BRB No. 06-0691 BLA

WILLIAM R. DUKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COWIN & COMPANY, INCORPORATED	)	DATE ISSUED: 08/16/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2004-BLA-6025) of Administrative Law Judge Edward Terhune Miller rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with 10.09 years of qualifying coal mine employment, and adjudicated this claim, filed on April 15, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv), (c). Accordingly, benefits were awarded.

On appeal, employer challenges its designation as the responsible operator herein, as well as the administrative law judge's exclusion of x-ray evidence pursuant to 20 C.F.R. §725.414, and his findings of more than ten years of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a)(4), 718.203(b), total respiratory disability at Section 718.204(b)(2)(i), (iv), and disability causation at Section 718.204(c). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance, to which employer replies in support of its position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in designating employer as the responsible operator herein. Employer maintains that the administrative law judge did not consider all relevant evidence and failed to apply the correct legal standard in assessing the nature of claimant's coal mine construction work and the regularity of claimant's exposure to coal dust during his approximately seventeen months with employer. Specifically, employer argues that the applicable standard for establishing covered coal mine construction work, set forth in *William Bros., Inc. v. Pate*, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987),[1] requires that claimant be regularly exposed to coal dust generated in the extraction or preparation of coal.[2] Employer asserts

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[2] Contrary to employer's arguments, the Eleventh Circuit held that coal mine dust "is not limited to dust from the substance, coal, but includes all dust from any substance generated during the extraction or preparation of coal." *William Bros., Inc. v. Pate*, 833 F.2d 261, 266 n. 3, 10 BLR 2-333, 2-336 n. 3 (11th Cir. 1987). As set forth *infra*, the

that the testimony of John Moore, employer's on-site Vice President of Safety in Human Resources, establishes that claimant's work as a gunnite machine operator and welder for eight months did not involve coal dust exposure, and that claimant's exposure to coal dust while working as a miner/driller was infrequent and limited. Employer's Brief at 9-13. Employer's arguments are rejected.

As this claim was filed after January 19, 2001, the effective date of the amendments to the regulations, the revised regulatory provisions relating to coal mine construction workers are applicable and, where conflicting, supersede *Pate*. *See generally Nat'l Mining Ass'n v. Dep't of Labor*, 191 F.3d 849 (D.C. Cir. 2002). The regulatory definition of a "miner" includes "any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a). The regulations further provide that a coal mine construction worker is considered a miner "to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. . . .[and to the extent that his] work is integral to the building of a coal or underground mine (see §725.101(a)(12), (30).)" 20 C.F.R. §725.202(b). Employer may rebut the presumption that a construction worker was exposed to coal mine dust during all periods of employment in or around a coal mine or coal preparation facility by evidence that demonstrates either that the individual was not regularly exposed to coal mine dust during his work therein, or that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(1), (b)(2)(i), (ii).

In the present case, the administrative law judge determined that claimant's work with employer involved building a new underground coal mine, and his duties included sinking an elevator shaft and building the slope or entry into the mine. Decision and Order at 4-5. Claimant testified that he worked for over a year as a miner/driller, retaining the roof of the slope by drilling through rock and coal seams and pinning wire, replacing pumps and laying down railroad tracks, all of which involved heavy exposure to coal dust.[3] Decision and Order at 4; Hearing Transcript at 48-55. Claimant then

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revised regulations supersede *Pate*. The regulatory preamble emphasizes that "[c]oal mine dust means any dust generated in the course of coal mining operations, including construction," 65 Fed. Reg. 79958 (Dec. 20, 2000), and the amended regulations further provide that a coal mine need not be operational in order for construction work to constitute covered employment where the work is integral to the building of a coal mine. *See* 20 C.F.R. §§725.101(a)(12), (a)(19), 725.202; 65 Fed. Reg. 79961 (Dec. 20, 2000).

[3] We reject employer's argument that, because claimant's testimony establishes that he drilled through only 11 to 14 coal seams, and encountered a coal seam approximately once a month, claimant was not regularly exposed to coal dust. Employer's Brief at 3-4, 13; Hearing Transcript at 50, 54, 75. In *Pate*, the Eleventh

worked in a shed on the surface preparing and shooting gunnite, a mixture of cement, sand and fibers, down a tube into the mine, to be used in cementing the roof. Decision and Order at 4; Hearing Transcript at 55-57. Claimant testified that he was also exposed to coal dust in this job, as coal extracted from the mine by other employees was stored in a large pile located next to the gunnite pot, and the wind blew coal dust into the shed. Decision and Order at 4; Hearing Transcript at 54, 57-58. Claimant's last job with employer was as an ironworker welder, installing I-beams for the elevator, where he was regularly exposed to coal dust blowing through the shaft from the mine. Decision and Order at 4; Hearing Transcript at 61-62. The administrative law judge accurately reviewed the testimony of both claimant and Mr. Moore, and acted within his discretion in determining that claimant's specific testimony describing his duties and resultant coal dust exposure was more credible than the general testimony of Mr. Moore, *see* Hearing Transcript at 85-103, that claimant was exposed to very little coal dust because the project was well ventilated and watered. Decision and Order at 4-6; s*ee generally Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(*en banc*); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Consequently, the administrative law judge permissibly found that employer failed to rebut the presumption at Section 725.202(b), and we affirm this finding as supported by substantial evidence. *See generally Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986). As the administrative law judge correctly determined that employer was the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year, *see* 20 C.F.R. §§725.494, 725.495, we affirm his finding that employer was properly named as the responsible operator herein.

Employer next contends that the administrative law judge erred in finding more than ten years of covered coal mine employment established. Employer maintains that the administrative law judge impermissibly relied on the 125-day table created by the Department of Labor in calculating the length of claimant's employment, as this table does not appear in any regulation or other legal authority, but is an extrapolation or estimate based on a wage survey and its use is limited to the earnings of actual coal miners, not construction workers. Employer further asserts that construing 125 days as a

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Circuit acknowledged that the miner in *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986), performed work that constituted covered employment, including "excavating the shaft down to the desired coal seam" and removing "a small amount of coal . . . from incidental coal seams which may be encountered before reaching the coal seam which is the goal of excavation," *Phillips*, 794 F.2d at 866. *Pate*, 833 F.2d at 266, 10 BLR at 2-337. In the present case, consistent with *Pate*, claimant testified that he was exposed to coal mine dust when he helped to excavate the slope to the main coal seam, and was additionally exposed to dust generated in the extraction or preparation of coal throughout his employment with employer, as the mine site was operational. Hearing Transcript at 50, 52-54.

full year of employment is irrational, as 125 days of exposure to coal dust cannot constitute a full year. Employer's Brief at 13-14. Employer's contentions lack merit.

The administrative law judge reviewed all relevant evidence, and determined that claimant's credible testimony regarding the nature of his coal mine construction work for various employers, in conjunction with claimant's Social Security Administration (SSA) records, established that claimant engaged in covered coal mine employment during the years 1977, 1978, 1979, 1980, 1981, 1982, 1985, 1986, 1992, 1993, 1994, 1995, 1998 and 1999.[4] Decision and Order at 3-7. As the SSA records listed total yearly earnings but did not reflect claimant's quarterly earnings for those years, *see* Director's Exhibit 7, and the evidence did not permit the administrative law judge to ascertain the beginning and ending dates of all periods of claimant's coal mine employment, *see* 20 C.F.R. §725.101(a)(32)(ii), the administrative law judge applied the formula expressly provided at 20 C.F.R. §725.101(a)(32)(iii) to calculate, for each year that claimant engaged in covered employment, whether claimant was entitled to credit for a full year or fractional year of employment. Decision and Order at 7. The regulatory formula directs the administrative law judge to divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). As the administrative law judge found that claimant met the regulatory definition of a "miner," *see* 20 C.F.R. §725.202, the administrative law judge permissibly utilized the BLS table to establish the length of claimant's coal mine employment history. 20 C.F.R. §§725.101(a)(32)(i)-(iii); Decision and Order at 6-7; Director's Exhibit 24. The administrative law judge's computation of claimant's length of coal mine employment is reasonable and supported by the evidence as a whole, and thus, we affirm his determination of 10.09 years of qualifying employment. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Employer next contends that the administrative law judge abused his discretion in excluding four x-ray interpretations from the record, specifically the x-ray rereadings by Drs. Wheeler and Scott of films dated July 5, 2000 and February 9, 2002 that were

[4] We reject employer's additional argument that claimant's work dismantling a dragline in 1998 and 1999 does not constitute covered employment because it was performed one-half mile away from the actual coal mine site. Employer's Brief at 14. The Director correctly notes that this work was, in fact, performed at a mine site that was not in operation while claimant worked, although an unrelated coal mine was in operation approximately one-half mile away. Director's Brief at 4; *see* Decision and Order at 5; Hearing Transcript at 78. As the administrative law judge determined that claimant was exposed to coal dust as a result of his work on the drag line, and the regulations do not require the mine site to be operational, the administrative law judge properly credited this work as covered employment. Decision and Order at 5-6; *see* 20 C.F.R. §725.101(a)(12).

contained in claimant's treatment records. Employer's Exhibits 5, 6, 8, 9. Employer asserts that this evidence demonstrates no progression of disease over a two-year period, and argues that the administrative law judge's exclusion of relevant, probative and non-cumulative evidence violated employer's fundamental right to a full and fair hearing. Employer also argues that the regulatory limitations on evidence are invalid to the extent that they permit the exclusion of relevant evidence in contravention of the Act. Employer maintains that denying it the opportunity to augment the record to respond to what is found in claimant's records impermissibly skews the evidence in favor of treating physicians with a propensity to assist their patients, and thus, the administrative law judge should have found either that good cause was demonstrated to admit the x-ray evidence, or that application of the exemption to the evidentiary limitations for treatment records at 20 C.F.R. §725.414(a)(4) was warranted. Employer's Brief at 15-18. Employer's arguments lack merit.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414, 725.456(b)(1). The claimant and the party opposing entitlement may each submit no more than two chest x-ray interpretations in support of their affirmative case, and no more than one x-ray interpretation in rebuttal of the case presented by the opposing party and by the Director pursuant to 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(2)(i)-(ii), (a)(3)(i)-(iii). The regulations further provide that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

In his Procedural Order Excluding Excess Evidence issued on January 24, 2006, the administrative law judge noted that employer had submitted x-ray evidence within the applicable regulatory limitations.[5] The administrative law judge permissibly found that employer had failed to demonstrate good cause for the admission of the excess evidence, as the alleged relevance and materiality of such evidence was deemed insufficient to overcome the explicit regulatory limitations. Order at 1; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The administrative law judge properly found that the x-ray rereadings generated at the behest of employer did not constitute treatment records,

[5] In support of its affirmative case, employer submitted x-ray interpretations by Drs. Scott and Wheeler of a film dated October 17, 2002; and in rebuttal of claimant's and the Director's x-ray evidence, employer submitted interpretations by Drs. Scott and Wheeler of a film dated July 3, 2002. Decision and Order at 8; Employer's Exhibits 3, 4, 11, 12.

and also could not be submitted in rebuttal to the original interpretations of those films because there was no regulatory provision allowing for the rebuttal of treatment records.[6] Order at 1-2; *see* 20 C.F.R. §725.414(a)(3)(ii), (a)(4).

It is well settled that the administrative law judge is allowed considerable discretion in the admission of evidence. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the Board has previously addressed and rejected employer's argument that revised Section 725.414 is arbitrary and invalid, holding that it does not conflict with the provisions of the Administrative Procedure Act or the requirement at 30 U.S.C. §932(b) that all relevant evidence be considered, and we decline to revisit this issue. *See Dempsey*, 23 BLR at 1-58, 1-59; *see also Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007). As employer has not demonstrated that it was unduly prejudiced by the application of the evidentiary limitations at Section 725.414, we affirm the administrative law judge's evidentiary rulings as a proper exercise of his discretion. *See Dempsey*, 23 BLR at 1-47.

Turning to the merits of entitlement, employer contends that the administrative law judge erred in relying on the opinion of Dr. Hawkins to find the existence of legal pneumoconiosis established at Section 718.202(a)(4). Employer asserts that the opinion is undermined because it is not clear whether the employment and smoking histories provided to Dr. Hawkins were accurate, or whether a positive x-ray interpretation played a critical role in the physician's diagnosis of pneumoconiosis.[7] Employer's Brief at 18. Employer's arguments are without merit.

The administrative law judge accurately reviewed the report of Dr. Hawkins, a pulmonary expert, and determined that the physician performed a physical examination of claimant, evaluated his employment, social and medical histories, and obtained an x-ray, blood gas studies and pulmonary function studies. Decision and Order at 9;

[6] In his Decision and Order, the administrative law judge noted that the miner's medical records contained x-ray interpretations that were not read specifically for the purpose of determining whether pneumoconiosis was present. Consequently, the administrative law judge did not weigh this evidence against the properly classified x-ray evidence of record. Decision and Order at 10-11; *see* 20 C.F.R. §718.102.

[7] Because the Board has affirmed the administrative law judge's evidentiary rulings and his finding of more than ten years of coal mine employment, employer's argument that the exclusion of x-ray evidence resulted in an erroneous weighing of Dr. Hawkins's opinion, and its arguments regarding the applicability of 20 C.F.R. §718.203(b), are moot. *See* Employer's Brief at 18-19.

Director's Exhibit 10. Contrary to employer's arguments, the employment and smoking histories obtained by Dr. Hawkins were essentially consistent with the administrative law judge's determination that claimant had slightly over ten years of coal mine employment and smoked from approximately age 18 at the rate of one and one-half to two packs per day until he quit in 2000.[8] Decision and Order at 3, 7; Director's Exhibit 10. Dr. Hawkins diagnosed pneumoconiosis caused by coal dust and fumes, based on an abnormal x-ray, exertional dyspnea, abnormal spirometry and a history of substantial exposure to coal dust, and concluded that claimant's moderate respiratory impairment was fifty percent attributable to pneumoconiosis and fifty percent due to smoking. Decision and Order at 9, 12; Director's Exhibit 10. Although the administrative law judge found that the x-ray evidence was in equipoise and thus was insufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1), he permissibly found that the persuasiveness of Dr. Hawkins's diagnosis of legal pneumoconiosis was not lessened, as the two x-ray films of record reviewed by dually-qualified Board-certified radiologists and B readers were interpreted as both positive and negative for pneumoconiosis, and Dr. Hawkins relied on more than a positive x-ray in formulating his conclusions. Decision and Order at 11-12; *see generally Stomps v. Director, OWCP*, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987); *Church v. Eastern Assoc. Coal Co.*, 21 BLR 1-51 (1996). The administrative law judge then acted within his discretion in finding that the opinion of Dr. Hawkins was adequately reasoned and documented, and sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4).[9] Decision and Order at 12; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4), they are affirmed.

Employer next contends that the administrative law judge erred in finding that the pulmonary function study evidence was sufficient to establish total respiratory disability at Section 718.204(b)(2)(i). Employer's Brief at 19-20. We disagree. The administrative law judge correctly determined that the sole pulmonary function study of

[8] The employment history form attached to Dr. Hawkins's report lists coal mine construction work in the years 1977-1983, 1985-1986, 1992-1993, and 1998-1999, and Dr. Hawkins indicated that claimant smoked at the rate of two packs per day from age 17 until he quit in 2002. Director's Exhibit 10. Claimant testified, however, that after Dr. Hawkins asked claimant how long ago he had quit smoking, claimant responded "two years," and the physician incorrectly wrote down "two weeks." Hearing Transcript at 73.

[9] The administrative law judge determined that the remaining medical opinion of Dr. Bradley merely diagnosed chronic obstructive pulmonary disease and indicated that "I see no radiographic evidence of coal workers' pneumoconiosis." Employer's Exhibit 1; Decision and Order at 10, 12.

record, obtained by Dr. Hawkins on July 3, 2002, produced qualifying results and thus was sufficient to establish total disability at Section 718.204(b)(2)(i). Decision and Order at 13; *see generally Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). While employer argues that the absence of corroborating studies leaves open the question of whether this test accurately reflects claimant's optimal effort and true respiratory capacity, the administrative law judge could properly rely on the test, as the administering technician noted good effort and understanding, and it was validated by a consulting pulmonary expert, Dr. Michos.[10] Decision and Order at 9, 13; Director's Exhibit 10; *see generally Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

Lastly, employer contends that the administrative law judge erroneously found that Dr. Hawkins's opinion constituted a documented and reasoned assessment of total disability due to pneumoconiosis at Section 718.204(b)(2)(iv), (c). Employer's Brief at 20. We disagree. The administrative law judge accurately determined that Dr. Hawkins listed claimant's respiratory impairment as moderate, and opined that claimant suffered exertional dyspnea and was unable to perform manual labor. Decision and Order at 9, 13. Although employer asserts that Dr. Hawkins did not have detailed information about the nature of claimant's work, and that claimant exaggerated the effort involved in the various tasks he performed, the administrative law judge acted within his discretion in crediting claimant's testimony that his coal mine construction duties were varied and involved heavy labor,[11] Decision and Order at 3-4, and rationally concluded that the opinion of Dr. Hawkins was well-reasoned, supported by the qualifying pulmonary function study he obtained, and sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). Decision and Order at 13-14; *see generally Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985). As Dr. Hawkins attributed fifty percent of claimant's impairment to pneumoconiosis and fifty percent to smoking, the administrative law judge properly found that his opinion established that pneumoconiosis was a substantially contributing

[10] Employer additionally asserts that later medical treatment records from Dr. Hawkins cast doubt on claimant's effort in performing the qualifying 2002 pulmonary function studies, because the treatment notes include the notation "FEV_1 2.38," a value that would render the test non-qualifying. Employer's Brief at 20. We reject employer's assertion, and agree with the Director's observation that the reference in claimant's treatment records is not clear, and could just as easily be read as "FEV_1 % 38," meaning that the FEV_1 value is 38% of normal. *See* Claimant's Exhibit 2; Director's Brief at 6 n. 4.

[11] Claimant testified that all of his work with employer was heavy, and included lifting and carrying rails and ties weighing 50-60 pounds; lifting pumps weighing 300 to 450 pounds with the help of one or two other people; lifting heavy screen wire; and carrying heavy tools. Hearing Transcript at 67-68.

cause of claimant's total disability. Decision and Order at 14; Director's Exhibit 10; *see* 20 C.F.R. §718.204(c)(1); *Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

The administrative law judge's findings and inferences at 20 C.F.R. §718.204(b) and (c) are supported by substantial evidence, and we may not substitute our judgment. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge