BRB No. 09-0248 BLA

DONALD R. DALTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 12/23/2009
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Donald R. Dalton, Big Stone Gap, Virginia, *pro se.*

Christina N. Morgan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (2006-BLA-5107) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) issued on a subsequent claim, filed on December 2, 2004, 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).[1] In a Decision and Order

[1] Claimant has filed three previous claims for benefits. Director's Exhibit 1. Claimant's first two claims were denied because claimant failed to establish any of the requisite elements of entitlement. *Id*. Claimant's third claim for benefits was denied by Administrative Law Judge Daniel F. Sutton on September 22, 1999. *Id*. Judge Sutton found that although claimant was totally disabled, he failed to prove the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled due

dated November 3, 2008, the administrative law judge credited claimant with nineteen and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge found that claimant failed to satisfy his burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in allowing employer to submit five x-ray interpretations, when claimant submitted four x-ray interpretations. Claimant further asserts that the administrative law judge erred in crediting the opinions of Drs. Hippensteel and Castle, over the opinions of Drs. Fleenor and Baker, as to whether he suffers from pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational,

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to pneumoconiosis. *Id*. Claimant filed a request for modification on September 5, 2000, which was denied by Administrative Law Judge Mollie W. Neal on November 24, 2003. *Id.* Claimant filed a subsequent claim on December 2, 2004. Director's Exhibit 3. Following a formal hearing held on October 18, 2006, the administrative law judge issued his Decision and Order – Denying Benefits on November 3, 2008, which is the subject of this appeal.

[2] We affirm the administrative law judge's determinations that claimant timely filed his claim and that he established nineteen and one-half years of coal mine employment, as those determinations are unchallenged on appeal and favorable to claimant. *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).

supported by substantial evidence, and in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis or that claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing one of these elements of entitlement in order to have the administrative law judge review the subsequent claim on the merits. *See White*, 23 BLR at 1-3.

The regulation at 20 C.F.R. §718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit has further held that all relevant evidence is to be considered together, rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4), in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge first considered whether claimant established the existence of pneumoconiosis based on the x-

[3] Because claimant's last coal mine employment was in Virginia, the Board will apply the law 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*); Director's Exhibit 1.

ray evidence. The administrative law judge weighed eleven readings of four films dated October 5, 2004, January 27, 2005, September 28, 2005 and June 6, 2006, of which there were four positive and six negative readings for pneumoconiosis, and one quality reading.[4] Decision and Order at 4-5, 11. The administrative law judge found that the readings by the dually qualified Board-certified radiologists and B readers were entitled to controlling weight and that these readings were in equipoise as to the existence of pneumoconiosis. Thus, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that under the regulations, the parties "are only allowed to submit the same number of [x]-ray readings for consideration" and that the administrative law judge erred in admitting Dr. Scott's negative reading of the June 6, 2006 x-ray. Claimant's Brief at [1] (unpaginated). We disagree. The evidentiary limitations, set forth at 20 C.F.R. §725.414, state that claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may also submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii).

Contrary to claimant's contention, as part of its affirmative case, employer was entitled to submit the two negative readings by Drs. Hippensteel and Wheeler of the September 28, 2005 x-ray. Employer's Evidence Summary Form and Exhibit List. In addition, employer permissibly submitted, in rebuttal of claimant's affirmative case, Dr.

[4] The October 5, 2004 x-ray was read by Dr. Aycoth, a B reader, as positive for pneumoconiosis and by Dr. Wiot, a Board-certified radiologist and B reader, as negative. Claimant's Exhibit 1; Employer's Exhibit 7. The January 27, 2005 x-ray was read by Dr. Barrett for quality only, and by Dr. Alexander, a Board-certified radiologist and B reader, as positive, by Dr. Baker, a B reader, as negative, and by Dr. Wiot as negative for pneumoconiosis. Director's Exhibits 10, 12; Claimant's Exhibit 2; Employer's Exhibit 1. The September 28, 2005 x-ray was read by Dr. Cappiello, a Board-certified radiologist and B reader, as positive, by Dr. Hippensteel, a B reader, as negative, and by Dr, Wheeler, a Board-certified radiologist and B reader, as negative. Claimant's Exhibit 6; Employer's Exhibits 3, 8. The June 6, 2006 x-ray was read by Dr. Alexander as positive, and by Dr. Scott, a Board-certified radiologist and B reader, as negative. Claimant's Exhibit 7; Employer's Exhibit 10.

Wiot's negative reading of the October 5, 2004 x-ray and Dr. Scott's negative reading of the June 6, 2006 x-ray. *Id*.; *see* Employer's Exhibits 7, 10. Employer was also entitled to submit Dr. Wiot's negative reading of the January 27, 2005 x-ray, as that film was obtained by the Director pursuant to 20 C.F.R. §725.406. Director's Exhibit 10; Employer's Exhibit 1. Thus, because all of employer's x-ray readings were submitted in accordance with the evidentiary limitations, we reject claimant's argument that the administrative law judge erred in admitting Dr. Scott's negative reading of the June 6, 2006 x-ray into the record.

We also reject claimant's general contention that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis. The administrative law judge properly considered the radiological qualifications of the physicians and found that "the equally-qualified readers have conflicting opinions as to the existence of pneumoconiosis on chest x-ray." Decision and Order at 11; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Because the administrative law judge considered the three positive and four negative readings by the better qualified readers to be equally balanced, we affirm his finding that claimant failed to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Since there is no biopsy evidence of record, the administrative law judge properly found that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11. Additionally, since claimant is not eligible for the presumptions set forth at 20 C.F.R. §§718.304 or 718.305, 718.306, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[5] *Id*.

With regard to 20 C.F.R §718.202(a)(4), the administrative law judge considered the newly submitted opinions of Drs. Fleenor, Baker, Castle and Hippensteel. In a report

[5] The administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304. Claimant also is not eligible for the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305, as that presumption does not apply to a claim, such as this one, which was filed on or after January 1, 1982. *See* 20 C.F.R. §718.305. The regulation at 20 C.F.R. §718.306 does not apply because this is not a survivor's claim.

dated August 5, 2005, Dr. Fleenor indicated that he had treated claimant since 1988 for "Black Lung." Claimant's Exhibit 5. He reported that claimant worked in coal mine employment for nineteen and one-half years and smoked "for many years but has quit." *Id*. Dr. Fleenor diagnosed clinical pneumoconiosis, citing Dr. Aycoth's positive reading of the x-ray dated October 5, 2004. *Id*. Dr. Fleenor further noted that pulmonary function testing performed on January 17, 2005, revealed an FEV1 value that "is only 53% of what a gentleman his age and stature should be," which "is indicative of considerable air trapping, a classic finding in chronic obstructive lung disease, of which Coal Workers' Pneumoconiosis is one."[6] *Id*. Dr. Fleenor opined that claimant's "respiratory condition is due in part to his Coal Workers' Pneumoconiosis." *Id*.

Dr. Baker examined claimant on January 27, 2005, at the request of the Department of Labor. Director's Exhibit 10. Dr. Baker read the chest x-ray as negative for pneumoconiosis, 0/1, and opined that claimant's pulmonary function study showed a moderate obstructive defect, while the arterial blood gas study was normal. *Id*. On the Form CM-988, Dr. Baker diagnosed chronic obstructive pulmonary disease based on the pulmonary function study and chronic bronchitis by history. *Id*. Dr. Baker listed the primary and secondary causes of these conditions as "cigarette smoking/? coal dust exposure." *Id*. In a one page addendum to Form CM-988, also dated January 27, 2005, Dr. Baker opined that claimant "has a chronic lung disease, which was caused by his coal mine employment. This diagnosis is based on legal pneumoconiosis." *Id*. However, Dr. Baker noted the following:

> He also has a history of smoking for [forty-three] years at the rate of one pack per day but states he quit off and on for several times during this [forty-three] years. He could not give an exact period of time that he would quit each time. I think his cigarette smoking history is a significant factor in his obstructive airway disease and chronic bronchitis. His coal dust [exposure] of [nineteen and one-half] years, most of which was underground, has some degree of significance as well, but with his negative x-ray, this suggest[s] he does not have a significant dust load. Therefore, I cannot say it was very significant[,] but it may have been a significant factor in production of his obstructive airway disease and chronic bronchitis.

Id.

[6] The January 17, 2005 pulmonary function study was obtained by Dr. Narayanan. Claimant's Exhibit 4.

Dr. Castle issued a report on March 3, 2006, and explained that he reviewed claimant's medical history, prior physical examinations and the deposition testimony of a number of physicians along with his own prior reports and deposition testimony. Employer's Exhibit 4. He noted that "[a]t no time did [claimant] demonstrate any consistent physical findings indicating the presence of interstitial pulmonary process" and that a majority of the x-ray readings have been negative for pneumoconiosis. *Id*. Dr. Castle opined that claimant was totally disabled as a result of severe airway obstruction consistent with "bronchial asthma and tobacco smoke induced" obstructive airway disease. *Id*. Dr. Castle opined that claimant's pulmonary function study results showed a significant degree of reversibility, which was not consistent with an impairment due to coal-dust exposure, as coal workers' pneumoconiosis causes a "mixed, irreversible obstructive and restrictive ventilatory defect." *Id*. During his deposition conducted on March 13, 2006, Dr. Castle explained that he disagreed with Dr. Fleenor's diagnosis of pneumoconiosis insofar as Dr. Fleenor based his opinion on the results of the January 17, 2005 pulmonary function study, which Dr. Castle considered to be invalid.[7] Employer's Exhibit 5. Dr. Castle opined that claimant has neither clinical nor legal pneumoconiosis. *Id*.

Dr. Hippensteel examined claimant on January 30, 2006, and opined that claimant "has negative x-ray evidence of pneumoconiosis and has other findings consisting of partially reversible airflow obstruction . . . ." Employer's Exhibit 3. Dr. Hippensteel further opined that claimant's "history of prolonged cigarette smoking and . . . asthma [is] sufficient to cause this amount of pulmonary impairment." *Id*. Dr. Hippensteel noted that "[t]hese findings are consistent with airways disease with some reversibility which is not a component of simple coal workers' pneumoconiosis in this case." *Id*.

In a deposition conducted on March 14, 2006, Dr. Hippensteel agreed with Dr. Castle's conclusion that the January 17, 2005 pulmonary function study, relied on by Dr. Fleenor, was invalid because of "excessive variation in [claimant's] FVC values." Dr. Hippensteel also noted that the study was incomplete because "no post[-]bronchodilator studies were done to determine reversibility when the findings previously in this case showed that [claimant] had significant reversibility with bronchodilator use." *Id*.

In weighing these conflicting medical opinions, the administrative law judge gave less weight to the diagnoses of pneumoconiosis by Drs. Fleener and Baker, and found

[7] Dr. Castle explained that the January 17, 2005 pulmonary function study showed "significant variability in the forced vital capacity" and that the tracings were not reproducible. Employer's Exhibit 5 at 10-11. Dr. Castle further noted that Dr. Narayanan did not obtain a post-bronchodilator spirometry, nor did he test claimant's lung volume or diffusion capacity. *Id*. at 15-16.

that claimant failed to satisfy his burden of proof pursuant to Section 718.202(a)(4). Claimant asserts that the administrative law judge erred by not giving controlling weight to Dr. Fleenor's opinion, based on his status as claimant's treating physician. Claimant's Brief at [1-3] (unpaginated). We disagree.

The United States Court of Appeals for the Fourth Circuit has held that, although the opinions of treating and examining physicians deserve special consideration, there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-8, 22 BLR 2-564, 2-571 (4th Cir. 2002). The regulation at 20 C.F.R. §718.104(a) provides that the weight accorded to a treating physician shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In this case, the administrative law judge considered the opinions of Drs. Castle, Hippensteel and Baker to be entitled to great weight since they are Board-certified pulmonologists. Decision and Order at 12. The administrative law judge correctly noted that "while Dr. Fleenor is [c]laimant's longtime physician, he is a family practitioner rather than a pulmonary specialist." Decision and Order at 12; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Contrary to claimant's contention, because the administrative law judge found the x-ray evidence to be in equipoise, he reasonably found Dr. Fleenor's diagnosis of clinical pneumoconiosis[8] to be unpersuasive as it was primarily based on a positive x-ray reading by Dr. Aycoth. Decision and Order at 12. Furthermore, the administrative law judge acted within his discretion in according Dr. Fleenor's diagnosis of chronic obstructive pulmonary disease due to coal dust exposure (legal pneumoconiosis)[9] less weight since

[8] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *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). This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

the administrative law judge found that Dr. Fleenor "did not discuss the specifics of [c]laimant's smoking history and its [e]ffect on [c]laimant's respiratory condition," and because he "did not discuss [c]laimant's history of asthma." Decision and Order at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, the administrative law judge determined that Dr. Fleenor relied, in part, on "invalid and incomplete pulmonary function testing" in reaching his diagnosis of pneumoconiosis. Decision and Order at 12. Thus, because the administrative law judge determined that Dr. Fleenor's opinion was not sufficiently reasoned to establish the existence of either clinical or legal pneumoconiosis, the administrative law judge committed no error in according Dr. Fleenor's opinion little weight at 20 C.F.R. §718.202(a)(4), despite his status as claimant's treating physician. *See Held*, 314 F.3d at 187-8; 22 BLR at 2-571; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997).

We also affirm the administrative law judge's findings with respect to Dr. Baker. As noted by the administrative law judge, Dr. Baker did not diagnose clinical pneumoconiosis. Decision and Order at 12. As to the issue of legal pneumoconiosis, the administrative law judge reasonably found Dr. Baker's opinion, that claimant's respiratory condition "*may have been"* substantially contributed to[,] or aggravated by[,]dust exposure in coal mine employment" was equivocal and, therefore, insufficient to support claimant's burden of proof. Claimant's Exhibit 10 (emphasis added); *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 12.

The administrative law judge also permissibly determined that the opinions of Drs. Castle and Hippensteel, that claimant does not have either clinical or legal pneumoconiosis, were reasoned and documented since both physicians "review[ed] other medical evidence in the record" and they had a "more complete picture of [c]laimant's health." Decision and Order at 13; *see Clark*, 12 BLR at 1-155. It is the duty of the administrative law judge, as the trier-of-fact, to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge acted within his discretion in rendering his credibility determinations and assigning controlling weight to the opinions of Drs. Castle and Hippensteel, we affirm his finding that the newly submitted medical opinions fail to establish that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 11-13. We further affirm the administrative law judge's finding that the newly submitted evidence, overall, is insufficient to establish the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 15.

Because claimant failed to establish the existence of pneumoconiosis, the administrative law judge properly found that claimant was unable to establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, we affirm the administrative law judge's finding that claimant failed to demonstrate a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. We, therefore, affirm the administrative law judge's denial of benefits on claimant's subsequent claim.

Accordingly, the administrative law judge's Decision and Order - Denying 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