BRB No. 07-0555 BLA

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| L.E.S. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BULLION HOLLOW ENTERPRISES, INCORPORATED | ) | DATE ISSUED: 05/28/2008 |
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| and | ) | |
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| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order-Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2006-BLA-5428) of Administrative Law Judge Larry W. Price on a subsequent claim[1] filed on April 29,

[1] On January 9, 2008 employer filed a "Motion to Dismiss Claim for Lack of a Proper Party" arguing that because claimant died on October 22, 2007 and no survivor's claim was filed, the instant claim should be dismissed. Employer argued that claimant's

2005 pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge found that claimant established a coal mine employment history of 31.29 years, that the instant claim was a subsequent claim pursuant to 20 C.F.R. §725.309(d), and that the prior claim was denied because claimant failed to establish the existence of pneumoconiosis. Considering the new evidence, the administrative law judge concluded that it established the existence of clinical pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1),[3] and that claimant had, therefore, demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d). Turning to the merits, the administrative law judge found that the entirety of the evidence of record supported a finding of clinical pneumoconiosis pursuant to Section 718.202(a)(1), that claimant was entitled to the presumption, at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's determination that the newly submitted x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and, thereby, established a change in an applicable condition of entitlement at Section 725.309(d). Employer further contends that, on the merits, the administrative law judge erred in finding that the weight of the entirety of the evidence of

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daughter has no standing to pursue the claim on behalf of claimant. In an Order dated April 11, 2008, the Board denied employer's Motion, holding that the "regulations clearly establish [claimant's daughter's] entitlement to any benefits owed to the deceased claimant." Further, the Board held that since the appeal was filed by employer, its request to dismiss the appeal for failure to prosecute was baseless. [*L.E.S.*] *v. Bullion Hollow Enterprises, Inc.*, BRB No. 07-0555 BLA (Order)(Apr. 11, 2008)(unpub.).

[2] Claimant's prior claim was denied because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). [*L.E.S.*] *v. Bullion Hollow Enterprises, Inc.*, BRB No. 02-0807 BLA (Jul. 25, 2003)(unpub.). A complete procedural history of this case is found in that decision.

[3] The administrative law judge also found that pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2) and (3) as those subsections were not applicable in this case. Additionally, the administrative law judge found that legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4). Decision and Order at 18-20. *See* 20 C.F.R. §718.201.

record established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[4]

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.[5] 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).

To be entitled 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. Failure to establish any element of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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). In this case, the prior claim was denied because claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). In order to establish a change in an applicable condition of entitlement, therefore, claimant had to establish the existence of pneumoconiosis by new evidence.

Employer first argues that the administrative law judge erred in finding that the newly submitted evidence of record established the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, employer argues: 1) that the administrative law

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

judge improperly presumed that pneumoconiosis is always latent and progressive without determining whether the evidence in this case established that it was latent and progressive; 2) that the administrative law judge erred in according greater weight to the positive readings of the more recent x-rays; 3) that the administrative law judge erred in failing to consider the negative CT scan readings in conjunction with the x-ray evidence at Section 718.202(a)(1); 4) that the administrative law judge failed to sufficiently weigh together all the relevant newly submitted evidence before determining that pneumoconiosis was established, as required by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); 5) that the administrative law judge improperly discounted Dr. Dahhan's opinion of no pneumoconiosis on the grounds that the doctor failed to consider the latent and progressive nature of pneumoconiosis, when there was no evidence showing that pneumoconiosis, if any, was latent and progressive; and 6) that the administrative law judge erred in according "some" weight to Dr. Tholpady's opinion solely because he was claimant's treating physician.

In considering whether the evidence established the existence of pneumoconiosis, the administrative law judge found that the newly submitted x-ray evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(1) because the two most recent x-rays of record, dated May 16, 2006 and October 19, 2005, were interpreted as positive for pneumoconiosis, and the Fourth Circuit has noted that pneumoconiosis is a progressive and irreversible disease.[6] Turning to the newly submitted medical opinion evidence at Section 718.202(a)(4), the administrative law judge accorded little weight to the opinions of Drs. Dahhan, Baker and Vito Cruz on the issue of clinical pneumoconiosis because their opinions were not sufficiently explained. Instead, the administrative law judge found that while the newly submitted opinion of Dr. Tholpady,

[6] Specifically, the administrative law judge determined that the most recent x-ray, dated May 16, 2006, was positive, as it was read as positive for pneumoconiosis by Dr. Miller, a B reader and Board-certified radiologist, Claimant's Exhibit 2, and read as negative by Dr. Dahhan, who was only a B reader, Employer's Exhibit 2. The administrative law judge determined that the October 19, 2005 x-ray was positive, as it was read as positive for pneumoconiosis by both Dr. Alexander, a B reader and Board-certified radiologist, Claimant's Exhibit 1, and Dr. Castle, a B reader, Employer's Exhibit 1. The administrative law judge found that the readings of the September 12, 2005 x-ray were in equipoise, as the x-ray was read as both positive and negative by dually-qualified readers, Dr. Alexander, Director's Exhibit 14 and Dr. Scatarige, Employer's Exhibit 4. The administrative law judge determined that the June 13, 2005 x-ray was negative, as it was read as both positive and negative by Drs. Alexander and Wiot, respectively, both of whom were dually-qualified readers, Claimant's Exhibit 3; Director's Exhibit 13, but was also read as negative by Dr. Baker, a B reader, Director's Exhibit 10.

claimant's treating physician, diagnosing clinical pneumoconiosis, was less documented than the opinion of Dr. Castle, who did not find the evidence consistent with clinical pneumoconiosis, it was entitled to "some weight because [Dr. Tholpady] did treat [claimant] for respiratory problems for seven years" and "prescribed numerous treatments for [claimant's] breathing problems, including oxygen and bronchodilators." Decision and Order at 16. Overall, however, the administrative law judge found Dr. Castle's opinion, that claimant did not suffer from clinical pneumoconiosis, Employer's Exhibits 1, 8, to be "slightly more persuasive", Decision and Order at 17, as Dr. Castle's opinion was supported by the CT scan readings, which did not show pneumoconiosis, and because Dr. Castle had better credentials than Dr. Tholpady.[7] The administrative law judge therefore found that the medical opinion evidence did not establish clinical pneumoconiosis at Section 718.202(a)(4). In conclusion, however, the administrative law judge found that the x-ray evidence "standing on its own" established clinical pneumoconiosis and "that the medical opinion evidence [was] not strong enough to refute the positive finding of clinical pneumoconiosis indicated in the x-ray evidence." Decision and Order at 18. Accordingly, the administrative law judge found that pneumoconiosis was established at Section 718.202(a)(1) and that claimant had, thereby, established a change in an applicable condition of entitlement at Section 725.309.

Initially, we reject employer's assertion that the administrative law judge impermissibly relied upon his own conclusion that pneumoconiosis was latent and progressive in determining that the newly submitted x-ray evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(1). Contrary to employer's assertion, claimant need not affirmatively establish his pneumoconiosis is latent and progressive, in order to establish the existence of pneumoconiosis. As the Board held in *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Decision and Order on Reconsideration *en banc*) "a miner is not required to separately prove that he [or she] suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that the disease actually progressed." *Workman*, 23 BLR at 1-26, citing *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002). Rather, "[b]ecause the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature." *Workman*, 23 BLR at 1-26-27.

[7] The record demonstrates that Dr. Castle was Board-certified in internal medicine and pulmonary disease, Employer's Exhibit 1, while Dr. Tholpady was certified only in internal medicine. Director's Exhibit 14.

In considering the newly submitted x-ray evidence, the administrative law judge considered the relevant readings and the qualifications of the x-ray readers and concluded that the weight of the readings supported a finding of pneumoconiosis at Section 718.202(a)(1). Because the administrative law judge properly performed both a quantitative and qualitative analysis of the x-ray evidence at Section 718.202(a)(1), we affirm his finding that the newly submitted x-ray evidence established the existence of pneumoconiosis thereunder. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*).

