BRB No. 99-0407 BLA

LYDIA B. HACKNEY (Widow of WILLIE O. HACKNEY)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

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

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-0293) of Administrative Law Judge Daniel J. Roketenetz denying benefits in both a miner's duplicate claim[2]

[1]Claimant is the widow of the miner, Willie O. Hackney, who died on October 25, 1995. Director's Exhibits 21, 22. Claimant filed her survivor's claim on March 22, 1996. Director's Exhibit 21.

[2]The miner filed claims with both the Social Security Administration (SSA) and

and 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). The administrative law judge credited the miner with nine years of coal mine employment and adjudicated the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Nonetheless, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge adopted his finding that

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the Department of Labor (DOL) on July 9, 1973. Director's Exhibit 18. The miner's 1973 SSA claim was finally denied by the SSA on June 29, 1977. *Id*. With respect to the miner's 1973 DOL claim, Administrative Law Judge Peter McC. Giesey issued a Decision and Order denying benefits on July 9, 1987, *id*., which the Board affirmed in part, vacated in part, and remanded so that the Director, Office of Workers' Compensation Programs, could fulfill his statutory obligation of providing the miner with a complete and credible pulmonary evaluation, *Hackney v. Director, OWCP*, BRB No. 87-2155 BLA (Aug. 31, 1989)(unpub.). On February 21, 1991, Judge Giesey issued a Decision and Order on Remand denying benefits based on the miner's failure to establish the existence of pneumoconiosis and total disability. *Id*. Because the miner did not pursue this claim any further, the denial became final. The miner filed his most recent claim with the DOL on February 4, 1993. Director's Exhibit 1.

the evidence is insufficient to establish the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 and the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(1).[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, we will address the Director's contention that the administrative law judge erred in finding the newly submitted evidence sufficient to establish a material change in condition at 20 C.F.R. §725.309 in the miner's claim. After considering the newly submitted x-ray evidence, the administrative law judge found that claimant established a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that the miner's prior claim was denied on the basis that "the Miner failed to establish any element of entitlement." Decision and Order at 5; *see* Director's Exhibit 18. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R.

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§725.309(d). *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered all of the newly submitted x-ray evidence of record. Of the five newly submitted x-ray interpretations of record, three readings are positive for pneumoconiosis,[4] Director's Exhibits 9, 10, 12, and two readings are negative,[5]

[4]Drs. Clarke and Fisher read the March 21, 1991 x-ray as positive for pneumoconiosis, Director's Exhibits 9, 10, and Dr. Rubenstein read the March 26, 1991 x-ray as positive for pneumoconiosis, Director's Exhibit 12.

[5]Dr. Sargent read the April 1, 1993 x-ray as negative for pneumoconiosis, Director's Exhibit 11, and Dr. Zweig read the April 2, 1993 x-ray as negative for pneumoconiosis, Director's Exhibit 13. The administrative law judge permissibly discounted Dr. Zweig's negative reading of the April 2, 1993 x-ray because he found

Director's Exhibits 11, 13. In addition to noting the numerical superiority of the positive x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[6] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

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that it "was not read for purposes of determining the presence or absence of pneumoconiosis." Decision and Order at 6; *see* 20 C.F.R. §718.102(e).

[6]The administrative law judge discounted Dr. Clarke's positive reading of the March 21, 1991 x-ray because he found that "Dr. Clarke...possesses no expertise in interpreting chest x-rays." Decision and Order at 6; Director's Exhibit 9. While Dr. Sargent, who is a B-reader and a Board-certified radiologist, read the April 1, 1993 x-ray as negative for pneumoconiosis, Director's Exhibit 11, Dr. Fisher, who is a B-reader and a Board-certified radiologist, read the March 21, 1991 x-ray as positive for pneumoconiosis, Director's Exhibit 10, and Dr. Rubenstein, who is a Board-certified radiologist, read the March 26, 1991 x-ray as positive for pneumoconiosis, Director's Exhibit 12. The administrative law judge found that "the two qualified positive interpretations of record outweigh the interpretation of Dr. Sargent to the contrary." Decision and Order at 6. Hence, the administrative law judge concluded that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis "[b]ased on the quality and quantity of the positive interpretations." *Id*.

The Director asserts that the administrative law judge erred in failing to weigh the newly submitted x-ray evidence and the newly submitted autopsy evidence together in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In *Williams*, the United States Court of Appeals for the Third Circuit held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the miner suffers from pneumoconiosis. However, as previously noted, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has not adopted the Third Circuit's holding in *Williams* with respect to the weighing the medical evidence under 20 C.F.R. §718.202(a)(1)-(4). Thus, we reject the Director's assertion that the administrative law judge erred in failing to weigh the newly submitted x-ray evidence and the newly submitted autopsy evidence together in accordance with *Williams*. Moreover, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter, supra*.

Next, we address claimant's contentions with regard to the administrative law judge's findings on the merits in both the miner's claim and the survivor's claim. Claimant contends, and the Director agrees, that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(1). The administrative law judge stated that "[t]he entire record contains twenty-four interpretations of fourteen x-rays." Decision and Order at 6. After discrediting thirteen x-ray interpretations,[7] the administrative law judge stated that "[o]f the remaining [eleven] interpretations, six are positive and five are negative." *Id*. at 7. The administrative law judge also stated that "[o]f the six positive interpretations, four were submitted by physicians who are B-readers and/or [B]oard-certified radiologists" and that "[o]f the five negative interpretations, four

[7]The administrative law judge permissibly discredited "the interpretations of the unidentified physician from the January 12, 1976, x-ray, Dr. Blumenstein, Dr. Walker and [Dr.] Zweig...given the fact that these interpretations were not [taken] for purposes of determining the existence of pneumoconiosis and were not properly classified." Decision and Order at 7; *see* 20 C.F.R. §718.102(e). The administrative law judge also permissibly discredited the "interpretations of the September 5, 1974, and January 12, 1976, x-rays as the better-qualified readers found these x-rays unreadable." *Id*.; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

were submitted by qualified physicians." *Id*. Hence, the administrative law judge concluded that "[a]s these interpretations are proximate to one another and have been read as both positive and negative by qualified physicians, I can find no basis to differentiate among them" and "I find the x-ray evidence to be equally balanced."[8] *Id*. However, as the Director asserts, the record indicates that while four physicians who are B-readers and/or Board-certified radiologists interpreted the remaining x-rays as positive for pneumoconiosis,[9] Director's Exhibits 10, 12, 18, only three

[8]In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose.

[9]Dr. Fisher, who is a B-reader and a Board-certified radiologist, read the March 21, 1991 x-ray as positive for pneumoconiosis. Director's Exhibit 10. Dr. Rubenstein, who is a Board-certified radiologist, read the March 26, 1991 x-ray as positive for pneumoconiosis. Director's Exhibit 12. Dr. Pitman, who is a B-reader and a Board-certified radiologist, read the October 10, 1973 x-ray as positive for pneumoconiosis. Director's Exhibit 18. Lastly, Dr. Brandon, who is a Board-certified radiologist, read the March 19, 1981 x-ray as positive for pneumoconiosis. Director's Exhibit 18.

physicians who are B-readers and/or Board-certified radiologists interpreted the remaining x-rays as negative,[10] Director's Exhibit 18. Contrary to the administrative law judge's finding that "Dr. Irish, a [B]oard-certified radiologist, read x-rays dated August 1 and 2, 1990" as negative for pneumoconiosis, Decision and Order at 7, the record indicates that an x-ray dated August 1, 1990 was read by Dr. Irish on August 2, 1990. In addition, contrary to the administrative law judge's finding that the October 10, 1973 x-ray "was read by four physicians," *id*. at 6, the record indicates that this x-ray was read by two physicians, namely Dr. Pitman and Dr. Harris. Director's Exhibit 18.

[10]Dr. Harris, who is a Board-certified radiologist, read the October 10, 1973 x-ray as negative for pneumoconiosis. Director's Exhibit 18. Dr. Elmer, who is a B-reader and a Board-certified radiologist, read the October 1, 1985 x-ray as negative for pneumoconiosis. Director's Exhibit 18. Dr. Irish, who is a Board-certified radiologist, read the August 1, 1990 x-ray as negative for pneumoconiosis. Director's Exhibit 18.

The administrative law judge also discredited the x-ray interpretations of Dr. Sargent since he found that "Dr. Sargent is of record as interpreting the Miner's x-ray[s] as both positive and negative without an explanation as to this apparent inconsistency."[11] Decision and Order at 7. Contrary to the administrative law judge's finding, an administrative law judge may not discredit the x-ray readings of a radiologist on the basis that the radiologist rendered positive and negative interpretations of different x-rays. *See generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Unlike physicians who render medical opinions with respect to the existence of pneumoconiosis on the bases of physical examinations, x-ray evidence, objective evidence, smoking and coal mine employment histories, and reviews of medical evidence, radiologists render interpretations of the presence or absence of roentgenographic manifestations of the disease solely on the basis of the x-ray film that is before them. *Compare* 20 C.F.R. §718.202(a)(1) with 20 C.F.R. §718.202(a)(4). Thus, inasmuch as the administrative law judge did not provide a valid basis for finding the x-ray evidence of record to be equally balanced, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(2). The administrative law judge considered the autopsy report of Dr. Houle and the consultative reports of Drs. Abrenio, Clarke, Crouch and DeLara. Whereas Drs. Abrenio, Clarke, DeLara and Houle opined that the miner suffered from pneumoconiosis, Director's Exhibits 23, 27, 28, Dr. Crouch opined that the miner did not suffer from pneumoconiosis, Director's Exhibit 29. The administrative law judge properly accorded determinative weight to the opinion of Dr. Crouch over the contrary opinions of Drs. Abrenio, Clarke, DeLara and Houle because of Dr. Crouch's superior qualifications.[12] *See Martinez v. Clayton Coal Co.*,

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[11]Although Dr. Sargent read the June 4, 1980 x-ray as positive for pneumoconiosis, Director's Exhibit 18, Dr. Sargent read the March 19, 1981, November 23, 1990 and April 1, 1993 x-rays as negative for pneumoconiosis, Director's Exhibits 11, 18.

[12]The administrative law judge correctly stated that "[o]f the physicians who rendered an opinion on this issue, Dr. Crouch was the only physician to submit his relevant credentials." Decision and Order at 9. Dr. Crouch is Board-certified in anatomic pathology. Director's Exhibit 29. Although the administrative law judge stated that "Dr. Houle is [B]oard-certified in anatomic pathology," Decision and

10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Crouch than to the contrary opinion of Dr. Houle in view of Dr. Houle's status as the autopsy prosector. The Board has held that an administrative law judge may not mechanically, without a valid explanation, accord greater weight to the opinion of the autopsy prosector over the contrary opinions of the reviewing pathologists simply on the grounds that the prosector had the benefit of performing a gross examination on the miner's lungs. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Here, the administrative law judge stated that "[a]s the opinions of all of these physicians, including Dr. Houle, are premised on microscopic findings, there is no reason to credit the physician performing the autopsy over those physicians reviewing the resulting slides." Decision and Order at 9. Thus, we reject claimant's assertion that the administrative law judge erred by not according greater weight to Dr. Houle's opinion based on his status as the autopsy prosector. *See Urgolites, supra*. Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(2).

Order at 10, the administrative law judge's statement in this regard appears to be a typographical error based on the context of the administrative law judge's analysis of the evidence on this issue and the fact that the record does not contain Dr. Houle's credentials.

Further, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the relevant medical opinions of Drs. Aten, Clarke, Engelman, Fritzhand, Hadad, Long, Newman and Toeller. Whereas Drs. Clarke, Fritzhand, Hadad and Toeller opined that the miner suffered from pneumoconiosis,[13] Director's Exhibits 8, 9, 18, Dr. Long opined that the miner did not suffer from pneumoconiosis, Director's Exhibits 24, 30. Drs. Aten and Newman diagnosed pulmonary fibrosis, but the physicians did not opine that the diagnosed condition was related to coal mine employment. Director's Exhibit 18. Dr. Engelman diagnosed possible hypertensive heart disease. Director's Exhibit 18. The administrative law judge properly discredited the opinions of Drs. Clarke and Fritzhand because he found that they were based on inaccurate coal mine employment histories.[14] *See Hunt v. Director, OWCP*, 7 BLR 1-709 (1985). The administrative law judge also properly discredited the opinions of Drs. Hadad and Toeller because he found that they were not well reasoned.[15] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Additionally, inasmuch as the administrative law judge rationally considered

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[13]Dr. Toeller diagnosed a restrictive pulmonary disease related to coal dust exposure. Director's Exhibit 18.

[14]The administrative law judge stated that the diagnoses of Drs. Clarke and Fritzhand are "premised upon an erroneous amount of coal mine employment." Decision and Order at 13. The administrative law judge observed that "Dr. Clarke and Dr. Fritzhand credited the Miner with fifteen years of coal mine employment." *Id*. The administrative law judge also observed that "[t]his figure is in excess of the amount of coal mine employment I found that the Miner was able to establish." *Id*. The administrative law judge found that "the Miner worked for nine years at most in and around the Nation's coal mines." *Id*. at 3.

[15]The administrative law judge stated that "Dr. Hadad rendered a diagnosis of pneumoconiosis." Decision and Order at 10. However, the administrative law judge found that "there is no semblance of reasoning or documentation for this diagnosis." *Id*. The administrative law judge also stated that Dr. Toeller "premised [his] diagnosis of coal workers' pneumoconiosis on the exposure history of the miner." *Id*. at 13. The administrative law judge further stated that "Dr. Toeller failed to record this history and I find his report incomplete as a result." *Id*. at 13. As previously noted, Dr. Toeller diagnosed a restrictive pulmonary disease related to coal dust exposure. Director's Exhibit 18.

Dr. DeLara's opinion, that the miner suffered from coal workers' pneumoconiosis, in his analysis of the evidence under 20 C.F.R. §718.202(a)(2) because Dr. DeLara's opinion was based on a review of autopsy slides, Director's Exhibit 27, we reject claimant's assertion that the administrative law judge erred by failing to consider the opinion of Dr. DeLara in his analysis of the evidence under 20 C.F.R. §718.202(a)(4). Moreover, inasmuch as the death certificate does not contain a diagnosis of pneumoconiosis or chronic obstructive lung disease related to coal mine employment, we hold that any error by the administrative law judge in failing to consider the death certificate in his analysis of the evidence under 20 C.F.R. §718.202(a)(4) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Director's Exhibit 22. Although the death certificate lists pulmonary fibrosis as a cause of the miner's death, the death certificate does not indicate that this pulmonary condition was related to the miner's coal mine employment. *Id*.

Claimant also asserts that the administrative law judge should have accorded greater weight to the miner's treating physician than to the non-treating physicians of record. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Moreover, the record does not indicate that any of the physicians of record treated the miner. Therefore, since the administrative law judge properly discredited the only opinions of record that could support a finding of pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(4).

If reached on remand in the miner's claim, the administrative law judge must consider whether the evidence is sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Finally, if reached on remand in the survivor's claim, the administrative law judge must consider whether the evidence is sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment at 20

C.F.R. §718.203, and whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge