BRB No. 11-0373 BLA

ELIZABETH J. BERRY (on behalf of DAMON J. BERRY, Deceased)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 02/21/2012
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2008-BLA-05260) of Administrative Law Judge Daniel F. Solomon, with respect to a claim filed on June 16, 2004, 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] The administrative law judge, based on the

[1] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30

stipulation of the parties, credited the miner[2] with at least twenty-seven years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). The administrative law judge also determined that claimant established that the miner had clinical pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), and that the miner's disabling respiratory impairment was due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in finding that claimant established the existence of clinical pneumoconiosis and that the miner's totally disabling respiratory impairment was due to pneumoconiosis. In addition, employer asserts that the administrative law judge's determination regarding the date of commencement of benefits cannot be reconciled with his finding regarding clinical pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's finding as to the onset date and the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief 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 supported by substantial evidence, is rational, and is 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).

U.S.C. §921(c)(4), and revived Section 422(l) of the Act, 30 U.S.C. §932(*l*). The amendments do not apply to this claim, as it was filed before January 1, 2005.

[2] Claimant is the widow of the miner, Damon L. Berry, who died on October 27, 2010, while this claim was pending before the administrative law judge. Claimant is pursuing this claim on the miner's behalf.

[3] We affirm, as unchallenged on appeal, the administrative law judge's coal mine employment determination and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

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

I. 20 C.F.R. §718.202(a)(1)

A. The Administrative Law Judge's Findings

The record contains eight interpretations of two x-rays.[5] The November 9, 2004 x-ray was interpreted as negative for pneumoconiosis by Drs. Repsher and Wiot and as positive by Drs. Ahmed and Smith. Director's Exhibits 17-6, 30-186, 30-66; Employer's Exhibit 1. The December 29, 2008 x-ray was interpreted as positive for pneumoconiosis by Drs. Baker and Ahmed and as negative by Dr. Spitz. Director's Exhibits 30-10, 30-34; Employer's Exhibit 2. Dr. Burnett read the December 29, 2008 x-ray for quality purposes only. Director's Exhibit 30-35.

The administrative law judge initially noted that, although he was required to consider the qualifications of the readers in weighing conflicting x-ray interpretations, he was not required to defer to radiological experience or a physician's status as a professor of radiology. Decision and Order at 6, *citing Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(en banc). The administrative law judge stated that he would accord "greater weight" to the readings performed by Drs. Wiot, Ahmed, Smith, and Spitz, as they are both Board-certified radiologists and B readers and, therefore, "best qualified." Decision and Order at 7. The administrative law judge noted that Drs. Baker and Repsher are B readers. *Id*.

[5] When Dr. Baker examined claimant at the request of the Department of Labor (DOL) on July 16, 2004, he obtained a chest x-ray and read it as positive for pneumoconiosis. Director's Exhibit 9. At the hearing, claimant objected to employer's submission of Dr. Wiot's negative interpretation of this film, as the DOL did not receive the film after Dr. Wiot performed his reading, thereby depriving claimant of the opportunity to procure a rebuttal reading. Hearing Transcript at 24; Director's Exhibit 30-240. The administrative law judge subsequently excluded the interpretations of the July 16, 2004 film by Drs. Baker and Wiot, and remanded the claim to the district director to obtain a second DOL x-ray. This x-ray was performed on December 29, 2008. Director's Exhibit 30-10.

The administrative law judge determined that the interpretations of the November 9, 2004 x-ray were in equipoise. Decision and Order at 7. The administrative law judge then rejected employer's argument that an interpretation of a CT scan taken on November 9, 2004, substantiated the negative readings of the x-ray, as the administrative law judge found the December 29, 2008 x-ray to be "more dispositive." *Id*. at n.6.

In addressing the December 29, 2008 film, the administrative law judge initially found that it was entitled to additional weight because it was the most recent x-ray of record. Decision and Order at 7, *citing Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge then stated that Dr. Spitz and Dr. Ahmed were equally qualified and concluded, "[a]s Dr. Baker also read the x-ray as positive for pneumoconiosis, I attribute greater weight to the positive readings." Decision and Order at 7. The administrative law judge determined, therefore, that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6] *Id*.

B. Arguments on Appeal

Employer contends that the administrative law judge failed to explain why he did not give additional weight to the opinions of physicians with enhanced credentials, in accordance with the teachings of the United States Court of Appeals for the Fourth Circuit and the Board, and the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). In addition, employer argues that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis, based on the superior number of positive readings and the recency of the December 29, 2008 film. Employer further maintains that the administrative law judge erred in opting to ignore the negative CT scan.

Claimant responds, arguing that the administrative law judge properly found that the miner had clinical pneumoconiosis, based on the x-ray evidence. Claimant also indicates that the administrative law judge was not required to consider the CT scan, as

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

employer did not meet its burden of establishing that the scan is a medically acceptable tool for diagnosing pneumoconiosis or prove that Dr. Repsher was qualified to interpret the scan. Claimant further asserts that relying on x-rays that are more recent is not impermissible and that the admission of the December 29, 2008 x-ray occurred as a result of the failure of employer's expert to return the July 16, 2004 x-ray to the Department of Labor.

Employer's contentions are without merit. Contrary to employer's allegation, the administrative law judge acted within his discretion in declining to accord greater weight to the readings performed by Drs. Spitz and Wiot, based upon their status as current or former professors of radiology. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003). The administrative law judge determined correctly that he was not required to give additional weight to a physician's x-ray interpretation on this basis and employer has not pointed to any evidence before the administrative law judge indicating that a professor of radiology has superior expertise in reading x-rays for the presence or absence of pneumoconiosis. *See Chaffin*, 22 BLR at 1-302; *Bateman*, 22 BLR at 1-261. Employer's argument that, under the Board's holding in *Chaffin*, the administrative law judge was required to consider this factor is not persuasive, as the Board did not state that consideration of academic qualifications was mandatory.[7] *Chaffin*, 24 BLR at 1-302. In addition, in contrast to the situation in this case, the administrative law judge in *Chaffin* did not indicate that she was aware that it was within her discretion to give greater weight to x-ray readings performed by physicians who were professors of radiology. Similarly, employer's reliance upon the Board's decision in *Bateman* and the citation therein to *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), within that decision are inapposite. The rulings by the Board and the United States Court of Appeals for the Fourth Circuit involved an administrative law judge's consideration of the radiological qualifications identified in 20 C.F.R. §718.202(a)(1)(ii)(C)-(E) and made no reference to academic qualifications. *Adkins*, 958 F.2d at 52, 16 BLR at 2-64; *Bateman*, 22 BLR at 1-261 n.8.

With respect to the administrative law judge's determination that the December 29, 2008 x-ray is positive for pneumoconiosis, employer relies on the law of the Inited States Courts of Appeals for the Fourth and Seventh Circuits to support its contention that

[7] The Board stated in *Chaffin*, "[w]hile, contrary to employer's suggestion, the additional qualifications of Drs. Spitz and Wiot do not mandate that their opinions be accorded greatest weight, the administrative law judge should consider these qualifications on remand, as they may bear on the quality of the various x-ray interpretations of record." *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003)(citations omitted).

the administrative law judge's finding is irrational and contrary to the evidence. However, because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, case law from other circuits is not controlling. *See* slip op. at 2 n.4. Contrary to employer's contentions, therefore, the administrative law judge considered the qualifications of the physicians and acted within his discretion in according greater weight to the readings by physicians who were dually qualified, but also giving some weight to the readings by physicians who were only B readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Accordingly, the administrative law judge did not rely, as employer asserts, on the least qualified reader to break the tie in the second film. Rather, he acted within his discretion in determining that Dr. Ahmed's positive interpretation, together with the positive reading of Dr. Baker, outweighed the negative reading of Dr. Spitz. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

Employer's allegations of error regarding the administrative law judge's finding that the December 29, 2008 x-ray was more probative than the November 9, 2004 x-ray, based on its recency, are also without merit. Employer contends that, apart from the question of whether the administrative law judge properly applied the "later evidence" principle is the issue of whether application of the principle was fair under the circumstances of this case, stating:

> From a procedural standpoint, the "recency" issue was created by the loss of the July [16,] 2004 x-ray. The ALJ recognized the need to place the claimant in the same position as he would have been but for the loss of the film. The solution, however, placed claimant in a better position.

Employer's Brief at 9-10. Employer's argument is not persuasive. At a telephone conference held after the hearing, employer and claimant agreed to the remedy proposed by the administrative law judge – that he would exclude the readings of the lost x-ray by Drs. Baker and Wiot and remand the claim to the district director so that a new x-ray could be obtained and reread by experts chosen by each party.[8] Director's Exhibit 30 at

[8] At the telephone conference, the administrative law judge indicated that he would remand the case to the district director and stated, "[o]kay, so that's what I'm going to do. I'll issue an order. I'll limit the order and then the two of you will go from there." Director's Exhibit 30 at 112. Ms. Fogel, attorney for claimant, responded, "[o]kay, that's fine, Your Honor." *Id*. Mr. Reverman, attorney for employer, then responded, "[o]kay." *Id*. at 113. The administrative law judge's December 5, 2008 Order, included the following language, "I held a telephone conference . . . . At that time, the parties agreed that the remedy would be to have a new x-ray performed. I accept that proposition." December 5, 2008 Order at 1.

110-14. In agreeing to the remedy applied by the administrative law judge, employer and claimant took the risk that the readings of the new x-ray, obtained on December 29, 2008, would be more favorable to the opposing party. Because the administrative law judge's rational determination that the new x-ray was positive for pneumoconiosis was a foreseeable possible result of the administrative law judge's unchallenged procedural ruling, we hold that employer's allegation of a due process violation is without merit. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Grant v. Director, OWCP*, 6 BLR 1-619 (1983).

With respect to the administrative law judge's actual application of the "later evidence" principle, the Sixth Circuit has held that an administrative law judge may accord greater weight to more recent x-ray evidence, provided that it is not inconsistent with the premises that pneumoconiosis is a progressive disease and those who suffer from it do not get better. *Woodward*, 991 F.2d at 321, 17 BLR at 2-85; *see also Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997). In this case, the administrative law judge rationally determined that the November 9, 2004 x-ray was neither positive nor negative for pneumoconiosis, while the December 29, 2008 x-ray was positive for pneumoconiosis. Therefore, the administrative law judge's reliance upon the more recent x-ray did not conflict with the premises underlying the later evidence principle. *Woodward*, 991 F.2d at 321, 17 BLR at 2-85. Because we have affirmed the administrative law judge's reliance upon recency to accord more weight to the December 29, 2008 x-ray, we also affirm his exclusion of the CT scan dated November 9, 2004, from consideration on the ground that "the 2008 x-ray is more dispositive." Decision and Order at 7 n.6. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

II. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

The administrative law judge initially determined that Drs. Baker, Fino, and Houser addressed the issue of total disability causation, while Dr. Repsher did not. Decision and Order at 8. The administrative law judge found that Drs. Baker and Houser concluded that the miner had obstructive lung disease, which was due to coal dust exposure and smoking, while Dr. Fino attributed the miner's obstructive impairment solely to smoking. *Id*. The administrative law judge then stated that, although he was "reminded that [he] could have analyzed legal pneumoconiosis," he was not required to discuss the issue, as he found that claimant established that the miner had clinical

pneumoconiosis.[9] *Id*. The administrative law judge further noted that it was within his discretion to accord less weight to physicians who did not diagnose clinical pneumoconiosis, contrary to his determination at 20 C.F.R. §718.202(a)(1). *Id*.

The administrative law judge also found that the medical literature cited by Dr. Houser was published in 2007, whereas Dr. Fino relied on articles predating the 2001 amendments to the regulations. Decision and Order at 8. Moreover, the administrative law judge determined that Dr. Fino's opinion conflicted with relevant Sixth Circuit case law. *Id*., *citing Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In contrast, the administrative law judge found that the opinions of Drs. Baker and Houser were "medically sound and documented" and "supported by the objective medical data and reasoned." Decision and Order at 8. In particular, the administrative law judge determined that Dr. Houser "provide[d] the most thorough and persuasive explanation for the opinion that the [m]iner's obstructive lung disease is a substantially contributing cause of his significant pulmonary impairment." Accordingly, the administrative law judge concluded that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).

B. Arguments on Appeal

Employer asserts that the administrative law judge erred in finding that Dr. Repsher did not address total disability causation and in crediting the opinions of Drs. Houser and Baker as reasoned and documented. Employer contends further that the administrative law judge improperly discredited Dr. Fino's opinion on the ground that he did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding.

Claimant responds, arguing that the administrative law judge properly found that the miner was totally disabled due to pneumoconiosis. Claimant indicates that employer's arguments confuse diagnoses of clinical pneumoconiosis with diagnoses of legal pneumoconiosis.

There is no merit to employer's contention that the administrative law judge erred in excluding Dr. Repsher's opinion from consideration on the issue of disability causation. The administrative law judge acted within his discretion in declining to accord

[9] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

weight to Dr. Repsher's opinion at 20 C.F.R. §718.204(c), because the physician determined, contrary to the parties' stipulation, that the miner's impairment was not totally disabling. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Employer's reliance on decisions rendered by the Fourth Circuit is unavailing, as the law of the Sixth Circuit is controlling in this case. *See* slip op. at 3 n. 4. The administrative law judge also rationally determined that Dr. Fino's opinion on the issue of whether the miner's clinical pneumoconiosis was a contributing cause of the miner's totally disabling impairment was entitled to little weight, as Dr. Fino stated, contrary to the administrative law judge's finding, that the miner did not have clinical pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

However, as employer asserts, the administrative law judge's ultimate determination, that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), cannot be affirmed. The administrative law judge relied upon his finding that Dr. Houser's diagnosis of totally disabling legal pneumoconiosis was entitled to greatest weight, without rendering a finding as to whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[10] Decision and Order at 8; Claimant's Exhibit 2. Rather, the administrative law judge stated that he "need not discuss legal pneumoconiosis" in light of his finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 8. Because the administrative law judge did not weigh the conflicting evidence to determine whether claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), we must vacate the administrative law judge's finding that claimant established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c) and the award of benefits.

On remand, the administrative law judge must initially make a finding at 20 C.F.R. §718.202(a)(4), as to whether claimant has established the existence of legal pneumoconiosis. Then, the administrative law judge must reconsider whether claimant established total disability causation at 20 C.F.R. §718.204(c), due to either clinical or legal pneumoconiosis, based upon his weighing of the opinions of Drs. Houser, Baker

[10] Dr. Houser reviewed the miner's medical records and determined, "[a]lthough the diagnosis of clinical pneumoconiosis may be in dispute with regard to the x-ray readings, I believe he does have legal pneumoconiosis[,] in that he has developed emphysema and chronic obstructive pulmonary disease arising[,] at least in part[,] secondary to exposure to coal and rock dust[,] arising from his 31-year history of coal mine employment." Claimant's Exhibit 2.

and Fino. When weighing the conflicting medical opinions, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR at 1-165.

III. Commencement of Benefits

Although we have vacated the award of benefits, in the interest of judicial economy, we will address employer's arguments concerning the administrative law judge's finding regarding the appropriate date for the commencement of benefits.

Employer asserts that the administrative law judge did not explain, as required by the APA, his reason for determining that the miner was entitled to benefits beginning as of June 2004. In addition, employer contends that this determination cannot be reconciled with the administrative law judge's finding that clinical pneumoconiosis was established based on the December 2008 x-ray while, according to employer, the x-ray evidence establishes that in November 2004, the miner did not have pneumoconiosis.

Claimant responds, arguing that the medical evidence does not establish the onset date of the miner's total disability due to pneumoconiosis, but rather only shows that he had a disabling impairment in 2004 and pneumoconiosis in 2008. Claimant contends that June 2004 is the appropriate date for the commencement of benefits, as employer did not produce any evidence proving that the miner was not disabled at the time the claim was filed.

In addressing the issue of the date from which benefits are payable, the administrative law judge stated that claimant "is entitled to her late husband's lifetime benefits under the Act since June[] 2004." Decision and Order at 8. However, he did not explain his finding, nor did he identify the evidence upon which he may have based his determination. Thus, if the administrative law judge awards benefits on remand, he must reconsider his finding with respect to the date of onset, bearing in mind that, if the medical evidence does not establish the date on which a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge