down for a minute and that she had a “cold or something like that.” Tr. 279.

Moore was worried and concerned “for her safety as well as the interruption in the flow of the product; and what we had to do was shut down a machine. Majorly [sic] for her safety; concern that she could have been caught in the conveyors that were running at the time and that kind of stuff.” Tr. 279. Moore reported the incident to Alton Holland, the production manager, because he “had never experienced anyone having this kind of a problem on the floor.” Tr. 280.

About a month later, Moore testified, he observed DeAngelis at the box maker “in about the same condition. She had stopped running the machine, was not putting dividers in the boxes, and she had backed away from one part of the machine. . . . [A]nd when I approached her, with the same blank expression, some sweating again, and she was unable to communicate with me when I asked her again what the problem was.” Tr. 281. This time DeAngelis appeared to be off balance and swaying. Again, it was three to four minutes before she began to respond to Moore, and then only slowly at first. Moore’s concern for DeAngelis’ safety only increased, and he reported this incident to Holland as well. Tr. 281-283.

In late February or early March, Holland found DeAngelis frozen at the conveyor belt with fifty or sixty bags of snacks on the floor around her and more coming down. Bags came off the conveyor at that point at a rate of 30 to 35 bags a minute. When Holland could get no response from her, he turned off the machine, came back to her, and was still unable to elicit any response. About 45 seconds to a minute later, DeAngelis began to respond but did not acknowledge that Holland was talking to her. She simply began packing again, and Holland cleaned up the spilled bags himself. Tr. 312-314.

On another occasion, Holland noticed her in a “stuped [sic] state at the box glue machine” with her hand stretched down to about two inches from the open glue pot. Tr. 314. She had evidently begun to replenish the glue in the glue melting pot with chips of hard glue. At some point, however, she appeared to be frozen in place and spilled glue chips were scattered on the floor around her. Holland took her by the arm and led her back to his office, where she sat without responding to him for four to five minutes. Then she told him she had mononucleosis and was not feeling well. Tr. 315. Holland said yes, she should go home, but she should also see the company doctor. Holland testified that he made an appointment for DeAngelis with the company doctor for the next day, “[b]ecause I felt there was something wrong and I did not know what was wrong. And I don’t want anybody hurt.” Tr. 316.

Holland also testified that he had “three or four different reports [from other employees] that Monica was having problems.” Tr. 316. One of these employees was Moore. Another was a man on temporary assignment in the area, who told Holland he thought that DeAngelis looked sick and as if she did not know what she was doing or where she was. A third was from Lanny Williams, a fork lift driver. According to Holland, Williams reported that he had almost run over DeAngelis one night. Williams said he blew his horn and assumed DeAngelis would move out of the way, but she did not move and remained standing directly in the path of the fork lift when it came through a curtain. Tr. 315-318.

Holland reported the fork lift incident to the plant manager, Ratliff, because Holland “didn’t want anything to happen to someone in that plant and him not be aware of it. It was a potential.” Tr. 318-319. In fact, it was Ratliff who gave Holland permission to make an appointment for DeAngelis with the company doctor. Tr. 318.

Holland's greatest fear was that DeAngelis "could get an arm cut off or burnt. The seals on the jaws of the machine will just burn you terrible. The glue pot, when you pull hot glue off somebody, you take a lot of their skin off with them." Tr. 319.

When Ratliff was replaced by a new plant manager, Doan Edmundson, Holland reported the incidents to Edmundson. "I told Doan that we had a lady, a production attendant, that had what I termed as some sort of seizures, because of the way she was acting. And that Ratliff and I had talked about and we had sent her to the doctor and that the doctor had initially said she was okay to work. And then later on, when we observed more seizures, more of the same kinds of things, she was not able to work." Tr. 320. Holland recommended that DeAngelis be transferred from his shift "because it was an unsafe situation." *Id.*

Holland also testified that he became aware of DeAngelis early in her employment because he frequently found her running inside the plant. Running was not allowed because the floors were slick at times and unsafe. "Yes, what caused me to start observing her, to be quite honest, was her constantly running in the plant. And this is something I talked to her about often." Tr. 311. The first time Holland stopped her, she told him she was not running. And when he asked her where she was working, she said she did not know. *Id.*

At the hearing, DeAngelis denied that she had a seizure at the glue pot. She denied being endangered by a moving tow motor while in a seizure state. She insisted that her auras always gave her adequate time to move into safety before the onset of a seizure. DeAngelis testified that she had about 30 seizures during her employment at Keebler, five of which occurred while working. Tr. 73, 74, 99-100.

Two medical experts testified at the hearing. Dr. Wannamaker, a neurologist specializing in epilepsy, testified for OFCCP. On direct, Dr. Wannamaker testified that in his expert opinion it would be safe for DeAngelis to continue to work as a production attendant. He reached this conclusion by applying his expert knowledge of epilepsy to what he learned about the production attendant job during a tour of the factory and the information DeAngelis gave him about her medical history and current condition. Tr. 122-129.

However, Dr. Wannamaker soon became the star witness for the defense. Under cross examination Dr. Wannamaker stated that he has a bias in favor of employing individuals with epilepsy and that he was "willing to accept" that DeAngelis would be facing a "reasonable probability of significant injury. . . [i]f she fell" and "if she got burned." Tr. 158, 199, 200. He testified that his opinion that DeAngelis could safely return to work was based on his understanding from his interview with DeAngelis that she had only one or two on-the-job seizures at Keebler, Tr. 160, that her auras lasted up to one minute, Tr. 170, and that her seizures were not associated with movement, Tr. 174, 196. Resp. Exh. 3. He was not aware before he appeared to testify that DeAngelis froze in place. Tr. 197. He did not previously understand that her seizures involved rocking, staggering, swaying, the possibility of losing her balance or bumping into things. Tr. 196. He stated that "if she had numerous seizures, then I would be concerned that should she be working, period." Tr. 184. The reason he was not concerned about

DeAngelis climbing the ladder to the walkway was because it had been his understanding that she did not have many seizures. Tr. 185. He testified that two to three seizures a day, even two to three seizures a week are “probably too many.” Tr. 186. If DeAngelis did have three seizures a month and each involved freezing, Dr. Wannamaker thought, she should work only under restrictions. Tr. 187. If DeAngelis had told him she stays frozen in place, his opinion might have been different. Tr. 197. Dr. Wannamaker was “uncomfortable” and “concerned” about DeAngelis working at the glue pot area but was “willing to take the risk.” Tr. 199.

Dr. Imbus, a specialist in occupational medicine, testified for Keebler. Dr. Imbus testified that while he was not a specialist in the treatment of epilepsy, he “had considerable experience with the workplace concerns of epilepsy and therefore I feel that I am quite experienced in this.” Tr. 349. Based on all the testimony presented at the hearing, DeAngelis’ medical history, and his evaluation of the production attendant job, Dr. Imbus testified that in his expert medical opinion the hazards facing DeAngelis were “considerable to the extent that it was probable that she would sustain a significant injury at that plant.” Tr. 342. He did not consider DeAngelis’ auras long enough to assure her ability to get to safety before the onset of a seizure. Tr. 352. He enumerated a list of circumstances that can provoke a seizure: alcohol intake, hyperventilation, stopping treatment, sexual or anger arousal, some drugs, emotional stress, flickering lights, and shortage of sleep. Tr. 364. On rebuttal, Dr. Wannamaker agreed with Dr. Imbus that each of these circumstances can provoke a seizure. Tr. 375.

DeAngelis testified that she first told Keebler about her epilepsy after her first seizure in a conversation with Holland and that Holland then urged her to see the company physician. “I had told him at that point that I had epilepsy and that’s what it was: it was an epilepsy seizure and it didn’t pose any problem, you know, as far as it would not be hazardous as far as working there. Then he said, ‘well, all the same, you need to see a physician.’” Tr. 26. As a result, DeAngelis went to Dr. Beason on March 14, 1985. Tr. 26. Dr. Beason cleared her to return to work with the following note: “I have examined Ms. DeAngelis today. She has a history of psychomotor epilepsy which should not endanger her or her co-workers. Feel free to call with questions.” Plaintiff Exh. 8.

DeAngelis continued to work, but her seizure activity increased and she was afraid that taking sick leave would cause her to lose her job since she was still in her probationary period. Tr. 25. However, when she learned that another employee at Keebler had epilepsy with seizures more severe than her own, she felt free to be more forthcoming. “My seizure activity continued. However, prior to this I had found out that there already was somebody there working with -- who had grand mal epilepsy. . . . [A]ny way, she was there and I figured there’s no problem. So what happened then was I was continuing to work, hoping my cold would go away. . . . Then, when I finally got to the point -- it came to a head where I was feeling weaker and weaker, and I realized that this thing was getting out of hand. So at that point I felt that I had to see a doctor. I was going to see the company doctor because I didn’t have one of my own.” Tr. 26-27. Consequently, DeAngelis went to company physician Dr. Forsyth on April 16. Plaintiff Exh. 9, Tr. 27.

As Dr. Forsyth understood the information DeAngelis gave him, she had two to three to six on-the-job seizures at Keebler. Dr. Forsyth did not forbid her to return to work because, he testified, he “was not aware of the severity of her symptoms.” Tr. 267. Dr. Forsyth wrote a return-to-work note stating that, “Monica DeAngelis is ill and under my care. She should be able to return to work on Monday, April 22, 1985.” Plaintiff Exh. 9. Dr. Forsyth also concluded, however, that DeAngelis needed to see a neurologist and made an appointment for her. Tr. 103, 233. DeAngelis did not return to work on April 22, but took sick leave instead. Tr. 28. Dr. Forsyth was later notified that DeAngelis did not keep the appointment with the neurologist. Tr. 268.

Dr. Forsyth changed his opinion about DeAngelis’ condition when Doan Edmundson called him in mid-May to discuss her possible return to work. (At some point in May, DeAngelis sought to return from sick leave, but a company lay-off prevented that. Tr. 28.) According to Dr. Forsyth, in this phone conversation Edmundson told Dr. Forsyth that DeAngelis was still having seizures and described the kinds of seizures employees had observed. Based on this information and the fact that DeAngelis did not keep the appointment with the neurologist, Dr. Forsyth recommended that she be terminated because she was at significant risk of serious injury.^{11/} Tr. 268

The administrative law judge concluded that the incidents at the packing station, the box making station, and at the glue pot occurred as described by the Keebler employees. He was persuaded primarily by the fact that in a pre-trial deposition DeAngelis admitted to having these seizures and offered no explanation for her contrary testimony at the hearing. We also find that these seizures occurred as described by Keebler’s employees. However, we do not rely solely on the unexplained discrepancy between DeAngelis’ deposition admissions and her hearing denials. In our view, the nature of DeAngelis’ seizures makes her unsupported denials inherently implausible. DeAngelis herself testified that she is not aware of what she is doing during a seizure and has no memory afterward of what occurred. Under these circumstances, categorical denials, without any corroborating evidence or plausible explanation, are insufficient to rebut testimony that includes details fully in accord with DeAngelis’ own description of her characteristic seizure behavior.

We also find that DeAngelis’ epilepsy did in fact manifest itself in running, something that DeAngelis apparently did not realize. We find Holland’s testimony credible on this point. He stated that he first began to watch DeAngelis because he found her repeatedly running on the

^{11/} OFCCP argues that Dr. Forsyth is not credible in his account of the phone conversation because Edmundson could not have told him DeAngelis was still having seizures, since DeAngelis had not been at work since April 22. OFCCP makes this claim in support of its theory that Edmundson unilaterally decided to terminate DeAngelis and that Dr. Forsyth had no new information that would justify his alleged recommendation to terminate based on safety concerns.

We regard the point as inconsequential, in light of the other new information Dr. Forsyth had, and our independent judgment that DeAngelis often tried to downplay the seriousness of her condition.

plant floor, even running past the glass wall of his cubicle. But when he stopped her she denied that she had been running. Dr. Imbus testified that running can be a symptom of the type of complex partial seizures that DeAngelis had. With respect to DeAngelis in particular, Dr. Imbus was struck by her denials. “I, of course, was very concerned about the fact that apparently she had been seen running on various occasions, but denied that she ran. It makes one question whether or not she really knew whether she was running. This may have been a manifestation of a seizure.” Tr. 345. Dr. Imbus’ testimony was unrebutted.

DeAngelis’ apparent unawareness of her running behavior, Tr. 62, also undermines the notion that DeAngelis recognized the seriousness of her condition. DeAngelis was adamant that her seizures are always preceded by an aura and always take the form of freezing in place, engaging in picking motions, staggering, walking, or bumping into things. The difficulty with this line of reasoning is that nothing about it precludes the possibility that DeAngelis also has seizure activity in the form of running that she does not remember. Indeed, the unconscious running incidents could well be the source of her belief that she sometimes has auras without seizures.

We find that DeAngelis’ testimony overall paints the picture of a person determined to work, even gallantly determined. The many low-paying but demanding jobs she took before and after Keebler are poignant evidence of this. Unfortunately, a preponderance of the evidence also shows that in her efforts to be hired and to stay employed by Keebler, DeAngelis understated -- as much to herself as to Keebler -- the seriousness of her condition and the safety hazards it posed. For example, DeAngelis sought to justify her failure to tell Keebler about her seizures during the application process on the ground that she did not “plan” to contract mononucleosis, thus implying that but for the mononucleosis, she would have had few seizures, perhaps even none, while working there. But as DeAngelis herself conceded, even the common cold could precipitate a significant increase in her seizure activity.

Her testimony that she could always put herself out of harm’s way during the aura preceding a seizure or even during a seizure is simply not plausible. It is flatly inconsistent with the unimpeached testimony of co-workers and supervisors who encountered her in obviously helpless states near moving conveyor belts, in the path of a tow motor, with her hand inches from 300-plus degree liquid glue. At the hearing, DeAngelis said the length of her auras varies and over the course of her testimony gave estimates ranging from 20 seconds to two to three minutes. Tr. 19, 98, 99. Dr. Wannamaker testified she told him the range was from 30 to 60 seconds. Dr. Wannamaker also testified that the typical range for someone with her symptoms would be 20 to 30 seconds. Tr. 127. We see this as further evidence of DeAngelis’ unwillingness to acknowledge the extent of her vulnerability.

And we find it significant that DeAngelis felt free to go to Dr. Forsyth for treatment of a cold (later diagnosed as mononucleosis) that she knew was the cause of her increased seizures when she learned that Keebler was already employing a person with grand mal epilepsy. DeAngelis well understood that she could not perform adequately when she was having on-the-job seizures -- auras notwithstanding. As soon as she felt it was safe to tell the company about

seizures that impaired her ability to work, she did. It seems clear to us that DeAngelis first held back the fact that she had epileptic seizures and then tried to minimize their seriousness not because she thought this was irrelevant, but because she knew it was.

C. Conclusions of law

OFCCP's burden under §503 is to prove (1) that the employee has a disability or is perceived as having a disability within the meaning of the Act, (2) that the employee suffered an adverse employment action because of the disability, (3) that the employer was a federal contractor at the time of the adverse employment decision (or, in this case, that the employee worked on the federal contract), and (4) that the employee is able to perform the essential functions of the job with or without reasonable accommodation. At this stage, only the last element is at issue.

The regulations in effect when Keebler terminated DeAngelis provided in pertinent part that a qualified handicapped individual "is a person with a physical or mental impairment that "substantially limits one or more of such person's major life activities" if that individual is also "capable of performing a particular job, with reasonable accommodation to his or her handicap." 41 C.F.R. §60-741.2 (1992). The regulations further provided that an employer charged with having screened out a qualified handicapped individual had the burden of proving that the screening out was justified by business necessity or safe performance of the job.

Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. **The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.**

41 C.F.R. §60-741.6(c)(2) (1992) (emphasis added).

On its face, the last sentence of §60-741.6(c)(2) suggests that the employer has the ultimate burden of persuasion concerning the employee's ability to perform the job safely with or without accommodation. However, the regulation cannot be construed to put the ultimate burden of persuasion on the employer, because that would violate the APA and the general principle that the party best positioned to present the requisite evidence bears the burden of proof. *See* discussion concerning APA burden allocation *supra*.

Construed in a manner consistent with the APA, §§60-741.2 and 60-741.6(c)(2) (1992) allocated the burdens of proof as follows. OFCCP had the burden to produce credible evidence that DeAngelis' on-the-job seizures did not impair her ability to perform her work safely with or without accommodation. If Keebler did not rebut OFCCP's showing with credible evidence

that the production attendant position jeopardized DeAngelis' safety, then OFCCP would win (assuming business necessity was not an issue in play). If OFCCP presented enough credible evidence that DeAngelis was not in danger to shift the burden to Keebler and Keebler produced credible evidence that she was in danger, and if the conflicting evidence appeared evenly balanced, OFCCP would lose. This is because the ultimate burden of persuasion never leaves the proponent. *Cf. Greenwich Collieries*, 114 S.Ct. at 2256-2257; *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998) (ADA); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998) (ADA); *Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131 (2d Cir. 1995) (§504); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1182-1183 (6th Cir. 1996).^{12/}

OFCCP long ago separated the general question of safety into constituent parts. The first more specific question is "whether the employee's continued employment in the designated position would pose a 'reasonable probability of substantial harm.'" *OFCCP v. Texas Indus., Inc.*, No. 80-OFCCP-28 (Ass't Sec'y ESA June 7, 1988), available in, www.oalj.dol.gov; cf. 29 C.F.R. §32.14 (job qualification assessment under § 504).

The "reasonable probability of substantial harm" concept has been further refined. It has become settled that the "probability of harm" determination (we use this shorthand phrase for ease of discussion only) cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. Instead, the inquiry must focus on whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm. *Cf. School Bd of Nassau County, Fla. v. Arline*, 480 U.S. 273, 284-285, 107 S.Ct. 1123, 1129 (1987) ("[T]he basic purpose of §504 [and §503] is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others," and "The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments"). Specific factors to be considered in evaluating the probability of harm are: (1) the duration of risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. *Id.* at 1130.

Moreover, the probability of harm to the disabled worker must be discernibly greater than the probability of harm faced by individuals without disabilities in the same position. *Texas Indus., supra*. *Cf. D'Amico v. City of New York*, 132 F.3d 145, cert. denied, ___ U.S. ___, 118 S.Ct. 2075 (1998) (§504); *Mantolete v. Bolger*, 767 F.2d 1416, 1422-1423 (9th Cir. 1985) (§501); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir.1982) (§504). *Compare Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996), cert. denied, 520 U.S. 1274, 117 S.Ct. 2454 (1997) (when added risk cannot be quantified in a §504 case, university

^{12/} Many aspects of the ADA and §§501, 503 and 504 of the Rehabilitation Act are conceptually interchangeable. The claimant's burden of proving ability to perform the essential functions of the job with or without accommodation is one of them. See e.g., *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196 (1998); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997).

may decide based on medical evaluations whether to permit student with heart defect to play intercollegiate basketball; the court's role is the limited one of deciding whether the university acted rationally).

In the instant case, the ALJ concluded that “[t]he fact that Ms. DeAngelis may freeze in place, walk, bump into things, or walk into things she did not intend to walk into during a seizure . . . coupled with the fact that the production attendant position involves work around hazardous machinery and in the vicinity of frequent fork lift traffic, compels the conclusion that seizures around hazardous machinery and fork lift traffic present a serious and imminent threat.” He rejected OFCCP’s argument that DeAngelis’ auras gave her adequate time to remove herself from such dangers.

OFCCP contends that the evidence does not support the ALJ’s recommended finding because the evidence shows that DeAngelis’ condition while at Keebler was atypical and short-lived, and her auras are dependable mechanisms for avoiding harm. But DeAngelis herself testified that her seizure activity increases even with a cold and that the only time in her life she had a sustained remission was for three months as a teenager. Moreover, DeAngelis’ post-Keebler employment history squarely contradicts OFCCP’s claim that DeAngelis’ condition at Keebler was atypical and short-lived. And OFCCP’s medical expert conceded that many commonplace occurrences such as lack of sleep influence seizure frequency. In fact, DeAngelis’ efforts to minimize the seriousness of her seizures both to her examining physicians and at the hearing suggest that her estimates of the number of seizures she had before she contracted mononucleosis were on the low side.

The risks to which production attendants are exposed are indubitably serious. As for the additional risk to DeAngelis, we find an observation by the Second Circuit in *D’Amico* particularly apt: “[W]here the issue to be decided is the likelihood that an event will occur, the fact that it did occur is perhaps the most probative evidence possible.” 132 F.3d at 151. The testimony of other Keebler employees describing various seizures they observed, which we accept as plausible and unrebutted, are the prior events that prove both the likelihood of future injury and the fact that the risk for DeAngelis was greater than for production attendants without seizures. That DeAngelis was not run over, burned, or dragged into ingoing nip points was due to pure chance. Her good luck could not be expected to continue indefinitely.

OFCCP argues for the first time on appeal that Keebler did not prove that DeAngelis would have no elevated risks if Keebler made accommodations such as transferring the most dangerous tasks to other production workers. This argument rests on the testimony of Dr. Wannamaker, particularly Dr. Wannamaker’s responses when he was confronted with evidence that DeAngelis’ condition was more serious than he had realized. We think off-the-cuff suggestions of this type, made for the first time during a hearing, are of limited value. *Cf. Crandall v. Paralyzed Veterans of America*, 146 F.3d 894, 898 (D.C. Cir. 1998) (stating in §504 case, “Especially in any area where medical appraisals are relatively contestable or contingent on patients’ self-descriptions, dispensing with a notice requirement would invite employees to manipulate the statutory protection, securing *post hoc* disability diagnoses that encompass the

conduct leading to the firing”). In this particular case, there is further reason to be dubious of such testimonial suggestions. They were made by a physician who said he was biased in favor of returning the employee to work and was personally “willing to take the risk” that the suggested accommodations might not pan out. We see no place in a §503 analysis for using the personal willingness of a consultant physician that his patient and his patient’s employer take a risk of injury as a measure of anything.

More importantly, the employer has no duty to accommodate when the employee rejects the very notion. *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir.), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 586 (1996) (under ADA, “[I]f employee fails to request accommodation, the employer cannot be held liable for failing to provide one”); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (under ADA, employer and employee should work through an interactive process concerning accommodation, and the process should ordinarily be initiated by the employee’s request for accommodation); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 311 (3d Cir. 1999) (same).

When Keebler decided to fire her, DeAngelis was adamant that she was as capable of handling the job as anybody else, and made no request for accommodation. Indeed, from the day DeAngelis filled out her application to the day she testified at her hearing, her position was that epilepsy is not an illness or an injury, that she never had been and never would be hurt because of a seizure, and that her epilepsy was irrelevant to her job performance.

Below, OFCCP argued only that DeAngelis could competently and safely perform the job of production attendant because the alleged risks to her were at most *de minimis*. No accommodation argument was raised. The only remedies OFCCP sought were reinstatement with retroactive seniority and benefits, plus back pay and prejudgment interest. In his opening argument at the outset of the hearing, counsel for OFCCP stated “even if she were to have a seizure on the job, as she did during this time of mononucleosis, the hazards presented to her are not significantly greater than those to anybody else.” Tr. 11. In fact, OFCCP put Dr. Wannamaker on the stand to prove that DeAngelis’s on-the-job-seizures did not raise a significant probability of substantial harm. It was only under cross examination, when Keebler confronted Dr. Wannamaker with evidence that DeAngelis’ condition was materially worse than Dr. Wannamaker had understood from DeAngelis, that Dr. Wannamaker began to suggest how these serious risks might be addressed -- usually in the form of, “I would prefer” that someone else fill the glue pot, climb the ladder, work in the hot package sealing area, walk on the catwalk. Tr. 199.

OFCCP did not make this accommodation argument before the ALJ, and we decline to consider it when it is raised for the first time before us on review. Moreover, the very nature of accommodation militates against *post hoc* unilateral conclusions:

An employee’s request for reasonable accommodation requires a great deal of communication between the employee and employer. We recognized this in *Beck*, where we held that both parties bear

responsibility for determining what accommodation is necessary. *Beck*, 75 F.3d at 1135. We further explained that No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary.

Bultemeyer v. Ft. Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996) (as in original).

The employer generally has more knowledge than the employee about the physical and financial possibilities for accommodation. The employee has more knowledge about his or her limitations and needs than has the employer. In this case, the employee first tried to hide her disability from the employer and then insisted she could perform the essential functions of the job without accommodation. Her attitude on this point never changed. Thus, DeAngelis herself prevented an interactive process with Keebler when she was still employed there.

OFCCP also seems to argue that Keebler did not meet its burden of proving that terminating DeAngelis was necessary for safety reasons because Keebler did not prove that it made an adequate investigation into DeAngelis' medical and employment history. As we understand OFCCP's position, Keebler's alleged failure to investigate adequately is grounds, without more, for finding a violation of the Act. This is but a variant on the question whether an employer's failure to engage in an interactive process with an employee who requests accommodation can constitute a violation of the Act, even if it is proven that no accommodation was possible. The short answer is, no. *See, e.g., Phoenixville School Dist.*, 184 F.3d at 317 ("The ADA, as far as we are aware, is not intended to punish employers from behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made"); *Barnett*, 157 F.3d at 753 (discussing cases under both ADA and Rehabilitation Act; "an employer's decision not to engage in an interactive process may put it at peril, but it does not create liability independent from a resulting failure to accommodate. . .").

After all, the purpose of the Rehabilitation Act is remedial, corrective. It seeks not to punish employers but to promote integration of qualified individuals with disabilities into the work force at the least cost and disruption consistent with the goal. Nothing about the Rehabilitation Act or similar statutes suggests that Congress wished to punish employers for omissions that have no practical consequences in terms of fair opportunity for workers with disabilities. Certainly OFCCP has suggested to us no reason in logic or policy.

Moreover, the decision OFCCP cites for the proposition that inadequate investigation into the employee's medical and work history is grounds, *per se*, for a §503 violation does not actually support the claim. The case is *Mantolite*, and in that decision the Ninth Circuit simply applied the teaching of *Arline* -- that mere assumptions and unexamined impulses cannot support

an employer defense based on safety hazards. In that context the court stated that employers must gather and act upon specific information about the individual's medical and work history and the particulars of the job in question. Only this kind of fact-based, rational analysis could support the employer in court should its final determination be challenged.

For these reasons we conclude that OFCCP did not meet its burden of proving that DeAngelis was a Qualified Handicapped Individual.

D. Keebler's falsified application defense

Keebler argued below that it had a uniformly applied policy of firing any employee who materially falsified his or her employment application, that it would have fired DeAngelis on this ground alone, and that these facts established a complete defense to the §503 charge. Keebler relied particularly on *Salmon Pineiro v. Lahman*, 653 F. Supp. 483, 492 (D. P.R. 1987) ("it would be highly inequitable to require reinstatement with an accommodation where the plaintiff could be denied employment based on his falsification. The Rehabilitation Act seeks to promote and expand employment opportunities for the handicapped. However, it may not be used as a tool for those who seek employment by subterfuge"). Keebler has abandoned this argument. However, we pause briefly to note that this affirmative defense was not a dual motive defense, as suggested in the recommended decision. A mixed motive case is one in which the defendant acted in part out of impermissible motivating factors, and therefore bears the burden of production and persuasion on the question whether it would have made the adverse employment decision even in the absence of impermissible motive. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989) (overruled by statute in 1991 in ways not relevant to this discussion).

In this case, Keebler had only one motive for firing DeAngelis -- its belief that her seizures put her at significant risk of harm. Keebler did not learn that DeAngelis knowingly misrepresented her medical condition in her application papers until the meeting between DeAngelis and Edmundson that she requested in order to discuss her termination. Tr. 29, 231 - 234. At most, Keebler's falsification "defense" is an after-acquired-evidence claim that, if proved, could bear on remedy. Cf. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 852, 115 S.Ct. 879 (1995).

IV. CONCLUSION

Having previously ruled that Keebler's decision to fire DeAngelis was covered by §503, we now find that OFCCP failed to prove that DeAngelis was a "qualified handicapped individual capable of performing the job of production attendant with or without reasonable accommodation" within the meaning of the applicable regulations.

Accordingly, the complaint is DISMISSED.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

Member E. Cooper Brown, concurring:

I agree with the majority's ultimate determination on the merits, that OFCCP failed to prove that Ms. DeAngelis was a "qualified handicapped individual" within the meaning of Section 503 of the Rehabilitation Act. I also concur in the majority's opinion that the interpretive deference principle articulated in *Chevron v. N.R.D.C.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), provides appropriate guidance if the Board were called upon to review an administering agency's construction or interpretation of a statutory provision or regulation under its charge. I write separately because I nevertheless do not agree with the majority's assessment that *Chevron* requires remand where the administering agency fails to provide an interpretation of the statute or regulation to which interpretive deference could be accorded.

In its discussion of *Chevron v. N.R.D.C.* and its applicability to the instant case, the majority asserts that where the administering agency fails to provide an interpretation of a statute or regulation under its charge, adherence to *Chevron* requires, in most instances, remand to permit the administering agency to provide the missing interpretation.^{1/} To the contrary, I read *Chevron* to permit resort by the Board in such instance to traditional canons of statutory construction in order to determine the meaning of the statute or regulation at issue, without the necessity of remand.

Simply put, I view *Chevron* deference as inapplicable to the situation where the administering agency fails to provide an interpretation of the statute or regulation to which deference could thus be accorded. The Supreme Court, by way of introduction to its articulation of the principle of interpretive deference, notes that such deference is only of relevance "[w]hen a court reviews an agency's construction of the statute which it administers." *Chevron v.*

^{1/} In support of its approach the majority relies upon the "*Chenery* doctrine," which I consider neither applicable nor relevant to *Chevron* deference analysis. The genesis of the doctrine is found in two related Supreme Court decisions of the 1940s: *Securities & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); and *Securities & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). See generally Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199.

N.R.D.C., 467 U.S. at 842, 104 S.Ct. at 2781.^{2/} Consistent with this introductory clarification, the Supreme Court’s articulation of the deference principle clearly intimates that where a statute is found to be ambiguous, and the court is presented with no administrative interpretation to which interpretive deference is owed, the reviewing court is free to “impose its own construction on the statute.” 467 U.S. at 843, 104 S.Ct. at 2782.^{3/}

I thus read *Chevron* to mean that the Board is free, should it so choose, to impose its own construction on a statute or regulation where the administering agency has failed to provide a proper agency interpretation thereof. Indeed, I do not find my understanding of *Chevron* in this regard to be unique. In instances where a reviewing court has not been presented with an agency interpretation warranting *Chevron* deference, the courts have proceeded to interpret the ambiguous statute or regulation at issue. For example, in *O’Connell v. Shalala*, 79 F.3d 170 (1st Cir. 1996), the appellate court was presented with no agency interpretation of its regulation to which deference could properly be accorded. Consequently, the court “approach[ed] the statutory question without the Secretary’s thumb on the scale,” applying traditional canons of statutory construction including, *inter alia*, “common congressional statute-drafting practices.” *Id.* at 179-180; *accord United States v. 29 Cartons of ... an Article of Food*, 987 F.2d 33, 38 (1st Cir. 1993) (finding that “the purely legal question facing us in this case presents no occasion for deference,” the court went on to note that “[w]hen, as now, a court is persuaded neither by the validity of [the agency’s] reasoning; nor by the interpretive fit between the agency’s rendition, on the one hand, and the language and structure of the statute, on the other hand, a court should not defer.”). *See also Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (en banc), *aff’d* on other grounds, 516 U.S. 152, 116 S.Ct. 595 (1996); *Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816 (10th Cir. 1997); *In re Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1993) (en banc); *DOE v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325 (11th Cir. 1983).

^{2/} *See Thomas Hodgson v. Sons, Inc.*, 49 F.3d 822, 826 (1st Cir. 1995) (*Chevron* mandates deference “when a court is reviewing an agency decision based on a statutory interpretation.”); *In re Electronic Surveillance Evidence*, 990 F.2d 1015, 1020 n.5 (8th Cir. 1993) (*Chevron* addresses “the proper deference to be given to ‘an agency’s construction of [a] statute which it administers’.”).

^{3/} The *Chevron* deference principle reads in its entirety: “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, *as would be necessary in the absence of an administrative interpretation*. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron v. N.R.D.C.*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (emphasis added).

Justice Scalia put it most succinctly, and on point, in his concurring opinion in *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 216, 109 S.Ct. 468, 475 (1988): “Where an interpretive rule is held invalid, and there is no pre-existing rule which it superseded, it is obviously available to the agency to ‘make’ law retroactively through adjudication, just as courts routinely do (and just as we indicated the Secretary of Agriculture could have done in *United States v. Morgan*, 307 U.S. 183, 193, 59 S.Ct. 795, 800-801 (1939)).” 488 U.S. at 222, 109 S.Ct. at 479. Thus, assuming there were no OFCCP regulation or other agency interpretation in the instant case to which deference would be owed, I would conclude that the Board is not required to remand to OFCCP for its interpretation of Section 503 coverage. In my opinion, *Chevron* permits the Board to make that interpretation itself, applying traditional canons of statutory construction.

Of course, this is not the situation that is before the Board in the instant case. OFCCP, the agency charged with administration of Section 503, has provided the necessary interpretation of the relevant provision of that statute through promulgation of 41 C.F.R. §60-741.4(a)(2)(I), which the Board in turn held dispositive on the issue of coverage in December, 1996.^{4/}

Prior to *WMATA v. DeArment*, 55 (CCH) EPD ¶40,507, 1991 WL 185167 (D.D.C., Jan. 3, 1991), OFCCP’s long-standing interpretation of Section 503(a) required all-employee coverage. As the majority discusses, *WMATA* eliminated that interpretation. In the aftermath of the district court’s decision, the Board, on September 4, 1996, issued a Decision and Order dismissing the instant action on the ground that OFCCP had failed to establish that DeAngelis was a covered employee under Section 503 of the Rehabilitation Act. Immediately, OFCCP filed a motion for reconsideration based on its recently adopted 41 C.F.R. §60-741.4(a)(2). The new regulation, at subsection (a)(2)(I), set forth two separate coverage interpretation provisions. The first proviso addressed the scope of coverage under Section 503 and Part 60-741 for contractor employment decisions and practices occurring before the effective date of the

^{4/} *OFCCP v. Keebler*, 87-OFC-20, Order Vacating Final Decision & Order (Dec. 12, 1996).

1992 Congressional amendment of Section 503.^{5/} The second proviso addressed the scope of coverage for employment decisions and practices occurring after the legislative enactment.^{6/}

Obviously, it is only the first coverage proviso of 41 C.F.R. §60-741.4(a)(2)(I) that is relevant and thus of concern to the instant case. It interprets the pre-amendment Section 503(a) proviso, “*in employing persons to carry out such contract,*” as limiting coverage of a government contractor’s employment decisions and practices occurring before the 1992 amendment to “positions that are engaged in carrying out a contract.” 61 Fed. Reg. at 19,337.^{7/} Effectively applying *Chevron* deference to the OFCCP regulation, the Board, in its December 1996 Decision and Order, held the proviso controlling in the interpretation of pre-amendment Section 503, concluding that DeAngelis was thus a covered employee.^{8/} Order of Dec. 12, 1996,

^{5/} Prior to the 1992 Congressional amendment, Section 503(a) provided that federal government contracts and subcontracts “shall contain a provision requiring that, *in employing persons to carry out such contract* the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps.” (Emphasis added.) The proviso within Section 60-741.4(a)(2) that interprets pre-amendment Section 503(a) states in relevant part: “With respect to the contractor’s employment decisions and practices occurring before October 29, 1992, this part applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a government contract; . . . A position shall be considered to have been engaged in carrying out a contract if [*inter alia*]: (A) The duties of the position included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract. . . .” 41 C.F.R. §60-741.4(a)(2)(i).

^{6/} The 1992 statutory amendment removed the language “*in employing persons to carry out such contract*” from Section 503(a), thereby effectively applying the requirements of Section 503 to all of a covered contractor’s or subcontractor’s work force at all of its facilities with regard to employment decisions and practices occurring after the date of enactment. See 61 Fed. Reg. 19,337. Accordingly, the implementing regulatory proviso for Section 503(a) as amended states: “with respect to employment decisions and practices occurring on or after October 29, 1992, this part applies to all of the contractor’s positions irrespective of whether the positions are or were engaged in carrying out a Government contract.” 41 C.F.R. §60-741.4(a)(2)(I).

^{7/} The regulatory history of Section 60-741.4(a)(2) is set forth at 57 Fed. Reg. 48,084 *et seq.* (Oct. 21, 1992) and 61 Fed. Reg. 19,336 *et seq.* (May 1, 1996).

^{8/} Consistent with the Secretary of Labor’s delegation of adjudicatory authority to the Board under Secretary Order 2-96, 61 Fed. Reg. 19,978 (May 23, 1996), the Board reasoned, “It is well established that administrative agencies are bound by their promulgated regulations. . .” and thus, “the validity of the regulations must be assumed.” Order of Dec. 12, 1996, at 3-4 (citations omitted).

at 3-4. Accordingly, the Board vacated its September 4, 1996 Final Decision and Order, reinstated the instant action, and instructed the parties to proceed to the merits of the instant case. *Id.* at 5. As mentioned in the introduction to this concurrence, I agree with the determination of the merits that the majority has now reached.

E. COOPER BROWN
Member