BRB No. 11-0334 BLA

RUEL B. MCGUIRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERESA COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/23/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6038) of Administrative Law Judge Alice M. Craft rendered on a claim[1] 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).[2] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited claimant with "at least" thirteen years of qualifying coal mine employment. The administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant filed his application for benefits on September 4, 2001. Director's Exhibit 2.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed before January 1, 2005.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence established at least thirteen years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5, 41-45.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Employer initially contends that the administrative law judge erred in failing to resolve the various discrepancies in claimant's cigarette smoking history that were reported by Drs. Baker, Hussain, Jarboe, and Fino, and contained in claimant's formal hearing testimony. Specifically, employer asserts that the administrative law judge's failure to resolve the conflicting cigarette smoking histories and to provide an explanation for her finding that claimant had a 22.5 pack-year cigarette smoking history does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer avers that the administrative law judge failed to reconcile the following smoking histories: Dr. Hussain reported one pack every three or four days from 1953-November 2001; Dr. Fino reported one pack per day from 1956-1990/1991; hospital records dated January 2007 indicated that claimant quit smoking ten years ago (1997); Drs. Baker and Jarboe each reported one pack per day for 20-25 years; and claimant testified that he ceased smoking in the late 1980's.

Employer's argument is without merit. The medical opinions of record reflect the following cigarette smoking histories for claimant: Dr. Baker recorded one pack per day for 20-25 years; Dr. Forehand reported one pack per day for twenty years; Dr. Jarboe stated that claimant smoked one pack per day for 20-25 years; Dr. Fino recorded one pack per day for 25 years; and Dr. Hussain reported that "patient has quit smoking" in his treatment records. Employer's Exhibits 6, 7, 9; Claimant's Exhibits 1, 2, 3, 7. Claimant testified at the formal hearing on June 2, 2009 that he stopped smoking in the late 1980's; he testified at his deposition on August 5, 2002 that he smoked one pack per day for fifteen years, quitting in the late 1980's. Hearing Transcript at 23; Director's Exhibit 17 at 17. After noting claimant's testimony, the administrative law judge stated that, "[w]ith the exception of Dr. Hussain's report, the medical reports submitted for this claim report a smoking history of one pack per day for between 20 and 25 years." Decision and Order at 4. Because the administrative law judge reasonably found that claimant had a 22.5 pack-year smoking history, based on "tak[ing] the midpoint" of the smoking histories recorded by all the physicians, except that of Dr. Hussain, *id.*; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), we reject employer's assertion that the administrative law judge violated the APA by failing to resolve the conflicting cigarette smoking histories and by failing to provide an explanation for her finding that claimant had a 22.5 pack-year cigarette smoking history. We, therefore, affirm it.

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that the administrative law judge provided invalid reasons for crediting the opinions of Drs. Baker, Forehand, and Hussain, that claimant has legal pneumoconiosis, over the contrary opinions of Drs. Jarboe and Fino. Specifically, employer argues that the administrative law judge erred in crediting Dr.

Baker's opinion because: (1) his opinion was not necessarily consistent with the preamble to the regulations; (2) his conclusion that chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis "can all be caused by coal dust exposure" was merely a possibility, rather than a definitive conclusion; and (3) his deposition testimony was not subjected to the same scrutiny as the opinions of Drs. Fino and Jarboe. We disagree.

Contrary to employer's assertion, in evaluating the conflicting medical opinions of record on the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately summarized the explanations and bases for the various physicians' conclusions, and acted within her discretion in finding that Dr. Baker's opinion, that claimant suffers from disabling legal pneumoconiosis and chronic obstructive pulmonary disease/chronic bronchitis caused primarily by coal mine dust exposure and cigarette smoking, was well-reasoned, well-documented, and entitled to full probative weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 33-34. In so finding, the administrative law judge determined that Dr. Baker's diagnosis was based on the following: claimant's medical and employment histories; an accurate cigarette smoking history of one pack per day for 20-25 years; a positive chest x-ray interpretation; physical examination findings; objective tests that were consistent with other tests of record, including qualifying pulmonary function studies demonstrating a moderate obstructive defect and arterial blood gas studies reflecting mild resting arterial hypoxemia; and his critique of the medical reports and deposition testimonies of Drs. Jarboe and Fino. Decision and Order at 33-34; Claimant's Exhibits 1, 7. The administrative law judge was persuaded by the opinion of Dr. Baker, who is a Board-certified pulmonologist, that with "a dual exposure, such as [claimant] had with cigarette smoking and coal dust exposure, there may be elements of both conditions present on pulmonary function studies[,] as neither one is exactly pure and simple exposure to cigarette smoke alone or to coal dust alone," and evidence of both exposures on pulmonary function studies would "make it very difficult to separate the harmful effects of each in my opinion," as Dr. Baker's conclusion was consistent with "the premises underlying the regulations." Decision and Order at 34; *see* Claimant's Exhibit 7; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Thus, the administrative law judge properly found that Dr. Baker's opinion, that claimant's coal dust exposure predominantly caused his disabling chronic obstructive pulmonary disease/chronic bronchitis, was sufficient to affirmatively establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *accord Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006). Consequently, we reject

employer's assertion that the administrative law judge erred in crediting Dr. Baker's opinion.

Employer also asserts that the administrative law judge's weighing of the opinions of Drs. Forehand and Hussain under Section 718.202(a)(4) was flawed, and thus her determination to credit these physicians' opinions was not rational. Employer maintains that, even though the administrative law judge found that Dr. Forehand did not adequately explain his conclusion and was not a Board-certified pulmonologist, she concluded that Dr. Forehand rendered a reasoned opinion and was well qualified to do so. Likewise, employer avers that the administrative law judge's reliance on Dr. Hussain's opinion was flawed, since the administrative law judge acknowledged that it was based on an invalid pulmonary function study, a discredited x-ray film, a deflated cigarette smoking history, and an inflated coal mine employment history.

Contrary to employer's argument, the administrative law judge accorded "less weight" to the opinions of Drs. Hussain and Forehand on the issue of the existence of legal pneumoconiosis. Decision and Order at 40. While the administrative law judge noted that Drs. Baker, Hussain, and Forehand rendered "well[-]documented and reasoned opinions," she ultimately accorded "the most weight" to Dr. Baker's opinion. The administrative law judge acknowledged that Dr. Hussain, who is a Board-certified pulmonologist, treated claimant during his 2007 and 2009 hospitalizations, and diagnosed chronic obstructive pulmonary disease caused by coal dust exposure, based on claimant's coal mine employment history, physical examination, positive chest x-ray, and abnormal pulmonary function and blood gas studies. The administrative law judge, however, accorded "less weight" to Dr. Hussain's opinion, contained in his November 30, 2001 report, as it was based on a cigarette smoking history that was "approximately" six to ten years less than that found by the administrative law judge, *see Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Bobick*, 13 BLR at 1-54; *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308-309 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986), and because his pulmonary evaluation of claimant was eight years prior to the other evaluations, *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993) (while a bare appeal to recency is prohibited, an earlier opinion might conceivably be rationally devalued because it is extremely remote in time); Decision and Order at 32-33. Likewise, the administrative law judge found that the relative credibility of Dr. Forehand's opinion was diminished because Dr. Forehand opined, in his May 29, 2009 report, that "the etiology of [claimant's] respiratory impairment is a combination of coal mine dust exposure and cigarette smoking, [as] discussed in depth in my letter of July 24, 2007," which was not contained in the evidentiary record. Claimant's Exhibit 2; Decision and Order at 35. Because Dr. Forehand's only explanation for the conclusion contained in his May 29, 2009 report was his reference to his July 24, 2007 report, which was inadmissible evidence, the administrative law judge properly found that the probative value of Dr. Forehand's opinion was undermined on the issue of legal pneumoconiosis.

See Keener v. Peerless Eagle Coal Co., 23 BLR 1-229 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*); Decision and Order at 35. Thus, we reject employer's assertion that the administrative law judge erred in weighing the opinions of Drs. Hussain and Forehand.

Employer further asserts that the administrative law judge erred in failing to provide valid reasons for discrediting the opinions of Drs. Jarboe and Fino, which employer argues were better reasoned and documented than that of Dr. Baker. Employer avers that "measuring the credibility of evidence against the discussion in the preamble violates the [APA]." Employer's Brief in Support of Petition for Review at 18. Specifically, employer asserts that the administrative law judge's declaration that Dr. Jarboe's opinion was hostile to the regulatory definition of legal pneumoconiosis was improper because Dr. Jarboe did not express an opinion that is antithetical to the Act (*e.g.*, foreclose all possibility that simple pneumoconiosis can be totally disabling, opine that legal pneumoconiosis cannot exist absent x-ray evidence of pneumoconiosis, conclude that coal dust exposure cannot cause obstructive lung disease, etc.). Similarly, employer asserts that the administrative law judge impermissibly found that Dr. Jarboe's conclusion, premised on a finding that an absence of evidence demonstrating dust retention "pointed away from coal dust-related emphysema," was inconsistent with the preamble, regulations, or legislative fact. Employer maintains that the administrative law judge's analysis of Dr. Jarboe's opinion was flawed because it was predicated on a finding that coal dust and cigarette smoking are additive, which is a conclusion contrary to *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). Lastly, employer contends that the administrative law judge erred in discounting Dr. Fino's opinion, that the reversibility of claimant's obstruction was not indicative of a coal dust related disease, because the doctor's conclusion was at odds with the additive risks associated with coal dust exposure and cigarette smoking. Employer maintains that the administrative law judge's reliance on *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), was misplaced because it does not mention the preamble or rely on the combined risk of smoking and mining. Employer further asserts that, because Dr. Fino adequately explained his rationale for concluding that claimant's pulmonary impairment was unrelated to coal dust exposure, the administrative law judge improperly shifted the burden of proof to employer to rule out coal workers' pneumoconiosis as a contributing cause of disability.

At the outset, we note that, contrary to employer's argument, the administrative law judge may properly consider whether a medical opinion is based on premises that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. *See Obush*, 650 F.3d at 256-57, 24 BLR at 2-383 ("The ALJ's reference to the preamble to the

regulations…unquestionably supports the reasonableness of his decision to assign less weight to [a physician's] opinion."); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, we reject employer's assertion that the administrative law judge erred by relying on the preamble and the regulatory definition of legal pneumoconiosis as factors to determine the credibility of the medical opinion evidence in this case. A review of the Decision and Order reveals that the administrative law judge provided a comprehensive discussion of Dr. Jarboe's opinion, as contained in the physician's reports dated October 15, 2009 and November 1, 2009, as well as claimant's deposition testimony taken on November 12, 2009, and that she fully delineated the doctor's findings and the bases supporting his conclusion that cigarette smoking and asthma caused claimant's pulmonary problems. Decision and Order at 21-24, 35-38; Employer's Exhibits 6-8. The administrative law judge found that the opinion of Dr. Jarboe was less persuasive because it was premised on the belief that claimant's pulmonary function study, which demonstrated a preserved FVC with a "disproportionately reduced FEV1," was "not compatible with or indicative of a dust-induced lung disease," contrary to DOL's position that coal dust exposure may cause chronic obstructive pulmonary disease with associated decrements in FEV1 and the FEV1/FVC ratio. *See* 65 Fed. Reg. 79943 (Dec. 20, 2000); Decision and Order at 36. Further, the administrative law judge found that Dr. Jarboe's reliance on claimant's high elevation of residual volume and "striking reduction" in diffusion capacity as indicators of a cigarette smoking-induced lung disease precluded Dr. Jarboe from considering that smoking and coal dust exposure may result in a similar impairment in the lungs. *See Wisniewski v. Director, OWCP*, 929 F. 2d 952, 15 BLR 2-57 (3d Cir. 1991); *Gorzalka*, 16 BLR at 1-52. The administrative law judge therefore found that Dr. Jarboe's opinion failed to consider that claimant's lung condition could be caused by *both* coal dust exposure and tobacco abuse. The administrative law judge found that Dr. Jarboe's opinion was less persuasive because Dr. Jarboe failed to explain why he determined that claimant's impairment was due entirely to smoking and asthma, with no contribution from claimant's seventeen years of coal dust exposure, while Dr. Baker persuasively explained why claimant's pulmonary impairment was not due solely to smoking. *See Clark*, 12 BLR at 1-155; Decision and Order at 36. Hence, the administrative law judge properly found that Dr. Jarboe's failure to consider the effect on claimant's pulmonary condition of "35 years in and around coal dust" and "17 years underground," as noted in his October 15, 2009 report, Employer's Exhibit 6, diminished the probative value of his opinion. *See Stark*, 9 BLR at 1-37 (administrative law judge may legitimately assign less weight to medical opinion that fails to consider all potential causative factors suggested in record). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Jarboe's opinion.

We also reject employer's assertion that the administrative law judge erred in relying on *Barrett* to discount Dr. Fino's opinion. In *Barrett*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, upheld an

administrative law judge's discrediting of a medical opinion because the doctor "had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believe[d] that coal dust exposure did not exacerbate [Barrett's]… smoking-related impairments'." *Barrett*, 478 F.3d at 356, 23 BLR at 2-483. In this case, the administrative law judge properly found Dr. Fino's opinion less persuasive because Dr. Fino opined that claimant's variability in obstruction and bronchodilator response was a factor that precluded a finding of disabling coal workers' pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order at 39. Similarly, the administrative law judge properly found Dr. Fino's opinion further undermined as he relied on the absence of x-ray evidence of pneumoconiosis, and did "not adequately explain why 25 years of underground coal dust exposure was not at least a contributing or aggravating factor to the [c]laimant's respiratory impairment." Decision and Order at 39; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. Thus, we reject employer's assertion that the administrative law judge erred in according little weight to Dr. Fino's opinion.[5] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 35-39.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Finally, employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c). Specifically, employer argues that the administrative law judge's analysis of the medical opinion evidence "is no better than her findings as to legal pneumoconiosis." Employer's Brief in Support of Petition for Review at 28. We disagree.

The administrative law judge considered the opinions of Drs. Jarboe, Fino, Baker, Hussain and Forehand. The administrative law judge discredited the opinions of Drs.

[5] We reject employer's assertion that the administrative law judge erred in relying on *J.O. v. Helen Mining Co.*, 24 BLR 1-119 (2009), as a basis to reject Dr. Fino's opinion. Subsequent to the administrative law judge's decision, the United States Court of Appeals for the Third Circuit upheld the Board's decision and rejected employer's argument that "the preamble to the regulations lacks the force of law and cannot provide a legal basis to give an opinion less weight." *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011). The court held, "The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to [a physician's] opinion." *Obush*, 650 F.3d at 256-57, 24 BLR 2-383.

Jarboe and Fino, that coal dust exposure did not cause or contribute to claimant's total disability, because she found that they did not diagnose legal pneumoconiosis. The administrative law judge also found that "Drs. Jarboe and Fino's conclusions are contrary to the regulations, objective evidence and law governing this case." Decision and Order at 47. However, the administrative law judge credited the opinions of Drs. Baker, Hussain and Forehand, that pneumoconiosis contributed to claimant's total disability. The administrative law judge therefore found that "the [c]laimant has met his burden on this issue [of disability causation]."[6] *Id*.

As we have affirmed the administrative law judge's determination that the opinion of Dr. Baker was well-reasoned and entitled to greater probative weight to establish the existence of legal pneumoconiosis under Section 718.202(a)(4), we further affirm the administrative law judge's determination that Dr. Baker's opinion, as further bolstered by the opinions of Drs. Hussain and Forehand, was sufficient to establish disability causation under Section 718.204(c). *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 47. Thus, we reject employer's assertion that the administrative law judge erred in weighing the medical opinion evidence with regard to the issue of disability causation.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c). *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

[6] In considering the issue of disability causation at Section 718.204(c), the administrative law judge stated that, "[i]n order to be entitled to benefits, the [c]laimant must establish that pneumoconiosis is a 'substantially contributing cause' of his disability." Decision and Order at 46. The administrative law judge further noted that "[a] 'substantially contributing cause' is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment." *Id*.

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge