BRB No. 12-0333 BLA

STEVE R. BLACKWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIOPE MINING, INCORPORATED	)	DATE ISSUED: 03/26/2013
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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 Living Miner's Benefits (2010-BLA-5367) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a subsequent claim filed on March 20, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2) and, thus, found that claimant demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge determined that claimant invoked the presumption of total disability due to pneumoconiosis, set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also requests that the case be held in abeyance.[2] Relevant to invocation of the amended Section 411(c)(4) presumption, employer argues that the administrative law judge erred in failing to render a specific finding as to the length of claimant's coal mine employment. Employer also asserts that the administrative law judge erred in evaluating the arterial blood gas studies and improperly substituted his opinion for that of the medical experts in finding that claimant is totally disabled. Additionally, employer contends that the administrative law judge erred in finding the

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this miner's claim, Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), 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 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 is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] Employer's request that this case be held in abeyance pending resolution of the legal challenges to the PPACA is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). We reject employer's constitutional challenges to amended Section 411(c)(4). *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

evidence insufficient to establish rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's constitutional challenges to the application of amended Section 411(c)(4), and its argument regarding the credibility of Dr. Fino's blood gas study results.

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).

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

A. Length of Coal Mine Employment

In order to invoke the amended Section 411(c)(4) presumption, claimant must first establish that he worked fifteen years in underground coal mine employment or in surface coal mine employment, in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984).

On his application for benefits, claimant alleged twenty-two years of coal mine employment. Director's Exhibit 3. On his Employment History Form, CM-911a, claimant stated that he worked for Olga Coal Company from July 1973 to December 1986; Rayco Mining from May 1995 to August 1996; Cu Chi Mining from September 1996 to October 1996; Hiope Mining (employer) from October 1996 to February 28, 2002; and Corbadd Coal from March 2002 to May 31, 2002. Director's Exhibit 4. Claimant specifically reported on the form that all of his coal mine employment was underground as a roofbolter. *Id.* The district director found that claimant established twenty years of coal mine employment from July 1973 to May 2002. Director's Exhibit 22.

In addressing the length of claimant's coal mine employment, the administrative

[3] Because claimant's coal mine employment was in Virginia and West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

law judge noted correctly that "employer agreed that the miner worked for Hiope Mining for five years." Hearing Transcript at 6; Decision and Order at 4. The administrative law specifically noted that while working for employer, claimant worked in "36 to 38 inch coal" and that his primary job was as a "roof bolter." *Id*. at 5. The administrative law judge summarized claimant's hearing testimony as follows:

> With regard to his coal mine employment history, Claimant recalled that he worked for [Olga] Coal Company from 1973 until 1986, when they closed. Tr. at 16. Then he worked for Grayco [sic] Coal Mining in 1995. Tr. at 16. He stopped working in the mines in 2002, when he worked for Corbad[d] Coal. Tr. at 17. Prior to Corbad[d] Coal, he worked for Employer from October 1996 until February 2002. Tr. at 17. Since 2002, he has not worked as a miner.

Decision and Order at 4-5 (italics excluded); *see* Hearing Transcript at 16-17. The administrative law judge found that claimant has "[fifteen] years or more of qualifying coal mine employment" for invocation of the amended Section 411(c)(4) presumption. Decision and Order at 22.

Employer notes that the administrative law judge "did not make a specific finding of coal mine employment." Employer's Brief at 4. Employer asserts that because "it is unclear what evidence the administrative law judge relied upon" to find that claimant had the requisite coal mine employment for invocation of the amended Section 411(c)(4) presumption, his Decision and Order does not satisfy the requirements of the Administrative Procedure Act (APA)[4] and the award of benefits must be vacated. *Id*. at 5. We disagree.

Employer does not argue that claimant worked less than fifteen years in coal mine employment or that any of claimant's employment was in surface coal mining. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Although the administrative law judge did not render a specific finding as to the exact length of claimant's total coal mine employment, we consider this error to be harmless, as substantial evidence supports a finding that claimant worked as a miner for at least fifteen years. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 3, 4, 6; 22; Hearing Transcript at 16-

[4] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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), requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

17. Furthermore, the record supports a finding that claimant's coal mine work was all underground coal mine employment. Director's Exhibit 3. We therefore affirm the administrative law judge's determination that claimant established "fifteen years or more of qualifying coal mine employment" for invocation of the amended Section 411(c)(4) presumption. Decision and Order at 22.

B. Total Disability

The administrative law judge found that claimant established a totally disabling respiratory impairment, based on his consideration of the arterial blood gas studies and medical opinion evidence.[5]

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three blood gas studies dated June 25, 2009, August 27, 2009 and August 11, 2010, each of which included resting and exercise values. All of the resting blood gas studies were non-qualifying for total disability.[6] The June 25, 2009 and August 11, 2010 studies had qualifying values during exercise, while the August 27, 2009 study was non-qualifying during exercise. Director's Exhibits 12, 13; Employer's Exhibit 3.

In resolving the conflict in the evidence, the administrative law judge found that the exercise blood gas study results were the most probative of claimant's ability to perform the heavy manual labor required by claimant's last coal mine work as a roofbolter. Decision and Order at 8. With respect to the non-qualifying exercise study obtained by Dr. Fino on August 27, 2009, administrative law judge stated:

> [I]t is noted that this tribunal accords Dr. Fino's testing little weight. The undersigned observed the miner testify and found him very credible. Of relevance here is the miner's description of his appointment with Dr. Fino. The miner testified that Dr. Fino was not present during testing. He recalled that, for exercise blood gas testing, the laboratory technician "walked him down the hall" and back and his blood was drawn 63 seconds

[5] The administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as none of the pulmonary function studies was qualifying for total disability and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6 n.2, 7.

[6] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

> later. Dr. Fino agreed that he was not present during the testing. Due to the irregularities surrounding testing for Dr. Fino's examination, including the limited amount of exercise and the delay in drawing the miner's blood, it is determined that Dr. Fino's blood gas test results after exercise are accorded little weight.

Id., quoting Hearing Transcript at 25-26.

The administrative law judge determined that Dr. Hippensteel's explanation, that the qualifying exercise blood gas study values were "likely secondary to an abnormal cardiac response to exercise aggravated by [claimant's] very elevated carboxyhemoglobin level," was insufficiently documented and reasoned. Employer's Exhibit 3; *see* Decision and Order at 9. Thus, the administrative law judge concluded that claimant established total disability, based on the qualifying exercise arterial blood gas studies. *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge rejected the opinions of Drs. Fino and Hippensteel, that claimant is not totally disabled, based on his findings regarding claimant's blood gas studies. Decision and Order at 8-9, 20. The administrative law judge found that Dr. Rasmussen provided a reasoned and documented opinion that claimant is totally disabled by a respiratory or pulmonary impairment, and credited his opinion at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 20.

With regard to the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(ii), employer asserts that the administrative law judge erred in giving less weight to Dr. Fino's testing. We disagree. Under the terms of 20 C.F.R. §718.105(b):

> A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, *blood shall be drawn during exercise*.

20 C.F.R. §718.105(b) (emphasis added). If the blood is drawn after the conclusion of exercise the study does not conform with the quality standards. *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

In this case, claimant testified that for the exercise portion of Dr. Fino's blood gas study, the laboratory technician "walked me down the hall and around and come back." Hearing Transcript at 25-26. Claimant described that he was then asked to have a seat and they took his blood "63 seconds" later. *Id*. at 26. The administrative law judge observed that claimant "testified to this with certainty stating that he looked at his watch

during the examination." Decision and Order at 5; *see* Hearing Transcript at 26. In contrast to Dr. Fino's testing, claimant stated that, in Dr. Hippensteel's office, he was "on the treadmill for three minutes" and during Dr. Rasmussen's examination he was exercised "probably eight minutes." Hearing Transcript at 26.

During his deposition, Dr. Fino testified that he is not physically present when arterial blood gas testing is performed. Employer's Exhibit 10 at 9. Contrary to employer's assertion, the administrative law judge permissibly relied on claimant's uncontradicted hearing testimony in concluding that the blood gas sample taken during Dr. Fino's August 27, 2009 examination was not drawn during exercise. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 5, 8; Hearing Transcript at 25-26. We, therefore, affirm the administrative law judge's finding that Dr. Fino's non-qualifying exercise blood gas test was "unreliable" and entitled to little weight. Decision and Order at 8.

With regard to Dr. Hippensteel's opinion, employer argues that the administrative law judge erred in rejecting his explanation that claimant's qualifying exercise blood gas values were caused by a heart condition and were unrelated to lung disease. We disagree. The administrative law judge acted within his discretion in assigning less weight to Dr. Hippensteel's opinion because Dr. Hippensteel admitted that cardiac testing showed "suggestive evidence of heart disease, not definitive evidence." Decision and Order at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Employer's Exhibits 3, 4, 9. The administrative law judge also rationally found that, while Dr. Hippensteel stated that an elevated carboxyhemoglobin level "impairs the offloading of oxygen and also the uploading of oxygen," he failed to explain the process by which this occurred during claimant's testing, and did not address "the difference, if any, carboxyhemoglobin has on resting versus exercise values."[7] Decision and Order at 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, based on the qualifying June 25, 2009 and August 11, 2010 exercise blood

[7] The administrative law judge observed that claimant's "resting values were non-qualifying, indicating that [his] carboxyhemoglobin level did not impede the offloading of oxygen during this component of the testing." Employer's Brief at *Id*. Although employer maintains that the administrative law judge improperly acted as a medical expert, we consider the administrative law judge's error, if any, to be harmless, as he provided rational reasons for the weight accorded Dr. Hippensteel's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 n.4 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

gas studies, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

With regard to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv),[8] because we have affirmed the administrative law judge's decision to accord little weight to Dr. Fino's exercise blood gas testing, we reject employer's argument that the administrative law judge erred in giving less weight to Dr. Fino's disability opinion, based on those results. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.2d at 174, 21 BLR at 2-48. Furthermore, contrary to employer's assertion, the administrative law judge permissibly assigned little weight to Dr. Hippensteel's opinion on the issue of total disability, since the administrative law judge found that Dr. Hippensteel did not explain his conclusions with respect to the blood gas testing. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; Decision and Order at 20-21. Conversely, because the administrative law judge permissibly determined that Dr. Rasmussen offered a reasoned and documented opinion that claimant is totally disabled, we affirm the administrative law judge's reliance on Dr. Rasmussen's opinion as establishing total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Clark*, 12 BLR at 1-155. We also affirm the administrative law judge's overall determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 21.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of underground 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 claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 4.

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

In order to establish rebuttal of the presumption at amended Section 411(c)(4), employer is required to establish either that claimant does not have pneumoconiosis or

[8] Dr. Rasmussen opined that claimant is totally disabled by chronic obstructive pulmonary disease and emphysema, which he attributed to a combination of coal mine dust exposure and smoking. Director's Exhibit 12; Employer's Exhibit 2. In contrast, Drs. Fino and Hippensteel opined that claimant is not totally disabled by a respiratory condition related to coal dust exposure. Director's Exhibit 13; Employer's Exhibits 2-4, 9, 10.

that his disability "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4); *see also Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order at 23.

The administrative law judge determined that while employer proved that claimant does not have clinical pneumoconiosis,[9] it failed to also prove that claimant does not suffer from legal pneumoconiosis.[10] Employer challenges this finding, arguing that the opinions of Drs. Fino and Hippensteel, attributing claimant's chronic obstructive pulmonary disease to smoking, are sufficient to establish rebuttal. Employer's arguments are without merit.

The administrative law judge noted correctly that Dr. Fino opined that claimant does not suffer from legal pneumoconiosis, "based on his perception that [claimant's] exercise [blood gas] tests yielded variable results over time." Decision and Order at 27. The administrative law judge determined that "Dr. Fino's exercise testing is not a reliable indicator of [claimant's] lung function and, without this testing, there is no variability demonstrated on this record." *Id*. We see no error in the administrative law judge's

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[9] The definition of clinical pneumoconiosis is set forth in 20 C.F.R. §718.201(a)(1),which states:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[10] The definition of legal pneumoconiosis is set forth at 20 C.F.R. §718.201(a)(2), which states:

> "Legal pneumoconiosis" includes 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).

rational decision to accord Dr. Fino's opinion little weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Lane*, 105 F.3d at 172.

We also affirm the administrative law judge's decision to give less weight to Dr. Hippensteel's opinion. The administrative law judge permissibly determined that "Dr. Hippensteel's opinion that [claimant] does not suffer from legal pneumoconiosis is compromised by virtue of the fact that he relied on a premise that [claimant's] blood gas testing yielded evidence of a cardiac condition and high carboxyhemoglobin levels," and not a lung disease, contrary to the administrative law judge's findings. Decision and Order at 27; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Lane*, 105 F.3d at 172.

Additionally, the administrative law judge permissibly rejected the opinions of Drs. Fino and Hippensteel because he found that neither doctor adequately explained how they eliminated claimant's coal dust exposure as a cause of claimant's presumed respiratory disease. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 27. The administrative law judge also rationally determined that Drs. Fino and Hippensteel did not adequately explain why claimant's twenty-two years of coal dust exposure did not contribute, along with claimant's other potential causes, to his gas exchange impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We therefore affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Finally, contrary to employer's argument, the administrative law judge properly determined that because Drs. Fino and Hippensteel did not diagnose either clinical or legal pneumoconiosis, or a totally disabling respiratory impairment, their opinions were not credible as to the issue of disability causation. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 29. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's 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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BETTY JEAN HALL
Administrative Appeals Judge