BRB No. 11-0795 BLA

BOBBY D. MANN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TURNER BROTHERS, INCORPORATED	)	DATE ISSUED: 08/29/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Third Petition for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Bobby D. Mann, Wister, Oklahoma, *pro se.*

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Claimant's Third Petition for Modification (08-BLA-0013) of Administrative Law Judge Thomas M. Burke rendered on a claim filed on November 17, 1986, 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).[1] This case involves a request for modification of a duplicate claim.[2]

The pertinent procedural history of this case is as follows: Claimant filed his first claim on September 23, 1974. Director's Exhibit 31. It was finally denied by the district director on August 14, 1979 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his second claim (a duplicate claim) on April 25, 1983. Director's Exhibit 30. It was finally denied by the district director on March 14, 1984 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his third claim (a duplicate claim) on November 17, 1986. Director's Exhibit 1. On March 9, 1988, Administrative Law Judge Aaron Silverman issued a Decision and Order denying benefits because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000).[3] Director's Exhibit 33. By Order dated October 7, 1991, the Board remanded the case to the Office of Administrative Law Judges in light of the holding of the United States Court of Appeals for the Tenth Circuit in *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). *Mann v. Turner Brothers, Inc.*, BRB No. 88-1303 BLA (Oct. 7, 1991)(unpub. Order). In a Decision and Order dated February 16, 1995, Administrative Law Judge Robert S. Amery credited claimant with at least 15 years of coal mine employment and found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Director's Exhibit 46. Judge Amery also found that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(c) (2000). *Id*. Judge Amery further found that claimant failed to establish a material change

[1] On March 23, 2010, amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because the instant claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

[2] The Department of Labor has amended the regulations implementing the Act, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

in conditions at 20 C.F.R. §725.309 (2000). *Id*. Accordingly, Judge Amery denied benefits. *Id*. In response to claimant's appeal, the Board affirmed Judge Amery's length of coal mine employment finding, his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b), and his finding that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(c) (2000).[4] *Mann v. Turner Brothers, Inc.*, BRB No. 95-1197 BLA (Feb. 15, 1996)(unpub.).[5] The Tenth Circuit affirmed the Board's Decision and Order, which affirmed Judge Amery's denial of benefits. *Mann v. Director, OWCP*, No. 96-9509 (10th Cir. Feb. 11, 1997).

By letters dated March 13, 1997, March 17, 1997 and April 3, 1997, claimant indicated that he wished to appeal the Tenth Circuit's decision. On March 9, 1998, claimant filed his fourth claim, Director's Exhibit 56, which a claims examiner denied on July 24, 1998 because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Director's Exhibit 62. However, on September 5, 2000, the district director construed claimant's 1997 letters as a request for modification of the Tenth Circuit's decision denying benefits, and determined that claimant was entitled to benefits. Director's Exhibit 81. Employer requested a formal hearing on September 15, 2000. Director's Exhibit 82. In a Decision and Order dated December 10, 2002, Administrative Law Judge Pamela Lakes Wood found that claimant established total respiratory disability, but failed to establish the existence of clinical or legal pneumoconiosis. Director's Exhibit 100. Accordingly, Judge Wood denied benefits. *Id*. The Board affirmed Judge Wood's denial of benefits. *Mann v. Turner Brothers, Inc.*, BRB No. 03-0284 BLA (Sept. 24, 2003)(unpub.). Further, the Board denied claimant's motion for reconsideration. *Mann v. Turner Brothers, Inc.*, BRB No. 03-0284 BLA (Jan. 26, 2004)(unpub. Order on Recon.).

Claimant filed another request for modification on May 11, 2004. Director's Exhibit 120. In a Decision and Order dated October 4, 2005, Administrative Law Judge Thomas M. Burke (the administrative law judge) found that the new evidence did not

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[4] The provision pertaining to total respiratory disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5] The Board declined to address Administrative Law Judge Robert S. Amery's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000) in light of its disposition of the case at 20 C.F.R. §718.204(c) (2000). *Mann v. Turner Brothers, Inc.*, BRB No. 95-1197 BLA, slip op. at 4 (Feb. 15, 1996) (unpub.).

establish a change in conditions and that Judge Wood's decision did not contain a mistake in a determination of fact at 20 C.F.R. 725.310 (2000). Director's Exhibit 167. Accordingly, the administrative law judge denied benefits. *Id*. The Board affirmed the administrative law judge's denial of benefits. *Mann v. Turner Brothers, Inc.*, BRB No. 06-0166 BLA (Sept. 27, 2006)(unpub.). Further, the Board denied claimant's motion for reconsideration. *Mann v. Turner Brothers, Inc.*, BRB No. 06-0166 BLA (Dec. 19, 2006) (unpub. Order on Recon.). Moreover, following claimant's appeal, the Tenth Circuit granted claimant's motion to dismiss the case. *Mann v. Director, OWCP*, No. 07-9501 (10th Cir. Feb. 21, 2007).

Claimant filed this request for modification on January 14, 2008. Director's Exhibit 179. In a Decision and Order Denying Claimant's Third Petition for Modification dated April 26, 2011, the administrative law judge found that the new evidence did not establish a change in conditions and the previous decision did not contain a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits, but specifically contends that the administrative law judge did not consider all of the new evidence and that he erred in admitting Dr. Repsher's deposition into the record. Employer responds, contending that the Board does not have jurisdiction of this case because the appeal was not timely filed. Alternatively, employer urges affirmance of the administrative law judge's denial of benefits because it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal, but notes that the amendments under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), do not apply in this case because the instant claim was filed before January 1, 2005.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[6] The record indicates that claimant was employed in the coal mining industry in Oklahoma. Director's Exhibits 2, 31. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Initially, we will address employer's contention that the Board does not have jurisdiction in this case because claimant's appeal is untimely. Specifically, employer argues that claimant's appeal was not filed within 30 days of the administrative law judge's first Order denying reconsideration. Employer maintains that the administrative law judge's second Order denying reconsideration did not toll the period for an appeal, citing *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Midland Coal Co. v. Director, OWCP* [*Luman*], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998); and *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997). We disagree.

An administrative law judge's decision or order becomes final and effective when it is filed with the district director unless it is appealed within 30 days after being filed. 20 C.F.R. §802.205(a). A request for reconsideration of an administrative law judge's decision or order, within 30 days of its filing, will toll the time for filing an appeal of the decision or order with the Board. 20 C.F.R. §802.206(a), (b)(2). Further, Section 802.206(f) contemplates one appeal of a case and provides that, if a motion for reconsideration is filed with the administrative law judge, a previously filed notice of appeal is premature and any party desiring Board review must wait until the administrative law judge resolves the motion and files his decision or order. 20 C.F.R. §802.206(f). Moreover, the applicable regulations place no limit on the number of times a party may seek reconsideration from an administrative law judge's decision or order. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (June 22, 2007).

In addition, *Stanley*, *Luman* and *Abner* apply to appeals of the Board's decisions to the courts, and not to appeals of the administrative law judges' decisions to the Board. Hence, these decisions address the issue in terms of the requirements for invoking the jurisdiction of the United States Courts of Appeals, rather than in the context of internal administrative appeals within an agency. Here, claimant filed motions for reconsideration of the administrative law judge's decisions, and not motions for reconsideration of the Board's decisions. On April 26, 2011, the administrative law judge issued his decision denying benefits. Claimant's first motion for reconsideration was denied by the administrative law judge on June 22, 2011. Claimant's second motion for reconsideration was denied by the administrative law judge on July 28, 2011. Claimant filed an appeal of the administrative law judge's denials on August 17, 2011. Thus, because the time for filing an appeal to the Board was tolled until after the administrative law judge filed his decision denying claimant's second motion for

reconsideration, *Tucker*, 41 BRBS at 68, claimant's appeal was timely filed within 30 days of the issuance of the administrative law judge's final decision denying reconsideration, 20 C.F.R. §§802.205, 802.206. Consequently, we reject employer's assertion that the Board does not have jurisdiction in this case.

Next, we address the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and, thus, that the evidence did not establish a basis for modification at 20 C.F.R. §725.310 (2000). As noted above, however, the instant case involves a request for modification of a duplicate claim.

Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310 (2000). The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 1511, 20 BLR 2-302, 2-320-21 (10th Cir. 1996). The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether the claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

In the instant case, claimant's most recent, prior claim in April 1983 was denied because claimant failed to prove any of the elements of entitlement. Director's Exhibit 30. Because claimant filed a request for modification of the administrative law judge's October 4, 2005 denial of benefits in this November 17, 1986 duplicate claim, the issue properly before the administrative law judge was whether the medical evidence developed since the denial of benefits in the prior claim (*i.e.*, the evidence developed

since the district director's March 14, 1984 denial of benefits in claimant's April 25, 1983 claim) established a material change in conditions at 20 C.F.R. §725.309 (2000) and, thereby, established a basis for modification at 20 C.F.R. §725.310 (2000). *See also Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

We affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),[7] as none of the new x-rays were classified as positive for pneumoconiosis.[8] Director's Exhibit 179. Further, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because the record does not contain any biopsy or autopsy evidence. Additionally, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) because none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Finally, the administrative law judge found that the new medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Tjandra, Repsher and Tuteur.[9]

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[7] Dr. Huskison found that the December 18, 2007 x-ray (2 views) showed "upper nodular changes primarily in the upper lobe but also to some changes in the lung bases consistent with longstanding chronic interstitial or pneumoconiotic disease." Director's Exhibit 179. Dr. Huskison also noted that "[u]nderlying obstructive pulmonary disease [was] felt to be present." *Id.* Dr. Navani reread the December 18, 2007 x-ray (2 views), classifying the profusion of the small opacities as 0/1 and classifying the large opacities as category 0. Director's Exhibit 180.

[8] Section 718.102(b) provides that "[a] Chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971)." 20 C.F.R. §718.102(b). Furthermore, Section 718.102(e) states, "[e]xcept as provided in this paragraph, no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section and Appendix A." 20 C.F.R. §718.102(e).

[9] The administrative law judge also noted that the record is replete with medical

In a clinic note, Dr. Tjandra's assessment included "[s]hortness of breath secondary to multiple problems, possible chronic obstructive pulmonary disease with history of smoking 50 pack years, possible black lung disease, [and] coal miner lung."[10] Director's Exhibit 179. In a report dated May 11, 2008, Dr. Repsher opined that claimant does not have "medical or legal coal workers (sic) pneumoconiosis." Employer's Exhibit 12. Dr. Repsher further opined that claimant does not have "any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust."[11] *Id*. During a deposition dated May 24, 2010, Dr. Repsher opined that claimant does not have pneumoconiosis, but has chronic obstructive pulmonary disease from smoking cigarettes.[12] Employer's Exhibit 28 (Dr. Repsher's Deposition at 30-31). In a report dated March 29, 2010, Dr. Tuteur diagnosed chronic obstructive pulmonary disease manifested by both emphysema and chronic bronchitis related to cigarette smoke. Employer's Exhibit 19. Dr. Tuteur stated that "it must be recognized that though there has been a progressive material change in his condition over time, this worsening is expected and typical for chronic obstructive pulmonary disease that is caused by the inhalation of tobacco smoke." *Id*. Dr. Tuteur further opined that claimant's condition was in no way related to, aggravated by, or caused by the inhalation of coal mine dust or the development of coal workers' pneumoconiosis. *Id*. During a

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records and hospital reports that refer to black lung by history or as a listed diagnosis, but "provide no explanation for the diagnosis." Decision and Order at 9. Additionally, the administrative law judge noted that "[a]lthough the [medical] records establish the existence of a severe and disabling pulmonary condition, they do not provide a reasoned opinion of its cause." *Id*. Thus, the administrative law judge reasonably found that the medical records are insufficient to establish that claimant's pulmonary condition was related to coal mine employment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

[10] Dr. Tjandra did not relate claimant's chronic obstructive pulmonary disease to his coal dust exposure. Director's Exhibit 179.

[11] Dr. Repsher opined that claimant has severe chronic obstructive pulmonary disease that is "overwhelmingly most likely due to his long, heavy, and probable continued cigarette smoking habit." Employer's Exhibit 12.

[12] Claimant contends that the administrative law judge erred in admitting Dr. Repsher's deposition testimony into the record because it was submitted less than 20 days before the hearing. Because any error by the administrative law judge in this regard is harmless, we need not address claimant's contention that the administrative law judge erred in admitting Dr. Repsher's deposition into the record on this basis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

deposition dated May 18, 2010, Dr. Tuteur opined that claimant's chronic obstructive pulmonary disease was related to the inhalation of cigarette smoke, and that claimant does not have any disease related to coal mine dust. Employer's Exhibit 27 (Dr. Tuteur's Deposition at 42, 65). The administrative law judge permissibly found that Dr. Tjandra's opinion was not reasoned because it is too equivocal. *See Justice v. Island Creek Coal Company*, 11 BLR 1-91, 1-94 (1988); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). In addition, the administrative law judge permissibly found that Dr. Tjandra's opinion was not documented because "it provides no basis for its assessment of causation except for a reference to cigarette smoking and coal mine employment history." Decision and Order at 7; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Further, the administrative law judge reasonably found that, "[a]s the evaluations of Drs. Repsher and Tuteur conclude that [c]laimant does not have pneumoconiosis, the CT scan does not show pneumoconiosis,[13] and the medical treatment records are insufficient to establish that [c]laimant's coal mine employment caused or contributed to his pulmonary disease, [c]laimant has not met his burden of establishing the existence of coal workers' pneumoconiosis." Decision and Order at 9. Additionally, based on his review of the entire record, the administrative law judge permissibly found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (3), (4). Thus, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), as supported by substantial evidence.

In view of our affirmance of the administrative law judge's finding that the evidence did not establish that the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(en banc), we affirm the administrative law judge's denial of benefits.

[13] The administrative law judge noted that "Dr. Myer interpreted the [November 14, 2008] CT scan as showing: no evidence of coal worker's (sic) pneumoconiosis; sequellae (sic) of prior granulomatous disease with focal areas of calcified parenchymal nodules; discrete well defined oval mass in left lower lobe, suggesting a benign etiology such as a large granulomas, hamartoma or residual of prior hematoma, but neoplastic process cannot be excluded; and severe centrilobular emphysema." Decision and Order at 7-8; Employer's Exhibit 10. The administrative law judge also noted that "Dr. Repsher referenced Dr. Myer's CT scan as negative for pneumoconiosis but [noted a] prior granulomatous disease with a well defined oval mass in left lobe." Decision and Order at 7; Employer's Exhibit 12.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Third Petition for Modification is affirmed.

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