BRB No. 07-0943 BLA

M.M.W. (Widow of J.G.W.) Claimant-Respondent v. N.O.W. COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/22/2008 DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenburg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5136) of Administrative Law Judge Daniel F. Solomon awarding benefits on a survivor's 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).

Claimant filed her survivor's claim on February 9, 2004.[1] Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on September 14, 2004. Director's Exhibit 28. On August 31, 2005, pursuant to 20 C.F.R. §725.310, claimant requested modification of the district director's denial and submitted additional medical evidence in support of her request. Director's Exhibit 32. On July 19, 2006, the district director issued a Proposed Decision and Order granting claimant's request for modification and awarding benefits. At employer's request, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing, which was convened on April 25, 2007. Directors Exhibits 47, 48. At the hearing, however, the parties agreed to waive their rights to a formal hearing, in favor of several telephone conferences and a decision on the record.

In a decision dated August 3, 2007, the administrative law judge credited the miner with at least twenty-two years of coal mine employment[2] and found that employer is the responsible operator. The administrative law judge further found that claimant established the existence of simple, clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), 718.203, and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, noting that claimant had remarried after the miner's death, the administrative law judge awarded benefits on the survivor's claim commencing December 2003, the month in which the miner died, and ending July 2005, the month in which claimant remarried.

On appeal, employer contends that the administrative law judge erred in his analysis of the autopsy and medical opinion evidence in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer further asserts that the administrative law judge failed to consider whether accepting claimant's modification petition would "render justice under the Act." Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to hold that any error by the administrative law judge in failing to consider whether accepting claimant's modification petition would

[1] Claimant is the widow of the miner, who died on December 14, 2003. Director's Exhibit 7.

[2] The record indicates that the miner's coal mine employment was in Virginia. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

"render justice under the Act" was harmless on the facts of this case. Employer has filed a reply brief reiterating its contentions.[3]

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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In evaluating the medical evidence at 20 C.F.R. §718.202(a), the administrative law judge initially found that there was no x-ray evidence in the record pursuant to 20 C.F.R. §718.202(a)(1), and none of the presumptions described at 20 C.F.R. §718.202(a)(3) was applicable to this claim. The administrative law judge further found, however, that the autopsy and medical opinion evidence conclusively established the

[3] As neither party challenges the administrative law judge's findings that employer is the responsible operator, that the miner had at least twenty-two years of coal mine employment, and that claimant established the existence of simple, clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), 718.203, they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

existence of simple, clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4); 718.203(b).[4] Decision and Order at 8-9.

Turning to the question of whether the miner's death was due to pneumoconiosis, the administrative law judge noted that the medical records indicated that on August 13, 2002, the miner was diagnosed with amyotrophic lateral sclerosis (ALS), or Lou Gehrig's Disease. Following his diagnosis, the miner's health continued to deteriorate, and on December 14, 2003, he passed away at home. Administrative Law Judge's Exhibit 1. Treatment notes dating from February 1, 1994, before his ALS diagnosis, through December 10, 2003, shortly before his death, indicated that in addition to his ALS, the miner was treated for deep vein thrombosis and left-sided pulmonary embolism, seizure disorder, mild anemia, chronic low back pain, depression, hypertension, hyperlipidemia, cholelithiasis, chronic left shoulder pain, status post shoulder surgery, degenerative joint disease, and asthma. Decision and Order at 7; Employer's Exhibits 1-4.

The miner's death certificate, signed by Dr. Rheinhart, his treating physician, listed the immediate cause of death as ALS. No other causes or conditions were noted. Decision and Order at 5; Director's Exhibit 7. Dr. Segen performed an autopsy on December 15, 2003, and listed his diagnoses as moderate coal workers' pneumoconiosis, early acute pneumonia, pulmonary edema, and global congestion of the heart and lungs, but did not offer an opinion as to the cause of the miner's death. Decision and Order at 6; Director's Exhibit 8. Dr. Perper opined that the miner's "coal workers' pneumoconiosis,

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[4] Dr. Segan, the autopsy prosector, listed his final anatomic diagnoses as: moderate coal workers' pneumoconiosis, early acute pneumonia, pulmonary edema, and global congestion of the heart and lungs. Director's Exhibit 8.

Dr. Perper reviewed the autopsy slides and additional medical records and diagnosed: moderately severe coal workers' pneumoconiosis, chronic obstructive pulmonary disease and moderate centrilobular emphysema, pulmonary hypertension, congestion and edema of the lungs, focal myocardial fibrosis, and arteriosclerosis of the aorta. Director's Exhibit 35.

Dr. Crouch also reviewed the autopsy slides and additional medical records and diagnosed: simple coal workers' pneumoconiosis, emphysema, apparently mild, mixed patterns, and acute congestion, edema and focal acute bronchopneumonia. Employer's Exhibit 5.

Finally, Dr. Fino reviewed the pathology reports and medical records and agreed that there was "clearly pathologic evidence of coal workers' pneumoconiosis," although neither clinical nor legal pneumoconiosis had been diagnosed during the miner's lifetime. Employer's Exhibit 6.

caused, contributed substantially to and hastened the death of [the miner], through each one of his complications separately and in aggregate[,]" including: "Replacement of normally breathing lung tissue by fibro-anthracotic dysfunctional tissue interfering with diffusion of respiratory gases," "chronic obstructive pulmonary disease (COPD) on the background of centrilobular emphysema," and "terminal bronchopneumonia (alongside with his ALS disease)." Director's Exhibit 35. By contrast, Dr. Crouch stated that the miner's simple pneumoconiosis was "far too mild to have caused any clinically significant degree of respiratory impairment or disability and could not have caused, contributed to or otherwise hastened [the miner's] death." Decision and Order at 10; Employer's Exhibit 5. Finally, Dr. Fino reviewed the pathologists' reports, and agreed with Dr. Crouch that while the miner had coal workers' pneumoconiosis, there was "no evidence of any respiratory disability caused, or contributed to, by the inhalation of coal mine dust," nor was there any evidence "that primary lung disease due to coal mine dust inhalation caused, contributed to, or hastened his death." Employer's Exhibit 6.

The administrative law judge considered the conflicting medical opinions and determined to assign controlling weight to Dr. Perper's opinion. Decision and Order at 11-12. Employer argues that the administrative law judge erred by relying on Dr. Perper's opinion to find that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Specifically, employer contends that the administrative law judge failed to adequately consider whether Dr. Perper's opinion was tainted by his reliance on medical evidence that is not contained in the record, by his reliance on an inflated history of coal mine employment, and by his reference to the wrong patient in his initial medical report. Employer's Brief at 14-16. Employer further contends that the administrative law judge erred in crediting Dr. Perper's opinion because it was consistent with the proposition that persons weakened by pneumoconiosis may expire more quickly from other diseases. Employer's Brief at 12-14. In addition, employer asserts that the administrative law judge failed to explain why he found Dr. Perper's "logic [to be] more rational than [that of] Dr. Crouch or Dr. Fino." Decision and Order at 12; Employer's Brief at 14-16. Employer's arguments have merit, in part.

Initially, we reject employer's contention that the administrative law judge was required to accord diminished weight to Dr. Perper's opinion because the physician reviewed the medical report of Dr. Forehand, which was not admitted into evidence in the survivor's claim. Employer's Brief at 14-15. Contrary to employer's contention, the administrative law judge noted that Dr. Perper had reviewed evidence that was not contained in the record, but permissibly determined that because Dr. Perper had relied principally on the admissible autopsy evidence in formulating his conclusions, Dr. Perper's opinions were not tainted by his review of the inadmissible evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). Similarly, there is no merit

to employer's contentions that the administrative law judge was required to discredit Dr. Perper's opinion because he relied on a greater coal mine employment history than found by the administrative law judge, and because Dr. Perper's initial report contained references to another patient, which were subsequently corrected.[5] The administrative law judge fully considered employer's assertions, and acted within his discretion in determining that these factors did not undermine the reliability of Dr. Perper's conclusions. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

We agree, however, with employer's contention that the administrative law judge failed to adequately explain his determination to accord greater weight to the opinion of Dr. Perper, than to the opinions of Drs. Crouch and Fino. In evaluating the medical opinions, the administrative law judge initially noted that Dr. Segan, the autopsy prosector, diagnosed moderate coal workers' pneumoconiosis, but that, based on the prosector's description of the lungs, Dr. Crouch determined that the miner's pneumoconiosis was "far too mild" to have hastened the miner's death. Decision and Order at 10-11. The administrative law judge then noted that, by contrast, Dr. Perper determined that the pneumoconiosis was "slight to moderate," but determined that the emphysema was "moderate." Decision and Order at 11. Without resolving the conflict in the medical opinions as to the degree of pneumoconiosis present in the miner's lungs, the administrative law judge concluded that "it is reasonable that there is enough

[5] Dr. Perper's initial report, designated as Director's Exhibit 32, contained mistaken references to another patient. Consequently, claimant submitted a corrected copy of Dr. Perper's report, which was substituted for Dr. Perper's original report and designated as Director's Exhibit 35. Employer asserts that page ten of Dr. Perper's corrected report still contains references to another patient. Employer's Brief at 16, citing Director's Exhibit 35 at 10. However, the copy of Dr. Perper's corrected report contained in the record before the Board does not contain such a reference.

In addition, employer argues extensively that the administrative law judge erred in crediting Dr. Perper's opinion as consistent with the Department of Labor's recognition that persons weakened by pneumoconiosis may expire quicker from other diseases. Employer's Brief at 12-14. However, a review of the administrative law judge's decision does not reflect that he credited Dr. Perper's opinion on this basis. Decision and Order at 10-12. To the extent that employer argues that the administrative law judge, on remand, may not consider the Department's position that persons weakened by pneumoconiosis may expire quicker from other diseases, we reject employer's contention. *See Ziegler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 335, 22 BLR 2-581, 2-588-2-590 (7th Cir. 2002).

'pneumoconiosis' and sequellae [sic] to consider it competent to produce hastening." Decision and Order at 11.

The administrative law judge then stated:

> Dr. Crouch fails to consider "legal" pneumoconiosis. Although she cites to the amount of coal dust she calculates as a total percentage of lung volume to determine that it is "too mild," the composition of coal dust may also include anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or tuberculosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201. The record shows the Miner was a smoker. In fact, even cigarette smoking can interplay with compensable pneumoconiosis. . . . Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. . . . Moreover, Dr. Crouch noted silica, also. The silica can be considered as components of both clinical and legal pneumoconiosis. Although she noted the presence of emphysema, superimposed vascular congestion, and acute bronchopneumonia, Dr. Crouch also failed to [discuss] whether coal dust exposure aggravated the miner's emphysema or contributed to pneumonia or whether the emphysema hastened death.

Decision and Order at 11 (citations omitted).

As employer correctly contends, under the facts of this case, the administrative law judge erred in criticizing Dr. Crouch for failing to explain whether legal pneumoconiosis played a part in hastening the miner's death. Decision and Order at 11. Although the regulatory definition of legal pneumoconiosis may include chronic respiratory conditions such as emphysema and bronchitis, when those conditions are due in part to coal dust exposure, *see* 20 C.F.R. §718.201, claimant has the burden to establish the existence of legal pneumoconiosis. *See Trent*, 11 BLR at 1-27. As employer asserts, the administrative law judge did not make a finding as to the existence of legal pneumoconiosis, but rather, found that claimant established the existence of simple, clinical pneumoconiosis by autopsy. Therefore, the administrative law judge erred in discounting Dr. Crouch's opinion for failing "to consider 'legal' pneumoconiosis." Employer's Brief at 16. Moreover, employer does not have the burden to disprove that the miner's pneumoconiosis aggravated other conditions. *See* 20 C.F.R. §718.205(a). Consequently, we vacate the administrative law judge's finding that Dr. Perper's opinion is more rational than that of Drs. Crouch, and remand this case to the administrative law judge for further consideration of these opinions. Before assessing whether the doctors adequately addressed legal pneumoconiosis, the administrative law judge, on remand, should first determine whether claimant has established that the miner had legal pneumoconiosis. See 20 C.F.R. §718.201(a). The administrative law judge

must adequately explain his reasons for crediting and discrediting the medical opinion evidence and, in comparing the physicians' relative credentials, the administrative law judge should consider employer's contention that in addition to being Board-certified in anatomic pathology, Dr. Crouch's curriculum vitae reflects that she specializes in pulmonary pathology.[6] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Employer next argues that the administrative law judge erred in discounting the opinion of Dr. Fino because his opinion is internally inconsistent, and because he is not a pathologist. We agree. With respect to Dr. Fino's opinion, the administrative law judge stated:

> Dr. Fino first noted that there was a "mild" respiratory impairment present, due to ALS. He did note that respiratory failure is a frequent cause of death in patients with ALS. He also explained that pneumonia was a frequent complication of ALS, and noted the pathologists' reference to pneumonia on autopsy. Dr. Fino concluded that the evidence of record indicated the miner died from complications of ALS, and found no evidence of a respiratory impairment related to any intrinsic lung disease, including coal workers' pneumoconiosis. He did review the entire record. I note that in a report dated May 20, 2003, Dr. Robinette took pulmonary function tests, and found a restrictive ventilatory defect, categorized as "moderate." Therefore I find that the opinion as to whether a respiratory defect was present is suspect.
>
> Moreover, he is not as well qualified as Drs. Perper and Crouch to evaluate the pathology reports and he also did not discuss the effect of emphysema, documented by the autopsy, and by the reports of Dr. Perper and Dr. Crouch. He did not discuss how he reached his conclusion that there was no evidence of any respiratory disease, when in fact, he had commented on it elsewhere in his report. Treatment records show that the miner was treated for respiratory diseases by Dr. Robinette . . . and at Johnston Memorial Hospital. He failed to account for Dr. Perper's position that there were complications imposed on the ALS "separately and in aggregate."

[6] The administrative law judge, on remand, should also take into account Dr. Crouch's statement that: "Although there is emphysema, the changes are mild and the histologic patterns do not indicate coal mine dust with the exception of a few areas of focal emphysema." Employer's Exhibit 5; *see* 20 C.F.R. §718.201(a)(2).

> I attribute less weight to Dr. Fino's opinions because of the inconsistent findings, and the fact that he is less qualified than the pathologists as to the cause of death.

Decision and Order at 11-12 (citations omitted).

We hold that the administrative law judge mischaracterized the opinion of Dr. Fino as internally inconsistent as to the presence of a respiratory impairment. As employer asserts, Dr. Fino did not state that the miner had no evidence of a respiratory impairment. Rather, Dr. Fino specifically acknowledged that the miner exhibited a respiratory impairment, as documented by Dr. Robinette, but opined that this impairment was due to ALS and not to any coal dust-related condition. In addition, Dr. Fino explained the mechanism by which ALS causes respiratory impairment, as did Dr. Robinette. In addition, Dr. Fino noted that there was no evidence in the treatment records that the miner was clinically diagnosed with any coal dust-related impairment during his lifetime, and Dr. Robinette himself did not attribute the respiratory impairment that he measured to coal dust exposure. Thus, given the absence of any impairment in lung function due to coal dust exposure, Dr. Fino concluded that there was no evidence that coal mine dust inhalation caused, contributed to, or hastened the miner's death. Therefore, the administrative law judge's conclusion that Dr. Fino's opinion was "inconsistent" and "suspect" as to the presence of a respiratory impairment, is not supported by the evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Moreover, as discussed above, it was not rational for the administrative law judge to discredit Dr. Fino's opinion for failing to discuss the effects of emphysema on the miner's death, where the administrative law judge has not found that the miner's emphysema was related to coal dust exposure. 20 C.F.R. §718.201; *see Trent*, 11 BLR at 1-27.

We further agree with employer that the administrative law judge erred by discounting the opinion of Dr. Fino because he is not a pathologist. In *Sparks*, 213 F.3d at 191, 22 BLR at 2-260, 2-261, the United States Court of Appeals for the Fourth Circuit addressed the same issue. In *Sparks*, the administrative law judge, without explanation, found the pathologists' opinions more probative than the pulmonary experts' opinions on the issue of whether pneumoconiosis hastened the miner's death. The court, in *Sparks*, refused to guess why the administrative law judge had found the pathologists' opinions more probative, and remanded the case to the administrative law judge for a better explanation. As in *Sparks*, the administrative law judge in this case did not explain why he found the pathologists' opinions more probative than that of a pulmonary specialist. Consequently, we vacate the administrative law judge's discounting of the opinion of Dr. Fino, and remand this case to the administrative law judge for further consideration of Dr. Fino's opinion. *Sparks*, 213 F.3d at 191, 22 BLR at 2-261.

Based on the foregoing, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c), and remand the case to the administrative law judge for reconsideration of whether pneumoconiosis hastened the miner's death. On remand, the administrative law judge must reweigh the medical evidence on the issue of whether pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). In so doing, the administrative law judge must be cognizant that claimant bears the burden of proving her entitlement to benefits. *See* 20 C.F.R. §§718.201; 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Moreover, the Fourth Circuit has held that, in addition to assessing whether there has been a change in conditions or a mistake in a determination of fact in a modification proceeding, the adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing other factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *D.S. v. Ramey Coal Co.*, --- BLR ---, BRB No. 07-0789 BLA (June 25, 2008). The relevant factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Id.* The court also noted that finality interests may sometimes be relevant to whether modification should be granted. *Id.* Employer contends that because claimant failed to submit any evidence when her initial claim was pending, and, instead, chose to submit her supporting evidence on modification, the record reflects that claimant displayed a lack of diligence in pursuing her claim. Employer's Brief at 10-11. Employer asserts that the administrative law judge was required to consider this circumstance and make a determination as to whether reopening the claim would render justice under the Act. The Director responds, asserting that any error by the administrative law judge in failing to consider whether accepting claimant's modification petition would render justice under the Act was harmless, because, contrary to employer's contention, the facts of this case demonstrate that claimant was diligent, acted within her rights to submit evidence on modification, and did not submit multiple modification requests or otherwise abuse the process. Director's Brief at 4-5. Because we must remand this case for further consideration of the merits of claimant's entitlement to benefits, on remand, the administrative law judge should make an explicit determination as to whether the granting of the modification request would render justice under the Act.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge