BRB No. 12-0257 BLA

DOROTHY SKALA (Widow of EDWARD SKALA)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 01/29/2013
FLORENCE MINING COMPANY	)	
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-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter LLC), Pittsburgh, Pennsylvania, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2009-BLA-5348) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a survivor's claim filed on February 22, 2008.[1] Director's Exhibit 2.

Following the hearing, according to the schedule set by the administrative law judge, claimant submitted the deposition testimony of Dr. Malhotra, the miner's treating physician. Employer submitted the deposition testimony of Dr. Renn, who had provided a medical report, and of Dr. Oesterling, who had provided an autopsy report.

In his Decision and Order issued on January 24, 2012, the administrative law judge admitted the depositions of Drs. Malhotra and Renn, but excluded Dr. Oesterling's deposition testimony on the ground that employer's submissions exceeded the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge then credited the miner with twenty-five years of coal mine employment, of which ten years were underground, pursuant to the parties' stipulation and the evidence of record, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that the miner worked in underground coal mine employment for ten years, and worked for an additional fifteen years as a tipple attendant at a coal preparation plant. The

[1] Claimant is the widow of the miner, who died on November 5, 2007. Director's Exhibit 10.

[2] Section 1556 of Public Law No. 111-148 also reinstated Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that a survivor is automatically entitled to benefits if the miner was determined to be eligible to receive benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Decision and Order at 2 n.2.

administrative law judge determined that the miner's surface coal mine employment at the coal preparation plant took place in dusty conditions that were substantially similar to those in an underground mine. Thus, the administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment. Additionally, the administrative law judge found that claimant established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's exclusion of Dr. Oesterling's deposition testimony. Employer also contends that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment, and in finding that the miner was totally disabled, and therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge erred when he found that employer failed to rebut the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response urging the Board to affirm the administrative law judge's finding that claimant established fifteen years of qualifying coal mine employment, but asserting that the administrative law judge applied an incorrect standard in finding that employer failed to rebut the Section 411(c)(4) presumption.

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.[3] 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

[3] The record indicates that the miner's coal mine employment was in Pennsylvania. Decision and Order at 14 n.18; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Exclusion of Dr. Oesterling's Deposition Testimony

Employer contends that the administrative law judge erred in excluding Dr. Oesterling's deposition testimony as in excess of the evidentiary limitations set forth at 20 C.F.R. §§725.414(a), (c); 725.457(c). Employer's Brief at 25-28. Alternatively, employer argues that the administrative law judge erred in rendering his evidentiary ruling in the Decision and Order, thus depriving employer the opportunity to establish good cause for the submission of the testimony, pursuant to 20 C.F.R. §725.456, or to re-designate its evidence. *Id*. at 2, 29.

Initially, we reject employer's assertion that the administrative law judge erred in determining that the admission of Dr. Oesterling's deposition testimony would exceed the number of medical reports that employer is allowed to submit pursuant to 20 C.F.R. §725.414(a)(3). The regulations governing the development of evidence provide that a physician who has prepared a "medical report" may testify with respect to a claim. 20 C.F.R. §§725.414(c), 725.457(c)(2); Decision and Order at 8. If a party has submitted fewer than two medical reports as part of its affirmative case, a physician who did not prepare a medical report may testify in lieu of such a medical report, and the testimony will be considered a medical report for the purposes of the evidentiary limitations. 20 C.F.R. §§725.414(c), 725.457(c)(2); Decision and Order at 8.

In this case, the administrative law judge properly found, and employer does not dispute, that Dr. Oesterling prepared an autopsy report, not a medical report. Decision and Order at 8; Employer's Brief at 26. Therefore, Dr. Oesterling's testimony is considered a medical report for the purposes of the evidentiary limitations. Decision and Order at 8. Contrary to employer's argument, applying the regulations, the administrative law judge properly found that as employer had already submitted its two affirmative medical reports, from Drs. Renn and Begley,[4] Dr. Oesterling's deposition testimony, if admitted, would exceed the evidentiary limitations on medical reports. Decision and Order at 8. However, we agree with employer that the administrative law judge should have rendered his evidentiary ruling prior to the issuance of his decision, consistent with the principles of fairness and administrative efficiency. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008). The administrative law judge's failure to render a preliminary evidentiary ruling precluded employer from presenting a good cause argument for exceeding the evidentiary limitations, or from re-designating its evidence to

[4] On its evidence summary form, employer designated Dr. Renn's report as its affirmative medical report, and Dr. Oesterling's report as its affirmative autopsy report. Employer's Evidence Summary Form Dated May 4, 2011 at 5-6. At the hearing, employer designated Dr. Begley's report as its second affirmative medical report. Hearing Transcript at 6.

conform to the evidentiary limitations. *See Preston*, 24 BLR at 1-63. Consequently, we vacate the administrative law judge's evidentiary ruling, and also vacate his findings on the issues of invocation and rebuttal of the amended Section 411(c)(4) presumption, and his award of benefits. On remand, prior to issuing his decision on the merits of entitlement, the administrative law judge must rule on the admissibility of the evidence submitted, advise the parties of his ruling, and provide them with an opportunity to respond appropriately.

In the interest of judicial efficiency, we will also address employer's remaining challenges to the administrative law judge's evaluation of the evidence relevant to invocation, and rebuttal, of the amended Section 411(c)(4) presumption.

Invocation of the Amended Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis. Employer initially challenges the administrative law judge's finding that the miner's work as a tipple attendant at a coal preparation plant occurred in dust conditions substantially similar to those found in underground mines.

To establish that the miner's work conditions were substantially similar to those in an underground mine, claimant need establish only that the miner was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

In this case, the administrative law judge analyzed the testimony of claimant's daughter, who lived near the miner while he was employed at the coal preparation plant.[5]

[5] We reject employer's argument that claimant's daughter's hearing testimony is inadmissible hearsay. Employer's Brief at 15-16. Claimant's daughter's testimony was based on her personal observation of the miner, his car, and his personal effects when he returned home from work. Further, the administrative law judge generally is not bound by statutory rules of evidence. *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (en banc recon.) (McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting). Rather, the administrative law judge is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence. *See Consolidation Coal Co. v. Williams*,

Hearing Tr. at 12. Claimant's daughter testified that she saw the miner come home "dirty" from the preparation plant a few times, as he usually showered at the mine, but that he frequently asked her to wash his car because it was dirty and full of coal dust, and that his "lunch bucket was filthy, always." Hearing Tr. at 14; Decision and Order at 3, 12. She also recalled that the miner told her that working at the preparation plant was "a very dirty job." Hearing Tr. at 15; Decision and Order at 3. The administrative law judge also considered the miner's statements on the Description of Coal Mine Work associated with his closed lifetime claim.[6] Decision and Order at 12; Director's Exhibit 1. On this form, the miner stated that his job at the coal preparation plant was as a tipple attendant and coal sampler at the truck dump. *Id.* He explained that as the truck raised its bed, he would take a few shovels of coal from each truck, riffle it, and fill a bag, and at the end of the shift he would take the bags to the lab. Director's Exhibit 1. The administrative law judge found that the miner's work, as described, required regular and close proximity to truckloads of coal, which the miner would have to shovel. Decision and Order at 12. Contrary to employer's arguments, the administrative law judge acted within his discretion in finding that claimant's daughter's testimony, together with the miner's description of his employment, and the fact that the miner worked at the tipple, constituted sufficient evidence to establish that his surface mine work took place in dusty conditions comparable to those in an underground mine. *See Leachman*, 855 F.2d at 512-513; *Clark*, 12 BLR at 1-153; Decision and Order at 12. Thus, the administrative law judge permissibly concluded that the miner's ten years of underground coal mine employment, taken together with his fifteen years working as a tipple attendant, equated to more than fifteen years of qualifying coal mine employment. *See Balsavage v.*

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453 F.3d 609, 620, 23 BLR 2-345, 2-369 (4th Cir. 2006); *Harris*, 23 BLR at 1-108; *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986).

[6] There is no merit to employer's contention that, in considering the Description of Coal Mine Work contained in the miner's closed claim, the administrative law judge considered evidence "outside the record," in violation of the Administrative Procedure Act, 5 U.S.C. §556(e), 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's Brief at 16. Contrary to employer's argument, at the hearing, the administrative law judge specifically admitted into the record, without objection, Director's Exhibits 1-29, containing the miner's closed claim. Decision and Order at 2; Hearing Tr. at 4-5. Moreover, the miner's Description of Coal Mine Work is not medical evidence, that is limited by 20 C.F.R. §725.414(a). *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc)(holding that medical evidence from the prior living miner's claim must be designated as evidence by one of the parties in order for it to be included in the record relevant to the survivor's claim); Decision and Order at 12 n.15; Director's Brief at 6 n.6.

Director, OWCP, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); Decision and Order at 12. As this finding is supported by substantial evidence, it is affirmed.

We next consider employer's contention that the administrative law judge erred in his evaluation of the medical evidence relevant to total disability, in finding that claimant invoked the amended Section 411(c)(4) presumption. In evaluating the evidence pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge initially found that, as all of the pulmonary function and blood gas studies of record are non-qualifying,[7] and as there is no evidence of either complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(1), (b)(2)(i)-(iii). Decision and Order at 12.

Addressing whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially found that "the only affirmative evidence of disability in this case" is the opinion of Dr. Malhotra, the miner's treating physician, who opined that the miner suffered from chronic obstructive pulmonary disease (COPD), emphysema, and coal workers' pneumoconiosis, which disabled him during his lifetime.[8] Decision and Order at 13; Claimant's Exhibit 1 at 17-18. The administrative law judge noted that, in contrast, Dr. Renn opined that the miner's objective test results were normal, and that he "did not have a totally disabling pulmonary or respiratory impairment" during his lifetime. Decision and Order at 6, 13;

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[7] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

[8] At deposition, Dr. Malhotra was questioned as to the miner's lifetime disability and responded, as follows:

> Question: Doctor, as the clinician, did you believe during life or did you come to the medical conclusion during life that this individual was afflicted with pulmonary dysfunction?
>
> Answer: I think I have – going way back in my treatment of this patient, I have said he had chronic obstructive pulmonary disease, emphysema, coal worker[s'] pneumoconiosis. I confirmed that when I did the Department of Labor exam[ination] on him and then on my death report and then, finally, the autopsy all confirmed that he was afflicted with it and he was disabled from it.

Claimant's Exhibit 1 at 17-18.

Employer's Exhibit 2B. Finding that Dr. Malhotra's opinion was entitled to significant weight as that of a treating physician,[9] the administrative law judge credited the opinion of Dr. Malhotra to conclude that claimant established that the miner suffered from a totally disabling respiratory impairment, which, together with his years of qualifying coal mine employment, was sufficient to invoke the amended Section 411(c)(4) presumption.

Employer asserts that the administrative law judge erred in relying on the opinion of Dr. Malhotra to find that claimant established the existence of a totally disabling respiratory impairment. Employer's Brief at 18-19. Employer asserts that in finding that Dr. Malhotra's opinion established total disability, the administrative law judge drew an unreasonable inference. Employer's Brief at 18-20. Employer further asserts that the administrative law judge erred in finding total disability established without considering all relevant evidence, including the medical opinions of Drs. Renn,[10] Oesterling,[11] and Begley.[12] Employer's Brief at 19-21.

Initially, we reject employer's contention that the administrative law judge erred in crediting the opinion of Dr. Malhotra as supportive of total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge accurately noted that, while Dr. Malhotra opined that the miner was "disabled" by COPD, emphysema, and pneumoconiosis during his lifetime, Dr. Malhotra did not state that the miner was "totally disabled," or specify whether the level of the miner's disability would have precluded

[9] The administrative law judge noted that Dr. Malhotra was the miner's treating physician for at least twenty years, and had evaluated the miner hundreds of times. Decision and Order at 13 n.16; Claimant's Exhibit 1 at 14.

[10] While the administrative law judge correctly summarized Dr. Renn's opinion that the miner did not have a totally disabling pulmonary or respiratory impairment during his lifetime, the administrative law judge did not otherwise discuss his opinion. Decision and Order at 6, 13; Employer's Exhibit 2B.

[11] Dr. Oesterling stated, in his July 24, 2008 report, that the miner's "lungs do illustrate other changes which were far more significant and would have produced significant respiratory distress, but these are unrelated to coal dust inhalation." Employer's Exhibit 1 at 3. However, Dr. Oesterling stated that coal dust did not "produce lifetime symptomatology." *Id*.

[12] Employer argues that the administrative law judge erred in not considering Dr. Begley's opinion on the issue of total disability. Employer's Brief at 19-20. However, Dr. Begley addressed the issues of whether the miner had pneumoconiosis and whether the miner's pneumoconiosis hastened his death, but did not address the issue of total disability. Employer's Exhibit 12.

him from performing his usual coal mine work as a tipple attendant, as set forth in 20 C.F.R. §718.204(b)(1). Decision and Order at 13-14. However, contrary to employer's argument, the administrative law judge permissibly found that Dr. Malhotra nonetheless provided sufficient information concerning the degree of the miner's impairment to allow him to infer that the miner was totally disabled from his usual coal mine employment, by comparing Dr. Malhotra's opinion with the exertional requirements of the miner's usual coal mine work. *See Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); Decision and Order at 13-14. The administrative law judge noted Dr. Malhotra's testimony that the miner was short of breath in his day to day life, and had been on home oxygen for his lungs for ten years prior to his death. The administrative law judge further found that the exertional requirements of the miner's job included shoveling coal, and filling and carrying bags of coal, a finding employer does not contest. Comparing Dr. Malhotra's testimony with the exertional requirements of the miner's usual coal mine work, the administrative law judge rationally concluded that Dr. Malhotra's opinion supports a finding of total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 14. We, therefore, affirm the administrative law judge's conclusion that Dr. Malhotra's opinion is sufficient to support a finding of total disability, pursuant to 20 C.F.R. §718.204(b).

There is merit, however, to employer's additional contention that the administrative law judge failed to consider the remaining medical opinions of record. As employer correctly asserts, both Drs. Renn and Oesterling offered opinions as to the degree of the miner's impairment during his lifetime. While the administrative law judge summarized their opinions, the administrative law judge failed to address the weight, if any, he accorded to the remaining medical opinions of record. Thus, the administrative law judge's analysis of the medical opinions fails to comply with the requirement that all relevant evidence be considered. 30 U.S.C. §923(b); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). We, therefore, vacate the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory impairment. On remand, the administrative law judge must consider all relevant evidence of whether total disability was established, consistent with this opinion.

Rebuttal of the Amended Section 411(c)(4) Presumption

The administrative law judge stated that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment

"did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 14-15. The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order at 16-17.

Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment.[13] Employer's Brief at 22-25. We agree. As the Director asserts, invocation of the amended Section 411(c)(4) presumption, in a survivor's claim filed after January 1, 2005, gives rise to a presumption that the miner's death was due to pneumoconiosis. In order to rebut this presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

Thus, contrary to the administrative law judge's analysis, the cause of the miner's respiratory disability was irrelevant in determining whether employer rebutted the presumption of death due to pneumoconiosis.[14] Because the administrative law judge erred in considering the issue of disability causation, rather than requiring employer to prove that the miner's death was unrelated to his coal mine employment, we vacate the administrative law judge's finding that employer did not establish the second method of rebuttal. If, on remand, the administrative law judge finds invocation of the rebuttable presumption of death due to pneumoconiosis established, the administrative law judge must determine whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of, or in connection with, dust exposure in the miner's coal mine employment. 30 U.S.C. §921(c)(4); *see Copley*, 25 BLR at 1-89.

[13] Employer does not challenge the administrative law judge's finding that as all of the physicians of record, including the autopsy physicians, diagnosed the existence of coal workers' pneumoconiosis, and as Drs. Renn and Oesterling could not rule out a connection between the miner's emphysema and his coal mine dust exposure, employer failed to disprove the existence of pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[14] In light of this holding, we decline to address employer's allegations of error regarding the administrative law judge's weighing of the medical opinions relevant to the cause of the miner's respiratory disability.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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