BRB No. 11-0687 BLA

JAMES E. HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 07/31/2012
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
SEABOARD SURETY COMPANY	)	
	)	
Intervenor	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2002-BLA-05251) of Associate Chief Administrative Law Judge William S. Colwell, with respect to a subsequent claim[1] filed May 23, 2001, 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] This case is before the Board for a third time.[3] In its most recent decision, the Board affirmed Administrative Law Judge Edward Terhune Miller's determination that employer has no legally protectable interest in this case and, therefore, there are no grounds for it to be represented by counsel or to submit evidence. *J.H.* [*Harris*] *v. Old Ben Coal Co.*, BRB No. 08-0807 BLA, slip op. at 6 (Aug. 26, 2009)(unpub.). The Board also denied the motion of Safeco Insurance Company (Safeco) for conditional intervention, because a second motion to intervene, filed by Seaboard Surety Company (Seaboard) replaced Safeco's motion. *Id*. The Board granted Seaboard's motion in light of its status as a surety, which gave it an interest in the outcome of this case. *Id*. Judge Miller was instructed to reconsider his previous decision awarding benefits. *Id*. Because Judge Miller was unavailable, the case was reassigned to Judge Colwell (the administrative law judge).

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[1] Claimant is the miner, James E. Harris, who died on May 25, 2007. His surviving spouse, Betty J. Harris, is continuing to pursue this claim on behalf of claimant's estate. Claimant filed an initial claim on August 20, 1985, which the district director denied on December 16, 1985, because claimant did not establish any element of entitlement. Director's Exhibit 1. There was no further action on this claim until claimant filed the present subsequent claim.

[2] 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 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.

[3] In the Board's initial decision, it affirmed Administrative Law Judge Edward Terhune Miller's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), but vacated the award of benefits and remanded the case for reconsideration of the digital x-rays and CT scan evidence relevant to the existence of simple and complicated pneumoconiosis. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-112 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.* 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting).

On remand, in a Decision and Order issued on June 29, 2011, the administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis[4] arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203(b), and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). The administrative law judge also found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits and directed employer, and Seaboard, to pay claimant benefits and reimburse the Black Lung Disability Trust Fund (Trust Fund) as needed.

On appeal, employer, in its initial brief and reply brief, argues that the administrative law judge erred in finding that claimant established the existence of simple and complicated pneumoconiosis. In addition, employer states that the administrative law judge exceeded his authority in directing an alleged surety to pay benefits and reimburse the Trust Fund. Claimant responds, urging affirmance of the award of benefits and of the administrative law judge's findings concerning the surety. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, agreeing with employer that the administrative law judge exceeded his authority in ordering the surety to pay benefits and reimburse the Trust Fund. The Director declined to address employer's arguments concerning the merits of entitlement, other than to state that, contrary to employer's contention, the administrative law judge did not err in relying on the preamble to the amended regulations when weighing the evidence relevant to the existence of pneumoconiosis.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30

[4] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibits 1, 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Merits of the Award of Benefits

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

In the present case, the administrative law judge rendered his findings regarding the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.107 and 718.202(a)(1), (4). Under 20 C.F.R. §718.202(a)(1), the administrative law judge determined that the analog x-ray evidence "is essentially in equipoise" and "neither proves nor disproves the existence of clinical simple or complicated pneumoconiosis." Decision and Order on Remand at 39. The administrative law judge then weighed the readings of the digital x-ray dated February 19, 2002 and the interpretations of the CT scans of record under 20 C.F.R. §718.107. When summarizing the readings of the February 19, 2002 digital x-ray, the administrative law judge initially indicated that, because Dr. Wiot read the digital x-ray as negative for pneumoconiosis, while Dr. Smith read it as positive for simple pneumoconiosis, this evidence was in equipoise. *Id*. at 9; Claimant's Exhibit 7; Employer's Exhibit 11. Upon determining that the preponderance of the CT scan evidence established the presence of fibrotic nodules in claimant's mid-lung zones, the administrative law judge credited Dr. Smith's positive digital x-ray reading over Dr. Wiot's negative reading, stating:

> Dr. Wiot's categorical negative opinion as to the existence of [coal workers' pneumoconiosis] based on the digital x-ray, without mention of the nodules, which are mentioned by too many qualified doctors not to be visible or exist in some form, is not credible in opposition to the contrary assessments of Dr. Cohen and Dr. Tuteur, who are pulmonary specialists and B-readers, though not radiologists, and the assessment of Dr. Smith, who is a board-certified radiologist and B-reader.

Decision and Order on Remand at 42; *see* Claimant's Exhibits 5, 6; Employer's Exhibit 11.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge resolved the conflict among the physicians as to the source of the fibrosis observed on the x-rays and CT scans

by according greatest weight to Dr. Cohen's opinion, as supported by the opinion of Dr. Houser, that the fibrosis was caused by coal dust inhalation. Decision and Order on Remand at 43, 51. In so doing, the administrative law judge indicated that Dr. Cohen's opinion was consistent with the scientific view endorsed by the Department of Labor (DOL) in the preamble to the amended regulations. *Id*. at 41, 43. The administrative law judge concluded:

> Although the evidence of record is varied and conflicting, this tribunal concludes that a preponderance of the credible evidence establishes that [c]laimant is totally disabled by a pulmonary or respiratory impairment. The impairment is attributable to a chronic dust disease of the lung consisting of interstitial pulmonary fibrosis attributable at least in part to inhalation of coal mine dust, and severe emphysema caused in combination by [c]laimant's lengthy history of cigarette smoking and in part by the effects of his extensive exposure to coal mine dust. These conclusions, which establish both clinical and legal simple pneumoconiosis under the Act are based upon the reasoned and documented medical opinion of Dr. Cohen, a board-certified and experienced pulmonary specialist, corroborated in significant part by the reasoned and documented medical assessment by Dr. Houser, who examined Claimant pursuant to §725.406, and in part by certain reasoned and documented components of Dr. Tuteur's medical opinion.

Id. at 51.

Employer alleges that the administrative law judge erred in finding simple clinical pneumoconiosis, and legal pneumoconiosis, established because his analysis of the x-ray and CT scan evidence was internally inconsistent and based upon an inaccurate characterization of the evidence. Employer also contends that the United States Court of Appeals for the Sixth Circuit "has explicitly rejected the reasoning employed by the [administrative law judge] here—that Dr. Wiot did not explain why [claimant's] interstitial pulmonary fibrosis was not related to his coal mine employment." Employer's Brief at 19, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, 2-651 (6th Cir. 2003). Employer further argues that the administrative law judge violated the Administrative Procedure Act, 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), by relying on evidence outside of the record, in the form of the preamble to the amended regulations, to resolve conflicts when weighing the evidence. Employer also contends that the administrative law judge's reliance on the preamble conflicts with the decision of the United States Court of Appeals for the District of Columbia in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

Employer's contentions are without merit. As to the allegation that the administrative law judge's findings regarding the x-ray evidence are internally inconsistent, the administrative law judge first considered separately the analog x-rays of record and the digital x-ray of record, to determine whether the readings in each category established the existence of pneumoconiosis. Decision and Order on Remand at 9, 39, 41. The administrative law judge then addressed the medical opinions regarding the source of the interstitial fibrosis observed on x-ray and CT scan and acted within his discretion in concluding:

> Dr. Cohen, Dr. Tuteur, and Dr. Houser, credibly opined that the interstitial fibrosis was a manifestation of coal workers' pneumoconiosis. The more carefully and extensively reasoned opinions of Drs. Cohen, Tuteur, and Houser that identify exposure to coal mine dust as a contributing cause of the interstitial pulmonary fibrosis seen on the radiological evidence, especially in light of the medical literature cited by Dr. Cohen, and the scientific findings disclosed in the preamble to the revised black lung regulations, are persuasively reasoned, and are deemed to be credible proof of the existence of simple clinical and legal pneumoconiosis manifest in the interstitial fibrosis in [c]laimant's mid and lower lung zones by the x-ray evidence as a whole.

Id. at 42-43; *see Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In addition, contrary to employer's argument, the administrative law judge rationally determined that Dr. Tuteur's opinion supported Dr. Cohen's diagnosis of pneumoconiosis, as Dr. Tuteur stated that claimant has extensive interstitial pulmonary fibrosis consistent with simple pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Anderson*, 12 BLR at 1-113; Director's Exhibit 28; Employer's Exhibit 18.

We also reject employer's contention that the Sixth Circuit's holding in *Williams* precluded the administrative law judge from relying upon the extent to which Dr. Wiot addressed whether coal dust exposure contributed to claimant's lung disease to discredit Dr. Wiot's opinion. The law of the Sixth Circuit is not controlling, as this case arises within the United States Court of Appeals for the Seventh Circuit. *See* slip op. at 3 n.5. Furthermore, in contrast to the facts in *Williams*, the administrative law judge did not assume, in the absence of evidence, that coal dust exposure played a role in claimant's fibrosis and fault Dr. Wiot for reaching a contrary conclusion.[6] *See Williams*, 338 F.3d at

[6] Employer's suggestion that it is the Sixth Circuit's position that an administrative law judge cannot discredit a physician's opinion for failure to explain why dust exposure in coal mine employment did not play a role in the miner's lung disease, is belied by the

515, 22 BLR at 2-651. Rather, the administrative law judge determined that there was abundant evidence of a causal connection in the form of the opinion of Dr. Cohen, as supported by the opinion of Dr. Tuteur, and the preponderance of the radiological evidence. Decision and Order on Remand at 41-43. We hold, therefore, that the administrative law judge acted within his discretion in according little weight to Dr. Wiot's opinion, as Dr. Wiot did not explain why dust exposure in claimant's coal mine employment could not have contributed to claimant's interstitial fibrosis, which he identified as idiopathic pulmonary fibrosis.[7] *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990).

We also reject employer's allegation of error regarding the administrative law judge's reliance on the preamble to the amended regulations. The preamble sets forth the resolution of questions of scientific fact made by the DOL concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Consequently, the administrative law judge did not err in according more weight to Dr. Cohen's opinion based, in part, upon its consistency with the preamble to the amended regulations. *Obush*, 24 BLR at 1-125-26.

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court's decisions in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) and *Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). In *Cornett*, the Sixth Circuit indicated that whether a physician explains his or her conclusion that coal dust exposure played no role in the miner's respiratory condition is a factor to be considered by the administrative law judge. *Cornett*, 227 F.3d at 576-77, 23 BLR at 2-112. Similarly, the court held in *Barrett* that the administrative law judge acted rationally in discrediting a physician's opinion because he did not adequately explain why he believed the coal dust exposure did not exacerbate the miner's impairment, which the physician attributed solely to cigarette smoking. *Barrett*, 478 F.3d at 356, 23 BLR at 2-476.

[7] The administrative law judge noted that the parties stipulated to twenty-nine years of coal mine employment. Decision and Order on Remand at 5.

Moreover, contrary to employer's contention, the administrative law judge did not find that the preamble created a presumption that claimant's impairment is due to coal dust exposure. Rather, the administrative law judge rationally determined that Dr. Cohen's conclusions identifying coal dust exposure as a significant contributing cause of claimant's impairment were entitled to great weight, as they are well-documented, well-reasoned and consistent with the scientific views endorsed by the DOL in the preamble.[8] *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. We affirm, therefore, the administrative law judge's determination that the evidence of record is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). We further affirm the award of benefits.[9]

II. Surety

In ordering payment of benefits, the administrative law judge stated that "[e]mployer, a nominal party, and Surety shall pay to claimant's representative . . . all such benefits as shall be determined to be owing and unpaid to [c]laimant with respect to this claim . . . ." Decision and Order on Remand at 53. The administrative law judge also directed that "[e]mployer and Surety shall pay to the Trust Fund by way of reimbursement any and all such amounts as shall have been paid as benefits to [c]laimant by the Trust Fund with respect to this claim." *Id*.

Employer contends that the administrative law judge's order is in error, as "[a]ccording to the terms of the Bankruptcy Court's order, if a claim resulted in an award of benefits, that claim would not be enforced against [employer], but it would form the basis for a collection proceeding against any other parties that might be responsible,

[8] Because the administrative law judge provided a valid rationale for according great weight to Dr. Cohen's opinion, that claimant's interstitial fibrosis is significantly related to coal dust exposure, we reject employer's allegation that the administrative law judge erred in crediting Dr. Cohen's CT scan interpretation over Dr. Wiot's interpretation. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[9] In light of our affirmance of the award of benefits based upon the administrative law judge's determination that claimant proved total disability due to pneumoconiosis, without benefit of the irrebuttable presumption set forth in 20 C.F.R. §718.304, we decline to address employer's allegations of error regarding the administrative law judge's alternative finding that claimant invoked the presumption. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

including any sureties for the Debtor." Employer's Brief at 22. The Director agrees with employer that the administrative law judge exceeded his authority in ordering the surety to pay benefits and to reimburse the Trust Fund. According to the Director, "the issue of a surety's liability is a jurisdictional issue properly addressed to a federal district court and is beyond the scope of an [administrative law judge], the Board, or even a circuit court of appeals." Director's Brief at 1. Claimant responds, arguing that the surety is liable for the claim.

We are persuaded that, under the agreement reached in Bankruptcy Court, employer is liable for the award of benefits in this case and the award may be used as a basis for recovery against Seaboard in an enforcement proceeding. We further agree that resolving the issue of whether Seaboard's surety bond covers this claim does not fall within the administrative law judge's authority, as it is not a question pertaining to claimant's entitlement to compensation under the Act. 33 U.S.C. §913(a), as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.351(a)(1), (b)(4); *see Peabody Coal Co. v. Director, OWCP* [*Ayers*], 40 F.3d 906, 19 BLR 2-34 (7th Cir. 1994); *BethEnergy Mines Inc. v. Director, OWCP* [*Pierson*], 32 F.3d 843, 18 BLR 2-351 (3d Cir. 1994). Rather, it is a question of bond coverage that must be brought before a federal district court for resolution. *See Ayers*, 40 F.3d at 909-10, 19 BLR at 2-37. We modify, therefore, the administrative law judge's Decision and Order on Remand – Award of Benefits such that employer is ordered to pay benefits to claimant and to reimburse the Trust Fund.

III. Attorney Fee Petition

On August 4, 2011, claimant's counsel filed a fee petition in the amount of $13,573.35 for services performed before the Board[10] from July 20, 2004 to July 5, 2007, and from August 25, 2008 to November 5, 2009, pursuant to 20 C.F.R. §802.203. Employer contends that claimant's counsel failed to support her hourly rate of $240.00 with sufficient proof of the prevailing market rate. Employer's Brief at 1-5. We disagree. In her fee petition, claimant's counsel provided affidavits from other lawyers who are familiar with her skills and more generally with black lung work. Evidence of affidavits from lawyers who are familiar with the skills of the fee applicant and with the type of work performed in the relevant community is an appropriate factor to consider in establishing the market rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010)(Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165 (2010) (Order). In support of her requested hourly rate, claimant's counsel has also provided

[10] This amount represents 54.25 hours of work by claimant's counsel at an hourly rate of $240.00 and expenses in the amount of $553.35.

evidence of her expertise and experience in the field of black lung litigation and her normal billing rate. 20 C.F.R. §802.203(d). We find, therefore, that claimant's counsel has provided sufficient evidence of a market rate in her geographic area for an attorney of her expertise and experience, for appellate work before the Board.

Employer also challenges time entries from the periods between September 30 and October 4, 2004, September 16 and 20, 2005, and February 23 and 26, 2006, on the ground that they are not sufficiently specific.[11] Employer states that the lack of specificity prevents the Board from assessing whether the time billed is reasonable and, therefore, requires that the Board deny or reduce compensation for these entries. However, employer does not allege that any of the services listed by counsel on those dates were not necessary to the prosecution of the case or excessive in amount, nor do we find them to be. Consequently, the Board considers the time requested in these entries to be reasonable in light of the services performed. *See Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139-140 (1993). Thus, claimant's counsel is awarded a total fee of $13,573.35, representing 54.25 hours of services, billed at an hourly rate of $240.00, and expenses in the amount of $553.35.

[11] These entries list multiple services performed over a period of several days related to preparing a response brief, preparing for oral argument, and preparing a motion for reconsideration. *See* Claimant's Fee Petition at 2, 4-5.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed, as modified, to order employer to pay benefits to claimant and to reimburse the Trust Fund as required. In addition, employer is ordered to pay the attorney fee of $13,573.35 directly to counsel. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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