We must, however, vacate the administrative law judge's finding that the overall weight of the newly submitted evidence, *i.e.*, the x-ray and medical opinion evidence, when considered together, supported a finding of pneumoconiosis at Section 718.202(a). As employer argues, the Fourth Circuit held in *Compton*, 211 F.3d 203, 22 BLR 2-162, that, in order to establish the existence of pneumoconiosis, an administrative law judge must weigh together all relevant evidence, like and unlike, and provide legally permissible bases for crediting certain evidence over other evidence. *Compton*, 211 F.3d at 209-210, 22 BLR at 170-171. Here, while the administrative law judge provided a permissible basis for concluding that the newly submitted x-ray evidence supported a finding of pneumoconiosis at Section 718.202(a)(1), *see* discussion, *supra*, he did not adequately discuss the other evidence relevant to the issue, *i.e.*, the CT scans and the medical opinions. Although the administrative law judge noted that Dr. Castle's opinion was supported by negative CT scan evidence, he did not, as employer contends, weigh the negative CT scan evidence with the x-ray evidence, as required by *Compton*, 211 F.3d at 209-210, 22 BLR at 170-171. Further, as employer contends, the administrative law judge did not discuss Dr. Castle's opinion in terms of the physician's credentials. *See also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also* Administrative Procedure Act (the APA), 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) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. Additionally, the administrative law judge must reconsider the weight to give the opinion of Dr. Tholpady, claimant's treating physician. The administrative law judge found that Dr. Tholpady's opinion was entitled to "some" weight as that of a treating physician, even though he found that Dr. Tholpady's opinion was not as well-documented as Dr. Castle's. Before according additional weight to Dr. Tholpady's opinion based on his status as claimant's treating physician, the administrative law judge must initially consider the opinion in conjunction with the requirements at 20 C.F.R. §718.104(d)(1)-(5). Accordingly, we vacate the administrative law judge's finding that the newly submitted evidence, as a whole, establishes the

existence of clinical pneumoconiosis at Section 718.202(a), and establishes a change in an applicable condition of entitlement pursuant to Section 725.309.[8]

Employer next argues, for the same reasons, that the administrative law judge erred in finding pneumoconiosis established on the merits. We agree. Therefore, we also vacate the administrative law judge's finding of pneumoconiosis on the merits, and hold that, if reached, on remand the administrative law judge must consider all of the new evidence together with the earlier evidence, to determine if the evidence as a whole establishes pneumoconiosis at Section 718.202(a) pursuant to *Compton*, 211 F.3d at 209-210, 22 BLR at 170-171.

At Section 718.203(b), employer argues that the administrative law judge failed to consider Dr. Castle's comment on the x-ray he classified as positive, 1/1, that the "changes [shown on the reading] did not look like changes of coal workers' pneumoconiosis" because the changes shown are "commonly associated with a heavy tobacco smoking history and other problems including obesity and chronic congestive heart failure." Employer's Exhibit 1. Employer argues that such a finding is relevant to the issue of the cause of pneumoconiosis and that it was error for the administrative law judge to fail consider it at Section 718.203(b). We agree.

In finding that claimant was entitled to the presumption at Section 718.203(b), that his pneumoconiosis arose out of coal mine employment, the administrative law judge found that there was no "contrary evidence" to rebut the presumption. Decision and Order at 14. Contrary to the administrative law judge's determination, however, the opinion of Dr. Castle concerning the etiology of claimant's pneumoconiosis is relevant and must be considered pursuant to Section 718.203(b). *See Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *see also Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc*). Accordingly, the administrative law judge's finding that no contrary evidence is available to rebut to rebut the presumption at Section 718.203(b) is vacated and the case is remanded for further consideration, if reached.

Lastly, employer argues that the administrative law judge erred in finding that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis at Section 718.204(c). Specifically, employer argues that the administrative law judge erred in according substantial weight to the opinion of Dr. Vito Cruz on disability causation because the administrative law judge found her opinion on the issue of pneumoconiosis poorly explained. Employer contends, therefore, that it was

[8] In reaching this determination, we reject, however, employer's contention that the administrative law judge erred in discounting Dr. Dahhan's opinion. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Decision and Order on Reconsideration *en banc*).

irrational for the administrative law judge to credit the opinion on the issue of disability causation without further explanation. Additionally, employer contends that the administrative law judge erred in accepting Dr. Baker's opinion on disability causation without determining whether the opinion was well-reasoned and well-documented. Further, employer argues that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Castle, that claimant did not have a disability arising out of coal mine employment, Employer's Exhibits 1, 6, 8, as their medical conclusions were not contrary to the administrative law judge's finding that claimant had clinical, but not legal pneumoconiosis.

The regulation at Section 718.204 states that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined by the Act, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a substantially contributing cause if it has a materially adverse effect on the miner's respiratory or pulmonary condition or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant must demonstrate that pneumoconiosis is a necessary condition of disability; it must play more than a *de minimis* role in claimant's disabling respiratory impairment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003).

In considering the medical opinion evidence on the issue of disability causation pursuant to Section 718.204(c), the administrative law judge found that while Dr. Tholpady, one of claimant's treating physicians, opined that claimant's disability was due, in part, to coal mine employment, Director's Exhibit 14, his opinion was entitled to "diminished weight" because he relied upon an inaccurate smoking history. Decision and Order at 23. Regarding the opinion of Dr. Vito Cruz, claimant's other treating physician, who opined that claimant was totally disabled due to his severe respiratory impairment that was due to both smoking and coal mine employment, but that coal mine employment was the most significant factor, Claimant's Exhibit 4, the administrative law found it well-reasoned and based on accurate smoking and coal mine employment histories. Accordingly, the administrative law judge granted it "substantial weight" on the issue of disability causation. Decision and Order at 23. In addition, the administrative law judge noted that while Dr. Baker attributed claimant's totally disabling respiratory impairment to smoking and coal mine employment, he believed that coal mine employment was the more significant contributing factor. Director's Exhibit 10. Turning to the causation opinions of Drs. Dahhan and Castle, the administrative law judge accorded them little weight as they did not diagnose pneumoconiosis. In conclusion, therefore, the administrative law judge found that the medical opinion evidence established disability causation at Section 718.204(c).

We agree with employer that the administrative law judge's accordance of "substantial weight" to the opinion of Dr. Vito Cruz on the issue of disability causation is irrational, given the administrative law judge's finding that the physician's opinion on the issue of the existence of clinical pneumoconiosis was not well-supported.[9] Decision and Order at 16. Thus, if reached, the administrative law judge must again consider the opinion of Dr. Vito Cruz and determine whether the documentation underlying the opinion is sufficient to support the physician's conclusions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Additionally, if reached, the administrative law judge must, as employer contends, give his reasons for crediting the opinion of Dr. Baker on disability causation. While the administrative law judge noted that Dr. Baker found that coal mine employment was a significant contributing factor in causing claimant's disability, he did not discuss his reasons for crediting the opinion. *See Clark*, 12 BLR at 1-155. Further, if reached, the administrative law judge must revisit the opinions of Drs. Castle and Dahhan on the issue of disability causation. As employer notes, the administrative law judge based his finding of clinical pneumoconiosis on the x-ray evidence, and did not find legal pneumoconiosis established. Both Drs. Castle and Dahhan ruled out legal pneumoconiosis, not clinical pneumoconiosis. Thus, if the administrative law judge finds that clinical pneumoconiosis is again established, on remand, the administrative law judge must reconsider whether the opinions of Drs. Castle and Dahhan are contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). The administrative law judge's finding that disability causation was established at Section 718.204(c) is, therefore, vacated and the case is remanded for further consideration of this issue, if reached.

[9] The administrative law judge found that Dr. Vito Cruz based her opinion of clinical pneumoconiosis on an x-ray that was "not included in the record." Decision and Order at 16. The administrative law judge thus accorded the physician little weight on the issue of clinical pneumoconiosis as the administrative law judge couldn't "be sure that [the physician] would have come to the same conclusion without the x-ray that was not in the record." *Id.*

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge