BRB Nos. 11-0617 BLA
and 11-0677 BLA

JOELLA SWAN (o/b/o and Widow of HARRY EDWARD SWAN)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/08/2012
MIDWEST COAL COMPANY (formerly known as AMAX COAL COMPANY)	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Paul L. Edenfield (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 Decisions and Orders (08-BLA-5902, 08-BLA-5903) of Administrative Law Judge Alice M. Craft awarding benefits on claims[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's subsequent claim filed on August 13, 2007, and a survivor's claim filed on October 31, 2007.[2]

In considering the miner's 2007 subsequent claim,[3] the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to the miner'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 Section 411(c)(4), if a miner establishes 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 or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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);); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847, 24 BLR 2-385, 2-395 (7th Cir. 2011).

Applying amended Section 411(c)(4), the administrative law judge found that the miner established at least thirty years of qualifying coal mine employment,[4] and

[1] Employer's appeal in the miner's claim was assigned BRB No. 11-0617 BLA, and its appeal in the survivor's claim was assigned BRB No. 11-0677 BLA. By Order dated August 16, 2011, the Board consolidated these appeals for purposes of decision only.

[2] The miner died on October 5, 2007. Director's Exhibit 10. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[3] The miner's previous claims, filed on June 5, 1973, and September 11, 1985, were finally denied because the miner failed to establish any element of entitlement. Director's Exhibits 24, 25. Although the miner filed a third claim on July 24, 2003, he later withdrew it. Administrative Law Judge's Exhibit 1. Therefore, that claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[4] The record reflects that the miner's coal mine employment was in Indiana and Illinois. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the

determined that the new medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).[5] The administrative law judge, therefore, found that the miner invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that the miner did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In regard to the survivor's claim, the administrative law judge noted that Section 1556 revived Section 932(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because claimant filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge awarded claimant survivor's benefits pursuant to amended Section 932(*l*).

On appeal, with respect to the miner's claim, employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer argues further that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination of the date for the commencement of benefits. Regarding the survivor's claim, employer contends that amended Section 932(*l*) relieved claimant of her burden of proof, thereby contravening Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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). Claimant responds in support of the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, arguing that the administrative law judge, in her consideration of the miner's claim, permissibly found that the pulmonary function study evidence supported a finding of total

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United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] In light of her finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the miner demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

disability. The Director also contends that the administrative law judge permissibly found that the x-ray evidence did not disprove the existence of clinical pneumoconiosis. In a reply brief, employer reiterates its previous contentions.[6]

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).

The Miner's Claim

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

Employer contends that the administrative law judge erred in finding that the miner invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in finding that the new pulmonary function study and medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

The record includes the results of six new pulmonary function studies conducted on November 10, 2003, October 27, 2004, August 2, 2005, August 17, 2006, May 14, 2007, and August 16, 2007. Although the administrative law judge noted that the miner's pulmonary function studies conducted from 2003 through 2006 produced non-qualifying values,[7] she noted that the miner's May 14, 2007 pulmonary function study produced qualifying values after the administration of a bronchodilator, and that the miner's most

[6] Because employer does not challenge the administrative law judge's finding that the miner established at least thirty years of qualifying coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

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

recent pulmonary function study, conducted on August 16, 2007, produced qualifying values, both before and after the administration of a bronchodilator. Decision and Order at 47; Claimant's Exhibit 1; Employer's Exhibit 7. Relying upon the most recent pulmonary function study evidence, the administrative law judge found that it established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer asserts that, because the table values listed at 20 C.F.R. Part 718, Appendix B, end at age 71, and the miner was 78 years old at the time he performed the May 14, 2007 and August 16, 2007 pulmonary function studies, the administrative law judge erred in relying upon the results of these studies. Employer's Brief at 24. We disagree. Pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). In the case of older miners, an opposing party may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Id.* Under this standard, the administrative law judge properly characterized the miner's two most recent pulmonary function studies, conducted on May 14, 2007, and August 16, 2007, as qualifying studies. As employer submitted no evidence to show that those studies, which produced qualifying values for a miner of age 71, were actually normal or otherwise did not demonstrate a totally disabling pulmonary impairment, we affirm the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer also argues that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Harris, Jacqmain, Conibear, Rosenberg, and Tuteur. Although Dr. Harris opined that the miner retained the respiratory capacity to perform his previous coal mine employment, Claimant's Exhibit 22, Drs. Jacqmain, Conibear, and Rosenberg opined that the miner was totally disabled from a pulmonary standpoint. Claimant's Exhibits 1, 24; Employer's Exhibit 37. Dr. Tuteur opined that the miner "eventually developed impairment of pulmonary function," explaining that the "likely development of diastolic dysfunction of the left ventricle and subsequent development of . . . cardiomyopathy was fully responsible for his respiratory symptoms, his impairment of physiologic pulmonary function and disability." Employer's Exhibit 36.

The administrative law judge found that the weight of the medical opinion evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment:

> Three of the five doctors who gave opinions on disability stated explicitly that the [m]iner was totally disabled by a pulmonary or respiratory impairment. Dr. Tuteur was not so explicit, but his opinion does not contradict the others'. Dr. Harris said the [m]iner was not disabled in 2003. Drs. Jacqmain, Conibear, Rosenberg, and, by implication, Dr. Tuteur believed that he was totally disabled by a pulmonary impairment at some later time. All four had more extensive and more recent information available to them than did Dr. Harris. I find that the weight of the medical opinion evidence supports a finding that the [m]iner was totally disabled by a pulmonary or respiratory impairment based on the opinions of Drs. Jacqmain, Conibear, and Rosenberg, bolstered by Dr. Tuteur.

Decision and Order at 49.

Employer argues that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Tuteur as diagnoses of a totally disabling respiratory impairment, when the doctors attributed the miner's pulmonary impairment to cardiac issues. Employer's Brief at 24. We disagree. Contrary to employer's understanding, the cause of a miner's pulmonary impairment is not relevant to the issue of whether a miner is totally disabled pursuant to 20 C.F.R. §718.204(b). Disability causation is a separate element of entitlement. *See* 20 C.F.R. §718.204(c). Dr. Rosenberg characterized the miner's pulmonary impairments as "disabling," Employer's Exhibit 37, while Dr. Tuteur opined that the miner suffered from impaired "pulmonary function and disability." Employer's Exhibit 36. Therefore, substantial evidence supports the administrative law judge's finding that these opinions supported the existence of a totally disabling respiratory or pulmonary impairment. Because employer does not allege any additional error on the part of the administrative law judge, we affirm her finding that the weight of the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because employer does not challenge the administrative law judge's finding that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2), *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), this finding is also affirmed.[8] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] In light of our affirmance of the administrative law judge's finding that the new evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that the miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

In light of our affirmance of the administrative law judge's findings that the miner established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because the miner 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). The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order 49-53. Specifically, the administrative law judge found that employer failed to disprove the existence of both clinical and legal pneumoconiosis.[9] *Id*. at 17, 20. The administrative law judge also found that employer failed to disprove a causal relationship between the miner's disability and his pneumoconiosis. *Id*. at 20.

Employer argues that the administrative law judge erred in finding that the x-ray evidence did not disprove the existence of clinical pneumoconiosis. Although the administrative law judge noted that the record contains x-ray evidence submitted in connection with the miner's prior claims, she reasonably relied upon the more recent x-ray evidence, which she found more accurately reflected the miner's 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); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 50.

The only new x-ray evidence of record that was submitted in connection with the miner's 2007 subsequent claim was of an x-ray dated November 10, 2003. Drs. Whitehead, Ahmed, Miller, Newell, Lynch, and Alexander, each dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as positive for

[9] "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 "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

pneumoconiosis, Claimant's Exhibits 2, 20-23, and five equally qualified physicians, Drs. Shipley, Wheeler, Scott, Halbert, and Kendall, interpreted the x-ray as negative for the disease. Employer's Exhibits 23, 25, 26, 29, 35. The administrative law judge, therefore, accurately noted that the November 10, 2003 x-ray was interpreted as positive by six dually qualified physicians, and as negative by five equally qualified physicians.

Because the miner's November 10, 2003 x-ray was interpreted as both positive and negative for pneumoconiosis by the best qualified physicians of record,[10] the administrative law judge permissibly found that the x-ray was, at best, inconclusive and, therefore, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 51. Employer concedes that the interpretations of the miner's November 10, 2003 x-ray are "for all intents and purposes. . . in equipoise." Employer's Brief at 25. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence does not assist employer in disproving the existence of clinical pneumoconiosis.

Employer submitted the opinions of Drs. Rosenberg and Tuteur in support of its burden to disprove the existence of pneumoconiosis. The administrative law judge noted that Drs. Rosenberg and Tuteur based their opinions, that the miner did not suffer from clinical or legal pneumoconiosis, in part, on the fact that the miner's pulmonary function was normal when he stopped working in the mines in 1985, and his pulmonary impairment was not documented until 2003 or later. Decision and Order at 51. The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Tuteur, because she found that the doctors failed to account for the progressive nature of pneumoconiosis. *Id*. Because employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Rosenberg and Tuteur, this finding is affirmed. *Skrack*, 6 BLR at 1-711. Since employer makes no additional contentions of error regarding the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis,[11] this finding is affirmed. *Id.*

[10] Despite arguing that the radiological qualifications of Drs. Wiot, Wheeler, and Scott exceed those of the other physicians, employer provides no support for its contention. Moreover, although the administrative law judge considered reports submitted by Drs. Scott and Wheeler, wherein they explained why they disagreed with the positive x-ray interpretations, she "did not find them sufficiently persuasive to discredit the positive readings." Decision and Order at 51.

[11] Employer's specific arguments regarding the administrative law judge's consideration of the medical opinion evidence focus upon the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's Brief at 27-30; Employer's Reply Brief at 6-9. In light of our affirmance of

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption, by establishing 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). Employer specifically contends that the opinions of Drs. Rosenberg and Tuteur are sufficient to establish this second means of rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Tuteur, that the miner's pulmonary impairment did not arise out of his coal mine employment, because neither physician diagnosed the miner with clinical pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995).

Because the miner established invocation of the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

Commencement Date of Benefits in the Miner's Claim

Employer next challenges the administrative law judge's determination regarding the commencement date for benefits. When a miner is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined in the manner provided under 20 C.F.R. §725.503, except that no benefits may be paid for any period prior to the date upon which the denial of the previous claim became final. 20 C.F.R. §725.309(d)(5). Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to

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the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In this case, the administrative law judge found that the weight of the evidence supported a finding that the miner became disabled in May of 2007. The administrative law judge relied upon the results of the miner's May 14, 2007 pulmonary function study, which produced qualifying values post-bronchodilator. Decision and Order at 54. The administrative law judge further noted that Drs. Rosenberg and Tuteur agreed that the miner was in respiratory failure in 2007. *Id.* The administrative law judge, therefore, determined that the commencement date of benefits in the miner's claim was May 2007. *Id.*

Employer argues that the administrative law judge erred in relying upon the results of the miner's May 14, 2007 pulmonary function study because it was "not validated." Employer's Brief at 32. Employer, however, did not submit any evidence calling into question the results of the study. Employer does not challenge the administrative law judge's reliance upon the opinions of Drs. Rosenberg and Tuteur to support her determination regarding the commencement date of benefits. Substantial evidence supports the administrative law judge's finding that the commencement date of benefits in the miner's claim is May, 2007. *See Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Lykins*, 12 BLR at 1-182-83. This finding is, therefore, affirmed.

The Survivor's Claim

Because she determined that the miner was eligible to receive benefits at the time of his death, the administrative law judge found that claimant is derivatively entitled to benefits pursuant to amended Section 932(*l*). Employer argues that amended Section 932(*l*) relieved claimant of her burden of proof, thereby contravening Section 7(c) of the APA. We disagree. Amended Section 932(*l*) did not alter a survivor's burden of proof; it altered the criteria that a certain class of survivors must prove to qualify for benefits. *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-231 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011). Here, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*): that she filed her claim after January 1, 2005, that she is an eligible survivor of the miner, that her claim was pending on March 23, 2010, and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(*l*).

Accordingly, the administrative law judge's Decisions and Orders awarding benefits in the miner's claim and the survivor's claim are affirmed.

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