BRB Nos. 11-0788 BLA
and 11-0794 BLA

IRMA L. GOFF (Widow of and o/b/o the Estate of DORCE G. GOFF) Claimant-Respondent v. PEABODY COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/24/2012 DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge John P. Sellers, III, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2007-BLA-5219, 2010-BLA-5360) of Administrative Law Judge John P. Sellers, III, awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on December 27, 2005, and a survivor's claim[1] filed on March 27, 2009.

In considering the miner's claim, the administrative law judge credited the miner with twenty-two years of coal mine employment,[2] pursuant to the parties' stipulation, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to the miner's claim, Section 1556 of Public Law No. 111-148 reinstated the Section 411(c)(4) rebuttable presumption. 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[1] Claimant is the surviving spouse of the miner, who died on February 10, 2009. Director's Exhibit 30-30. Two hearings were held in these consolidated claims. A hearing was held in the miner's claim on May 6, 2008, before Administrative Law Judge Daniel Solomon. The miner died before a decision was issued, and his claim was remanded to the district director for consolidation with the survivor's claim. The current administrative law judge held a hearing on both claims, on October 19, 2010. Decision and Order at 2.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Applying Section 411(c)(4), the administrative law judge found that the miner's twenty-two years of coal mine employment at a surface mine took place in dusty conditions that were substantially similar to those in an underground mine. The administrative law judge further found that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption. The administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In adjudicating the survivor's claim, the administrative law judge noted that Section 1556 revived Section 932(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge awarded benefits in the survivor's claim pursuant to amended Section 932(*l*).

On appeal, employer contends that the administrative law judge erred in finding that the miner's aboveground employment at a surface mine was substantially similar to underground coal mine employment. Additionally, employer argues that the administrative law judge erred in his analysis of the medical evidence when he found that the miner was totally disabled. Further, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Finally, employer contends that the administrative law judge erred in awarding benefits in the survivor's claim pursuant to Section 932(*l*). Claimant responds, urging affirmance of the administrative law judge's Decision and Order awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's finding that the miner's aboveground coal mine employment was substantially similar to underground mining. The Director further argues that if the Board affirms the award of benefits in the miner's claim, it should affirm the award in the survivor's claim pursuant to 30 U.S.C. §932(*l*). In a reply brief, employer reiterates its previous 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,

[3] On appeal, employer does not challenge the administrative law judge's finding that the x-ray evidence is positive for pneumoconiosis. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

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

Employer challenges the administrative law judge's finding that the miner worked for at least fifteen years in a surface mine with dust conditions substantially similar to those in an underground mine.[4] To establish that his or her work conditions were substantially similar to those in an underground mine, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

In this case, the administrative law judge found that the miner's uncontradicted testimony from the first hearing established that the miner's work took place in dusty conditions comparable to those in an underground mine:

> The [m]iner described extremely dusty conditions during his coal mine employment. He explained that when working around the silos, the wind would blow the dust. He further explained how the dust would be blown up into the air when he used an air hose to remove the dust. Regarding the conditions at the tipple, he explained that there were vibrators and "[s]ometimes the water would be off, but they would still run. And the dry coal would come through, you know, and the whole tipple would be full of dust." He explained that he would regularly sweep the tipple with a broom, which would stir up the dust. Finally, he testified that the conditions were dusty when he worked as a welder and mechanic because he had to work around the tipple. Although I did not personally witness the [m]iner's testimony (he testified before Judge Solomon), the testimony is uncontradicted. The testimony describes conditions which are substantially similar to those of underground coal miners who also describe working in a

[4] Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

> cloud or fog of dust. Thus, I rely on the testimony and find that the environmental conditions of the [m]iner's employment in surface mines were substantially similar to those in underground mines.

Decision and Order at 11.

Employer contends that substantial evidence does not support the administrative law judge's finding, as it is not based on an "objective" standard to "measure whether [the miner's] work was in comparable conditions." Employer's Brief at 18-19. Contrary to employer's contention, the administrative law judge properly considered the miner's unrefuted testimony regarding the conditions in his aboveground coal mine employment, and compared that information with his knowledge of conditions that prevail in underground coal mine employment. *See Leachman*, 855 F.2d at 512. Because it is based upon substantial evidence, the administrative law judge's finding, that the miner worked for twenty-two years in a surface mine in dust conditions substantially similar to those in an underground mine, is affirmed. *See Leachman*, 855 F.2d at 512.

We next turn to employer's challenges to the administrative law judge's findings that the pulmonary function studies and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5]

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four valid pulmonary function studies conducted on September 23, 2004; January 19, 2006; October 19, 2007; and September 16, 2008.[6] The September 23, 2004 pulmonary function study yielded qualifying[7] values pre-bronchodilator, and non-qualifying values after the administration of a bronchodilator. Director's Exhibit 30-558. The January 19, 2006 pulmonary function study contained only pre-bronchodilator results, which were qualifying. Director's Exhibit 12. The October 19, 2007 pulmonary function study contained only pre-bronchodilator results, which were non-qualifying. Director's Exhibit

[5] The administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11.

[6] The administrative law judge credited Dr. Repsher's opinion that a fifth pulmonary function study, administered by Dr. Repsher on August 1, 2006, was invalid because of the miner's poor effort and morbid obesity. Director's Exhibit 14.

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

30-776. Finally, the most recent pulmonary function study of September 16, 2008, yielded qualifying values both pre- and post-bronchodilator. Director's Exhibit 43. The administrative law judge found that the preponderance of the pulmonary function study evidence was qualifying, and he accorded greater weight to the more recent pulmonary function study, which was qualifying both pre- and post-bronchodilator. Decision and Order at 11. The administrative law judge therefore determined that the preponderance of the pulmonary function study evidence supported a finding of total disability. *Id*.

Employer argues that the administrative law judge did not adequately explain his weighing of the pulmonary function studies. Employer's Brief at 20. We disagree. The administrative law judge permissibly accorded greater weight to the more recent pulmonary function study, and determined that the preponderance of the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (en banc). As substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), it is affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Simpao, Fino, and Repsher. Dr. Simpao opined that the miner suffered from a totally disabling respiratory impairment that precluded him from returning to work as a truck driver at a surface mine. Director's Exhibit 12-25. Dr. Fino opined that the miner was totally disabled by an obstructive and restrictive respiratory impairment. Director's Exhibits 30-139, 30-155, 30-186. Dr. Repsher stated that the miner's blood gas study was normal, and that his pulmonary function study was "probably within normal limits, when adjusted for effort, cooperation, and body habitus." Director's Exhibit 14-5. The administrative law judge found that Drs. Simpao and Fino concluded that the miner was totally disabled by a respiratory impairment. Decision and Order at 12. In contrast, the administrative law judge found Dr. Repsher's opinion to be equivocal, as Dr. Repsher "did not comment on whether the [m]iner suffered from a respiratory or pulmonary disability other than commenting that the [August 2006] pulmonary function test was 'probably within normal limits when adjusted for effort, cooperation, and body habitus.'" *Id.* Therefore, the administrative law judge credited the opinions of Drs. Simpao and Fino, and found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Simpao and Fino to find total disability established. We disagree. Contrary to employer's contention, Drs. Simpao and Fino both noted the miner's last coal mine work as a truck driver, and each opined that the miner was prevented from returning

to that work because of his respiratory impairment.[8] Therefore, the administrative law judge permissibly relied on the opinions of Drs. Simpao and Fino. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, the administrative law judge permissibly discounted Dr. Repsher's opinion, as the administrative law judge found it to be equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer further argues that the administrative law judge erred in finding that notations of cor pulmonale and right-sided heart failure, contained in the miner's medical treatment records, supported a finding of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). We need not resolve this issue. Review of the administrative law judge's Decision and Order reflects that he relied primarily on the medical opinion and pulmonary function study evidence to find total disability established. Decision and Order at 12. Thus, error, if any, in the administrative law judge's consideration of the treatment record evidence regarding cor pulmonale and right-sided heart failure, would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer contends that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2). We disagree. The administrative law judge weighed the evidence together, and reasonably found that the non-qualifying arterial blood gas study evidence did not call into question the qualifying pulmonary function study evidence,[9] or outweigh the opinions of Drs. Simpao and Fino

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[8] Dr. Simpao, in his medical report, which Dr. Fino reviewed, described in detail the requirements of the miner's work as a truck driver:

> He had to climb up into the truck around 12 feet each time having to pull himself up. He worked 5 days per week 8 hour shifts. Usually, in a day's time, [the miner] had to climb on and off his equipment 4-6 times daily. Approximately 2 times a month, he would have to shovel coal from under the belts that weighed approximately 10 lbs each shovel full. He was also responsible for setting up water pumps and dragging hoses on a daily basis. Welding was another job included in his coal mine duties.

Director's Exhibit 12 at 22.

[9] The administrative law judge specifically noted that "[t]he blood gas studies are the only contrary evidence, but they measure a different type of impairment than the pulmonary function studies." Decision and Order at 12.

that the miner was totally disabled by a respiratory or pulmonary impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Consequently, we affirm the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that the miner worked for at least fifteen years in qualifying coal mine employment, and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

The administrative law judge first considered whether employer disproved the existence of clinical pneumoconiosis.[10] After finding that the preponderance of the x-ray evidence was positive for pneumoconiosis, *see* n.3, *supra*, the administrative law judge considered Dr. Repsher's interpretation of an August 1, 2006 CT scan. Dr. Repsher indicated that the CT scan showed "bibasilar nonspecific fibrosis with some early honeycombing," in addition to two nodules in the left and right lobes "which [were] probably noncalcified granulomas." Director's Exhibit 14 at 4. Dr. Repsher noted that the CT scan exhibited "no rounded opacities consistent with medical CWP." *Id.* at 5. Because the record did not demonstrate that Dr. Repsher possesses any special qualifications or expertise in reading CT scans to detect pneumoconiosis, the administrative law judge chose to accord Dr. Repsher's CT scan reading "some, but not controlling weight," over the positive x-ray evidence. Decision and Order at 15.

Employer contends that the administrative law judge erred in not giving controlling weight to Dr. Repsher's negative CT scan interpretation, and in requiring that

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Dr. Repsher demonstrate special expertise in reading CT scans. Contrary to employer's assertion, the administrative law judge permissibly found that Dr. Repsher's CT scan interpretation was not entitled to greater weight than the x-ray interpretations, based on the lack of evidence that Dr. Repsher possesses expertise in reading CT scans. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). Therefore, we reject employer's contention.

In considering whether the medical opinion evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Simpao, Baker, Fino, and Repsher. Dr. Baker opined that the miner suffered from coal workers' pneumoconiosis. Director's Exhibit 43. Although Dr. Simpao concluded in his medical report that the miner "does have CWP," Director's Exhibit 12 at 25, he clarified in a subsequent deposition that he believed the miner had legal pneumoconiosis. Director's Exhibit 30 at 1425. In contrast, Drs. Fino and Repsher opined that the miner did not have clinical pneumoconiosis, but suffered from idiopathic pulmonary fibrosis. Director's Exhibits 12, 30-139, 30-155, 30-186.

In weighing the medical opinion evidence, the administrative law judge found Dr. Fino's opinion to be unpersuasive, as the physician considered only two x-ray readings, both negative, and the administrative law judge had specifically found that one of the negative readings relied upon by Dr. Fino was outweighed by the positive reading of a physician with superior radiological credentials. Decision and Order at 15. Further, the administrative law judge found that "the overall positive nature of the x-ray evidence undercuts Dr. Fino's opinion," in light of Dr. Fino's statement that, if there were sufficient positive x-ray evidence of pneumoconiosis, it would be reasonable to relate the miner's pulmonary fibrosis to pneumoconiosis.[11] The administrative law judge gave "some, but not controlling weight" to Dr. Repsher's opinion that the miner did not have clinical pneumoconiosis, but also found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was credible and entitled to probative weight. *Id.* Based on those findings, the administrative law judge determined that employer failed to meet its burden to disprove the existence of clinical pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the medical opinion evidence, as the administrative law judge confused "disease and disease causation." Employer's Response Brief at 23. We disagree. The administrative law

[11] The administrative law judge specifically referenced Dr. Fino's statement that, "[i]f there is clear-cut evidence of classical pneumoconiosis either radiographically or pathologically associated with the diffuse interstitial pulmonary fibrosis, then it is reasonable to assume that the two are connected." Decision and Order at 15, *citing* Director's Exhibit 30-161 (internal quotations omitted).

judge correctly recognized that it was "employer's burden to disprove" that the miner had clinical pneumoconiosis. Decision and Order at 16; *see* 30 U.S.C. §921(c)(4). Contrary to employer's contention, the administrative law judge acted within his discretion in finding Dr. Fino's opinion to be unpersuasive. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993). The administrative law judge also acted within his discretion in declining to find Dr. Repsher's opinion entitled to any greater weight than Dr. Baker's opinion. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 355, 23 BLR 2-472, 2-481-82 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 14-15. In light of the above, the administrative law judge reasonably found that the medical opinion evidence did not meet employer's burden to disprove the existence of clinical pneumoconiosis. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9; *Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis.[12]

The administrative law judge further found that employer failed to rebut the presumption by proving that the miner's impairment did not arise out of, or in connection with, his coal mine employment. Decision and Order at 16. Employer does not challenge that finding, which is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of the above, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Therefore, we affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4).

The Survivor's Claim

The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 932(*l*). Employer argues that the administrative law judge's award of benefits under Section 932(*l*) is premature, because the award in the miner's claim is not final. Employer's Brief at 24. We disagree. Claimant satisfied her burden to establish each fact necessary

[12] Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Morrison*, 644 F.3d at 480; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Therefore, we need not address employer's contention that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not disprove the existence of legal pneumoconiosis. Employer's Brief at 23.

to demonstrate her entitlement under amended Section 932(*l*). Claimant filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is entitled to benefits pursuant to amended Section 932(*l*). 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decision and Order awarding 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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BETTY JEAN HALL
Administrative Appeals Judge