BRB No. 12-0653 BLA

PAUL JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY WESTERN COAL COMPANY	)	
	)	DATE ISSUED: 07/17/2013
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 on Remand of John M. Vittone, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

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

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (07-BLA-5504) of Administrative Law Judge John M. Vittone awarding benefits 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 subsequent claim filed on January 28, 2004,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge noted that employer stipulated to twenty-six years of coal mine employment,[2] and to the existence of simple pneumoconiosis. However, the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge further found that the new evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant failed to establish that the applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Johnson v. Peabody W. Coal Co.*, BRB No. 09-0772 BLA (Aug. 31, 2010) (unpub.). However, the Board vacated the administrative law judge's finding that the new evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case for further consideration. *Id.* The Board also vacated the administrative law judge's finding that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.* The Board held that the administrative law judge erred in requiring that the new evidence must be qualitatively different than the evidence in the prior denied claim in order for claimant to establish a change in an applicable condition of entitlement. *Id.* The Board instructed the administrative law judge on remand to apply the standard set forth in 20 C.F.R. §725.309(d), which requires only that the new evidence establish at least one of the

[1] Claimant's previous claim, filed on June 17, 1997, was finally denied on March 28, 2001, because he failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1; *Johnson v. Peabody Coal Co.*, BRB No. 00-0613 BLA (Mar. 28, 2001) (unpub.).

[2] The record indicates that claimant's coal mine employment was in Arizona. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

elements of entitlement that was adjudicated against claimant.[3] *Id.*

On remand, the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established that the applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's subsequent claim on the merits. The administrative law judge found that the evidence, as a whole, established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further contends that the administrative law judge applied an incorrect standard in finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant responds in support 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 reject employer's contention that the administrative law judge applied an improper standard in evaluating the evidence pursuant to 20 C.F.R. §725.309. In a reply brief, employer reiterates its previous contentions.

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. 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).

[3] The Board subsequently denied employer's motion for reconsideration. *Johnson v. Peabody W. Coal Co.*, BRB No. 09-0772 BLA (Apr. 12, 2011) (unpub.). The Board rejected employer's argument that a qualitative comparison between the old and the new evidence is required to establish a change in an applicable condition of entitlement, and reaffirmed its holding that the administrative law judge on remand was to apply the standard for determining a change in an applicable condition of entitlement set forth at 20 C.F.R. §725.309(d). *Id.*

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d).

Complicated Pneumoconiosis

Employer argues that the administrative law judge erred in finding that claimant established that he suffers from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc).

Section 718.304(a)

Employer contends that the administrative law judge erred in his consideration of the x-ray evidence at 20 C.F.R. §718.304(a). The administrative law judge considered seven interpretations of three new x-rays taken on January 28, 2003, May 25, 2004, and

January 14, 2005. Dr. Gatenby interpreted the January, 28, 2003 x-ray as revealing findings "typical of progressive fibrosis in pneumoconiosis." Employer's Exhibit 3. Although the administrative law judge found that Dr. Gatenby's x-ray interpretation is "indicative of a finding of complicated pneumoconiosis," he found that "the interpretation does not meet the requirements of [Section] 718.304(a) because [Dr. Gatenby] does not specify the size of the upper lobe densities observed." Decision and Order on Remand at 5.

While Dr. James, a B reader, interpreted the May 25, 2004 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 41, Dr. Repsher, a B reader, interpreted the x-ray as negative for the disease.[4] Employer's Exhibit 6. Dr. Repsher opined that the x-ray revealed healed pulmonary tuberculosis. *Id.* In weighing the conflicting interpretations of the May 25, 2004 x-ray, the administrative law judge noted that Dr. Repsher did not interpret the x-ray as positive for simple pneumoconiosis. Noting that the presence of simple pneumoconiosis was undisputed, the administrative law judge found that Dr. Repsher's failure to diagnose simple pneumoconiosis undermined his negative interpretation for complicated pneumoconiosis. Decision and Order on Remand at 2-6. Consequently, the administrative law judge found that the May 25, 2004 x-ray is positive for complicated pneumoconiosis. *Id.*

While Dr. James, a B reader, and Dr. Klepper, a physician without any special radiological qualifications, interpreted the January 14, 2005 x-ray as positive for complicated pneumoconiosis, Director's Exhibits 9, 18, Drs. Repsher and Castle, both of whom are B readers, interpreted the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 1. Dr. Repsher interpreted the x-ray as revealing tuberculosis while Dr. Castle interpreted the x-ray as revealing granulomatous disease. *Id.* The administrative law judge again accorded less weight to Dr. Repsher's negative x-ray interpretation, based upon his failure to diagnose simple pneumoconiosis. Decision and Order on Remand at 6. Although the administrative law judge found that the interpretations of Drs. James and Castle were entitled to greater weight based upon their status as B readers, he determined that Dr. Klepper's Board-certification in Internal Medicine and Pulmonary Disease, and her status as a Professor of Medicine at the University of New Mexico, entitled her x-ray interpretation "to some weight." *Id.* at 7. The administrative law judge, therefore, found that Dr. James's positive interpretation, supported by Dr. Klepper's positive interpretation, outweighed Dr. Castle's negative interpretation. *Id.* The administrative law judge, therefore, found that the January 14, 2005 x-ray is positive for complicated pneumoconiosis. *Id.*

[4] Dr. Rohren, a radiologist, also interpreted the May 25, 2004 x-ray, finding that it was "compatible with progressive fibrosis." Director's Exhibit 41.

Weighing all of the new x-ray evidence together, the administrative law judge found that it established the existence of complicated pneumoconiosis:

> Overall, it is determined that a preponderance of the more probative x-ray interpretations support a finding that complicated pneumoconiosis is present under 20 C.F.R. §718.304(a). Dr. James's B-readings in support of complicated pneumoconiosis are supported by the findings of Dr. Klepper and Dr. Gatenby, a radiologist.

Decision and Order on Remand at 7.

Employer argues that the administrative law judge erred in discrediting Dr. Repsher's x-ray findings of no complicated pneumoconiosis because Dr. Repsher's findings of no simple pneumoconiosis are contrary to employer's stipulation that claimant has simple pneumoconiosis. We disagree. In considering whether the evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, an administrative law judge is required to examine all the evidence on the issue, namely, evidence of simple pneumoconiosis, complicated pneumoconiosis, and no pneumoconiosis, resolve the conflicts, and make a finding of fact. *Melnick*, 16 BLR at 1-37; *Truitt v. N. Am. Coal Corp*., 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. N. Am. Coal Corp*., 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). In this case, the administrative law judge accurately noted that employer stipulated that the previously submitted biopsy evidence established the existence of simple pneumoconiosis.[5] Hearing Transcript at 5-6. The administrative law judge permissibly found that Dr. Repsher's failure "to find the presence of simple pneumoconiosis in any form," contrary to employer's stipulation, diminished the credibility of Dr. Repsher's x-ray readings.[6] Decision and Order on Remand at 3. The administrative law judge, therefore, acted within his discretion in according less weight to Dr. Repsher's negative interpretations of the May 25, 2004 and January 14, 2005 x-rays. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order on Remand at 5-6.

[5] In the adjudication of claimant's initial claim, the administrative law considered biopsy evidence obtained during a bronchoscopy performed on April 5, 1995. Director's Exhibit 1. The administrative law judge found that the biopsy evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), a finding that was subsequently affirmed by the Board. *Johnson* , BRB No. 00-0613 BLA, slip op. at 2 n.2.

[6] The administrative law judge noted that, during the hearing, Dr. Repsher testified that the previously submitted biopsy evidence did not establish the existence of simple pneumoconiosis. Decision and Order on Remand at 6 n.2; Hearing Transcript at 66.

Employer further asserts that the administrative law judge erred in finding that Dr. Klepper's Board-certification in Internal Medicine and Pulmonary Disease, along with her status as a Professor of Medicine, entitled her positive interpretation of the January 14, 2005 x-ray to additional weight. Board-certification in Internal Medicine and Pulmonary Disease, and a position as a Professor of Medicine, are not radiological qualifications, and, therefore, are not relevant to the weighing of x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick*, 16 BLR at 1-37. However, the administrative law judge's error in his consideration of Dr. Klepper's x-ray interpretation is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Even if Dr. Klepper's positive x-ray interpretation is excluded from consideration, the January 14, 2005 x-ray would be in equipoise, having been read by equally qualified B readers (Drs. James and Castle) as both positive and negative for complicated pneumoconiosis. As previously noted, the administrative law judge found that the January 28, 2003 x-ray is supportive of a finding of complicated pneumoconiosis. Moreover, the administrative law judge permissibly credited Dr. James's positive interpretation of the May 25, 2004 x-ray over Dr. Repsher's negative interpretation, and found that the May 25, 2004 x-ray is positive for complicated pneumoconiosis. Consequently, even if Dr. Klepper's positive interpretation of the January 14, 2005 x-ray is disregarded, substantial evidence supports the administrative law judge's finding that the new x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). That finding is therefore affirmed.

Section 718.304(c)

Employer argues that the administrative law judge erred in finding that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[7] The record contains a range of other new diagnostic evidence under 20 C.F.R. §718.304(c), including interpretations of a June 2, 2004 digital x-ray, interpretations of a June 2, 2004 CT scan, and medical opinion evidence.

Drs. Repsher and Castle, both of whom are B readers, interpreted a June 2, 2004 digital x-ray as negative for complicated pneumoconiosis. Dr. Repsher interpreted the x-ray as showing evidence of "advanced, but healed, pulmonary tuberculosis." Director's Exhibit 18. Dr. Castle similarly interpreted the x-ray as showing changes of granulomatous disease consistent with old tuberculosis. Employer's Exhibit 4 at 8. Dr. Orbelo, a Board-certified radiologist, interpreted the same digital x-ray as including findings suggestive of coal workers' pneumoconiosis with progressive massive fibrosis.

[7] The record does not contain any new biopsy evidence submitted in connection with claimant's subsequent claim. 20 C.F.R. §718.304(b).

Claimant's Exhibit 1b. Dr. James, a B reader, interpreted the June 2, 2004 digital x-ray as consistent with both simple and complicated pneumoconiosis. Claimant's Exhibit 1.

In addition, Drs. Repsher and Castle interpreted a June 2, 2004 CT scan as negative for complicated pneumoconiosis, attributing the findings on the CT scan to advanced healed pulmonary tuberculosis. Director's Exhibit 18; Employer's Exhibit 4 at 8-9. Dr. Orbelo, however, interpreted the CT scan as revealing "[m]ultiple small pulmonary nodules and irregular upper lobe masses, suggestive of silicosis or coal workers' pneumoconiosis with progressive massive fibrosis. No cavitation to suggest superimposed tuberculosis." Claimant's Exhibit 1c. Dr. James interpreted the June 2, 2004 CT scan as revealing both small and large opacities. Claimant's Exhibit 1.

In addition, the record contains new medical opinions submitted by Drs. James, Klepper, Repsher, and Castle. Drs. James and Klepper diagnosed complicated pneumoconiosis, Director's Exhibit 9; Claimant's Exhibit 1; Drs. Repsher and Castle opined that claimant does not suffer from complicated pneumoconiosis. Employer's Exhibits 2, 6; Hearing Transcript at 77.

The administrative law judge found that the opinions of Drs. Repsher and Castle, that claimant's opacities or masses are due to conditions such as tuberculosis or granulomatous disease, were speculative and entitled to little weight. Decision and Order on Remand at 20. The administrative law judge further found that neither Dr. Repsher nor Dr. Castle explained why tuberculosis or granulomatous disease could not coexist with pneumoconiosis. *Id*. Moreover, the administrative law judge accorded less weight to Dr. Repsher's opinion because he did not interpret claimant's x-rays and CT scans as positive for simple pneumoconiosis, contrary to employer's stipulation to the existence of simple pneumoconiosis. *Id.* The administrative law judge credited Dr. James's opinion, that claimant suffers from complicated pneumoconiosis, finding that it was supported by Dr. Klepper's opinion, as well as the x-ray and CT interpretations of Drs. Orbelo and Rohren. *Id.* at 20-21. The administrative law judge, therefore, found that claimant met his burden to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Castle. We disagree. An administrative law judge may reject, as speculative and equivocal, the opinions of physicians who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions such as tuberculosis, histoplasmosis, or granulomatous disease, if those physicians fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010). In resolving the conflict in the evidence in this case, the administrative law judge correctly noted that the record

does not document any diagnoses of, or treatment for, any of the diseases put forward by Drs. Repsher and Castle as potential causes of the large masses in claimant's lungs. Decision and Order on Remand at 20. In fact, the administrative law judge accurately noted that there is evidence in the record showing that claimant tested negative for tuberculosis and granulomatous disease:

> [S]pecific testing for tuberculosis on multiple occasions yielded negative results as did testing for fungal infection and malignancy. There are no treatment or hospitalization records in this claim indicating that [claimant] suffered from tuberculosis or some other granulomatous disease at any point in his lifetime and he did not report such ailments or exposures during any of his physical examinations.

Decision and Order on Remand at 20.

The administrative law judge further noted that the previously submitted biopsy evidence of record did not reveal evidence of tuberculosis, a fungal infection, sarcoidosis, malignancy, or granulomatous disease. *Id.* The administrative law judge, therefore, permissibly discounted the opinions of Drs. Repsher and Castle, that claimant does not suffer from complicated pneumoconiosis, because the physicians diagnosed tuberculosis or granulomatous disease, with no evidence that claimant was ever diagnosed with, or treated for, those diseases. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; Decision and Order on Remand at 20. Additionally, the administrative law judge permissibly accorded less weight to the opinions of Drs. Repsher and Castle because they failed to explain why a finding of tuberculosis or granulomatous disease could not coexist with pneumoconiosis.[8] *Id.*

Employer generally contends that the administrative law judge, in finding that the evidence established the existence of complicated pneumoconiosis, "simply credited the positive diagnoses by default." Employer's Brief at 17. Employer's statements, however, do not raise any substantive issue or identify any specific error on the part of the administrative law judge in determining that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to

[8] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Repsher and Castle, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

pneumoconiosis at 20 C.F.R. §718.304.[9] *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. In light of this affirmance, we also affirm the administrative law judge's finding that claimant established that the applicable condition of entitlement has changed since the date upon which the denial of his prior claim became final. 20 C.F.R. §725.309(d).[10] We, therefore, affirm the administrative law judge's award of benefits.

[9] The administrative law judge noted that the record contains evidence submitted in connection with claimant's previous claim. However, the administrative law judge reasonably relied upon the more recent evidence, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 21. Moreover, because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983).

[10] We reject employer's contention that the administrative law judge, in finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309, erred by not conducting a qualitative comparison of the new evidence and the evidence submitted in the prior claim. The Board previously rejected this contention, holding that 20 C.F.R. §725.309 does not require a qualitative analysis of the old and new evidence. *Johnson v. Peabody W. Coal Co.*, BRB No. 09-0772 BLA, slip op. at 2 (Apr. 12, 2011) (unpub.). Employer has not demonstrated any exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand 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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JUDITH S. BOGGS
Administrative Appeals Judge