**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| EMPLOYEE, | ) | |
| Employee | ) | OEA Matter No. 1601-0014-23 |
| | ) | |
| v. | ) | Date of Issuance: January 22, 2026 |
| | ) | |
| DISTRICT OF COLUMBIA FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT, | ) | |
| Agency | ) | ERIC T. ROBINSON, ESQ. |
| | ) | SENIOR ADMINISTRATIVE JUDGE |

Marc Wilhite, Esq., Employee Representative
Daniel Thaler, Esq., Agency Representative

## INITIAL DECISION

### INTRODUCTION AND PROCEDURAL HISTORY

On November 12, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Fire and Emergency Medical Services Department ("FEMS" or the "Agency") adverse action of removing him from service. From the record, it was noted that Employee joined FEMS in or around January 2018. Regrettably, in July 2019 he was injured while on-duty status in response to a fire. He returned to full-duty approximately one month later. In October 2019, he was again hospitalized and placed on sick leave status. After waiting several months, Employee was ordered to report for multiple fitness for duty ("FFD") examinations in 2021. Employee did not appear for the scheduled FFD examinations. On June 28, 2022, FEMS convened a Fire Trial Board ("FTB") proceeding where his failure to appear for multiple FFD's was in question. The Employee, represented by counsel, pleaded not guilty.[1] What followed was that the FTB recommended Employee's removal from service. FEMS' Fire Chief John A. Donnelly, Sr., accepted this recommendation leading to Employee's removal and his appearance before the OEA in protest of this action.

[1] Agency Answer to Employee's Petition for Appeal pp. 2 – 3 (December 21, 2022).

By letter dated October 31, 2022, Employee was notified that he was being removed from service. The effective date of his removal was November 5, 2022. Employee's last position of record with the Agency was Firefighter/Paramedic. On November 23, 2022, the OEA's Executive Director issued a notice to FEMS' Fire Chief John A. Donnelly, Sr., requiring him to submit an Answer to Employee's Petition for Appeal by December 23, 2022. On December 21, 2022, FEMS timely filed its Answer. This matter was initially assigned to Administrative Judge ("AJ") Lois Hochhauser on January 10, 2023. AJ Hochhauser then proceeded to have an extended briefing schedule with multiple continuances granted due to Employee's inability to assist in the prosecution of his appeal. Apparently, AJ Hochhauser determined that Employee had significant personal tribulations that did not allow for him to diligently proceed on a normal schedule. AJ Hochhauser graciously accommodated this issue by granting additional time for the parties to deliberate on the briefing schedule and pursue possible settlement of this matter. In or around June 2025, AJ Hochhauser left the OEA.

This matter was then reassigned to the Undersigned on June 11, 2025. On June 12, 2025, the Undersigned issued an Order requiring the parties to convene for a Status Conference during which the Undersigned would be updated on the status of this then newly assigned matter. The conference was held as scheduled and during it, the Undersigned determined that this matter would be decided pursuant to the process outlined by the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002).[2] On July 14, 2025, the Undersigned issued an Order that codified this determination and provided a briefing schedule for the parties to submit their respective *Pinkard* briefs. During this briefing schedule, Employee obtained new legal counsel. Employee requested additional time to acclimate his new counsel and to submit his brief. This request was granted. Thereafter, both parties submitted their respective briefs. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

## JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 id. States:

[2] 801 A.2d 86 (D.C. 2002). This case will be discussed in further detail below.

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

## ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

Statement of the Charges

Charge 1: Violation of D.C. Fire & Emergency Medical Services Department Order Book Article Xl, Part l, §l (5), which states: "All employees who miss appointments or violate the instructions of the PFC or the referred specialists will be charged with the appropriate violations."

Further violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI Part l, 7(4), which states: "Whenever an employee is not in a full duty status for 30 days or more he/she will be required to take a Return to Duty or Fitness for Duty Physical at the discretion of the MSO."

Further violation of DCHR issuance No. l-2021-13, Fitness for Duty Assessments (effective March 23, 2021) which states:

Employees are expected to provide full cooperation regarding the fitness for duty process. To that end, employees may be subject to appropriate administrative action, up to and including removal, if they refuse to comply with legitimate directives related to the FFD process.

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of duty." See DPM S 1603.3 (f)(3) (August 27,2012).

Specification 1: ln his Special Report (dated 08/18/2021), Deputy Fire Chief Robert Pearson describes your misconduct as follows:

> Firefighter Paramedic [Employee] Police & Fire Clinic appointment was scheduled for August 13, 2021, at 1300 hours. . . Firefighter Paramedic [Employee] missed an appointment at the Police and Fire Clinic on August 13, 2021. Additionally, a review of FF/P [Employee] clinical records confirm that he missed a Psych Fitness for Duty Evaluation on August 13,2021 and a Medical Fitness for Duty Evaluation on August 17, 2021. Firefighter/Paramedic [Employee] is willfully noncompliant with the Department's attempt to assess his fitness lor duty and specific orders to submit to fitness for duty evaluations, which date back to November 30, 2020. In addition to the two missed appointments listed above, FF/P [Employee] missed PFC appointments on the following dates: July 14,

> 2020: November 30, 2020; December 16, 2020; and December 18, 2020. His misconduct establishes that he neglected his duties. Accordingly, this termination action is proposed.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

This Office's review of this matter is limited pursuant to the District of Columbia Court of Appeals' holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:
>
> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing*. [Emphasis added.]
>
> Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.
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> It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review,

> which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing" -- controls in Pinkard's case. The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the Adverse Action Panel in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the Adverse Action Panel.[3]

Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* Hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
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> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
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> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
>
> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

[3] *Id.* at 90-92. (citations omitted).

Based on the documents of record and the position of the parties as stated during the conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore, my review is limited to the issues set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to the Fire Trial Board's ("Trial Board") credibility determinations when making my decision. *Id.* A Trial Board hearing was held on June 28, 2022. On October 6, 2022, the Trial Board issued its Findings and Recommendations for the charge and specification outlined above. Ultimately, Employee was found guilty and the Trial Board recommended that he be removed from service. On October 31, 2022, Agency Fire Chief John Donnelly, Sr., provided written notice to Employee that he was adopting the findings and recommendations. Accordingly, Employee was removed from service on November 5, 2022.

Substantial Evidence

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [4] Further, "[i]f the Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." [5] In Agency's Pinkard Brief dated July 29, 2025, it asserted that substantial evidence supporting its removal action was contained within the record. More specifically, Agency noted the following:

> Here, the FTB's Decision is supported by substantial evidence because the testimonial and documentary evidence in the record proves that Employee failed to attend six PFC appointments on July 14, 2020; November 30, 2020; December 16, 2020; December 18, 2020; August 13, 2021; and August 17, 2021. Specifically, the record contains contemporaneous email correspondence between the PFC and Agency when Employee missed the appointments as well as PFC records8 for the appointments that document Employee's missed appointments. Additionally, MSO Liaison Johnson confirmed during his testimony at the FTB hearing that Employee missed the appointments. Moreover, Employee did not dispute that he missed the appointments during his testimony before the FTB. *See, e.g.*, Tr. 146 (Employee confirming that he missed the August 13, 2021 and August 17, 2021 appointments).
>
> The record also indicates that Employee had advance notice of the appointments. Agency emailed Employee notification of the fitness for duty and psychological evaluation appointments multiple weeks in advance of the appointments. Employee confirmed receipt of the notifications via reply emails.[6] (internal citations omitted).

[4] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).
[5] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[6] Agency's Pinkard Brief p. 7 (July 29, 2025).

All of Agency's witnesses collectively testified that Employee did not appear for the FFD appointments as provided for in its proposed notice. Being circumspect regarding Agency's witnesses is not required in this analysis due to Employee's testimony corroborating his no-shows for these appointments. What is particularly illuminating in this matter is that Employee admitted to all of the specifications in this matter as part of his Trial Board testimony.

Despite his submission, Employee, through counsel, still contests this parameter of analysis by asserting that FTB in its recommendation did not (in Employee's estimation) engage in a meaningful analysis as to why it made its decision to affirm the charge of Neglect of Duty. Employee further asserted that the language used by the FTB merely parroted the language used in the proposed removal and given that he contests that the FTB did not adequately establish that it had substantial evidence to support its removal recommendation. Employee also notes that he was experiencing physical and mental health difficulties that did not allow him to actively participate in the FFD examination process.[7] Because of these difficulties, Employee argues that Agency cannot prove that it had substantial evidence to support the Neglect of Duty charge.

Agency in its Pinkard Brief, persuasively notes that the record presented to the Trial Board was replete with evidence that Employee missed six FFD appointments; that he was notified through extended email correspondence that missing these appointments would lead to sanctions;[8] these circumstances were corroborated through both testimonial and documentary evidence before the FTB.

In making a determination as to whether FEMS satisfied this rubric in its removal action I take note that Employee readily admitted that "there is considerable evidence here that [Employee] was in the midst of a mental crisis/breakdown while the Agency simply kept scheduling and rescheduling appointments."[9] Employee further admits that he was experiencing severe mental difficulties during the time period in question.[10] I take further note that Employee occupied a position within a paramilitary outfit that requires its members to be of sound mind and body in order to dutifully carry out his/her duties. Employee's admissions directly indicate that he was unable to fulfill those duties given his admitted difficulties. Finding otherwise would put his Agency, his colleagues and most importantly the public at-large at risk of his being called into duty knowing that he is not able to perform. While Employe presents an interesting argument that substantial evidence was present that should have absolved Employee for his failure to show for the FFD appointments, I also find that Agency has established that the Trial Board had substantial evidence to support its removal recommendation. Despite his argument to the contrary, I find that Employee admitted to the salient facts that are the subject of the instant adverse action. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[11] I find that Employee's admission of misconduct before the Trial Board

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[7] In order to protect Employee's privacy, the nature of his mental and physical difficulties will not be disclosed in this ID. However, the Undersigned does take notice that those difficulties were substantial.

[8] See, Agency Pinkard Brief pp. 6-8 (July 29, 2025).

[9] Brief of Employee p. 10 - 11 (September 19, 2025).

[10] *Id*. As noted above, the Undersigned has opted not to disclose the nature of Employee's difficulties in order to help protect his privacy. I will take notice that the nature of his difficulties were severe and in need of further medical assistance.

[11] *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

constituted cause.[12] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002). Given this, I find that the record has substantial evidence supporting the FTB removal recommendation.

Harmful Procedural Error

According to *Pinkard* and OEA Rule 631. 3, the Undersigned is required to make a finding of whether or not FEMS committed harmful error. OEA Rule 631. 3, provides as follows: "Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Under this rubric, Agency asserts that it adequately complied with all applicable procedures in the handling of this matter. Employee takes umbrage with that assertion arguing that Agency's pretermination *Douglas* Factor Analysis[13] should have resulted in a less severe sanction in response to the proposed discipline.

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[12] *Employee v. MPD*, OEA Matter No. 1601-0036-17 (June 11, 2018).

[13] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

3) the employee's past disciplinary record;

4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;

6) consistency of the penalty with those imposed upon other employees for the same or similar offenses.

7) consistency of the penalty with any applicable agency table of penalties;

8) the notoriety of the offense or its impact upon the reputation of the agency;

In further detail, Employee contends that FEMS analysis *Douglas* factor #1 was deficient since Employee's failure to appear was not done maliciously but rather continuing grace should have been extended to Employee in light of the difficulties he was experiencing. Employee further notes that "[h]e missed the appointments because he was demonstrably mentally ill and was not capable of making rational decisions."[14] Employee took further account that FTB noted that Employee's actions interfered with FEMS mission. This argument is of no moment. Having a sufficiently staffed unit is vital to FEMS' mission of providing critical firefighting and medical care to the public at-large. As noted above, while it is entirely regrettable that Employee has endured the mental difficulties disclosed in this matter, it is incumbent on FEMS to continually assess and reassess whether its members can adequately perform in a crisis situation. Employee's failure to report did not allow for the reassessment and his admissions before the FTB predicted that he would have continually been precluded from serving due to his difficulties.

Employee contends that FEMS analysis of *Douglas* factors #4 and #5 were mitigating and the FTB did not accord the weight that this deserved since Employee had no negative work history prior to the matter at hand. Given the circumstances, regardless of whether these were aggravating or mitigating factors, the Undersigned cannot fathom a reasonable outcome where Employee prevails due to this analysis. Employee also notes that *Douglas* factors #6 and #7 were inconsistent stating that other unnamed members who were similarly sanctioned received more favorable outcomes. Regarding *Douglas* factors #8, #10, and #12, Employee also contends that the FTB "misapplied" its analysis, alleging that FEMS' sanction was inconsistent with prior results. However, it was clearly noted that Employee did not appear for the scheduled FFD appointments for over 10 months. FEMS rescheduled the appointments on numerous occasions in a failed effort to conduct it. Notwithstanding Employee's argument to the contrary, it is apparent that Employee did not submit for the examinations as was required. Given the instant circumstances, the Undersigned cannot find a reasonable fault with FEMS' *Douglas* factor analysis.

Adverse Action Done in Accordance with Applicable Rules and Regulations

Agency asserts that Employee's removal did not violate any applicable rules or regulations. Employee, in his reply brief, did not break out his *Pinkard* analysis with this rubric analyzed separately. With that, the Undersigned assumes that the *Douglas* factor analysis discussed under Harmful Procedural error also encompassed possible violations of applicable rules and regulation. Therefore, I hereby incorporate by reference my prior analysis. My examination of the record reveals that Agency's action was proper. Given the gravity of the conduct and the proper

9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10) potential for the employee's rehabilitation;

11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12) the adequacy and effectiveness of alternative sanctions to deter such conduct.

[14] Brief of Employee p. 12 – 13 (September 19, 2025).

procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to terminate Employee. Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.[15] The "primary discretion" in selecting a penalty "has been entrusted to agency management, not to the OEA."[16] Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case. OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in the Agency's shoes in the first instance; such an approach would fail to accord proper deference to the Agency's primary discretion in managing its workforce. Rather, the OEA's review of an agency-imposed penalty is essentially to ensure that the Agency conscientiously considered the relevant factors and did strike a responsible balance within tolerable limits of reasonableness.

Conclusion

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[17] I conclude that given the totality of the circumstances as enunciated in the instant decision, that Agency's action of removing Employee from service should be upheld. [18]

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing Employee from service is hereby UPHELD.

FOR THE OFFICE: /s/ *Eric T. Robinson*

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[15] *See*, Douglas v. Veterans Administration, 5 MSPB 313, 328, 5 M.S.P.R. 280, 301(1981) (Federal Merit Protection Board case); Raphael 740 A. 2d 945).
[16] *Id*.
[17] *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).
[18] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").