BRB No. 12-0503 BLA

BERNARD COOK, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OAK GROVE RESOURCES, LLC	)	
	)	DATE ISSUED: 05/09/2013
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 Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Conner, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Neil Richard Clement (RichardsonClement PC), Birmingham, Alabama, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05243) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on May 11, 2009.[1]

The administrative law judge credited claimant with thirty-one and one-half years of coal mine employment,[2] sixteen of which were underground, and found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable 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).[3] Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled, and therefore erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that, in finding that employer did not rebut the presumption by disproving the existence of pneumoconiosis, the administrative law judge erred in excluding Dr. Meyer's reading of a February 22, 2010 x-ray, failed to consider relevant evidence, and erred in weighing the medical opinions of record.[4] Claimant responds in support of the administrative law judge's award of

[1] Claimant filed a previous claim on December 28, 2005. On October 17, 2007, Administrative Law Judge Robert D. Kaplan granted claimant's request to withdraw that claim. Thus, claimant's prior claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] Claimant's coal mine employment was in Alabama. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[4] As they are unchallenged on appeal, we affirm the administrative law judge's findings that claimant established thirty-one and one-half years of coal mine employment, sixteen of which were underground, and that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or

benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contentions that the administrative law judge erred in failing to consider claimant's post-coal mine employment in finding claimant totally disabled, and erred in excluding Dr. Meyer's x-ray reading.

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).

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

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Specifically, employer contends that the administrative law judge failed to consider claimant's strenuous post-coal mine employment, which employer asserts demonstrates that claimant is not totally disabled. Employer also contends that the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), in finding total disability established. Employer's Brief at 21-22, 25-26.

Post-Coal Mine Work

Employer argues that, in finding claimant totally disabled, the administrative law judge failed to consider testimony and documentary evidence indicating that, after claimant left coal mine employment in 2006, he worked for about eighteen months as a heavy equipment operator and a railroad car operator. Employer's Brief at 22-25. Employer contends that this evidence establishes claimant's "true capacity for work" and was improperly "ignored" by the administrative law judge. Employer's Brief at 21-22, 24-25. Employer's argument lacks merit.

In considering the issue of total disability, the relevant inquiry is claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622,

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in connection with, coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405 (1982); Claimant's Brief at 10; Director's Brief at 2. The record reflects, and employer does not dispute, that claimant retired from all employment in March 2009, he filed his claim on May 11, 2009, and that the hearing was held on July 13, 2011. Hearing Tr. at 40, 43; Director's Exhibit 2. Therefore, as claimant had been retired from all employment for more than two years when the hearing was conducted, the fact that he worked between 2006 and 2009 is not relevant to whether he was disabled at the time of the hearing in 2011.

Section 718.204(b)(2)(i)

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered two pulmonary function studies conducted on June 17, 2009 and February 22, 2010. Permissibly relying upon claimant's average recorded height of 73.5 inches, *see Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983), the administrative law judge found that, as each study produced qualifying values[5] both before, and after, the administration of bronchodilators, the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 4-5.

Employer asserts that, because the June 17, 2009 study was "only just" qualifying, and because the technician who administered the February 22, 2010 study noted poor effort by claimant, the pulmonary function studies are unreliable and inconclusive evidence of total disability. Employer's Brief at 19-20. Employer contends that "[t]his is especially true" considering that claimant's blood gas studies yielded normal results. *Id.* We disagree.

While the technician administering the February 22, 2010 pulmonary function study indicated that claimant's effort was "inconsistent" and "poor," Dr. Goldstein, who interpreted the study, did not state that the study was invalid. Director's Exhibit 12. Rather, Dr. Goldstein acknowledged that the study "lack[ed] consistency," but concluded that the study nonetheless reflected a restrictive lung defect, noting that it yielded similar results to pulmonary function studies conducted in 2006, when claimant gave good effort. Director's Exhibit 12. Since Dr. Goldstein treated the February 22, 2010 as reliable, the administrative law judge did not err in relying on the study as an indicator of claimant's

[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

disability. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Moreover, even if the February 22, 2010 pulmonary function study were found to be unreliable and inconclusive, the administrative law judge properly found that the remaining June 17, 2009 study, the validity of which is undisputed, produced qualifying values supportive of total disability. *See McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1514, 12 BLR 2-108, 2-109 (11th Cir. 1988); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1535, 10 BLR 2-107, 2-108 (11th Cir. 1987). While employer asserts that the June 17, 2009 study is "only just" qualifying, its FEV1 and FVC values are less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). Because the June 17, 2009 pulmonary function study constitutes substantial evidence in support of the administrative law judge's finding of total disability, error, if any, in the administrative law judge's additional reliance on the February 22, 2010 pulmonary function study would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Finally, contrary to employer's contention, the administrative law judge was not required to find that the qualifying pulmonary function studies were undermined by the non-qualifying blood gas study results.[6] Decision and Order at 5. Because blood gas studies and pulmonary function studies measure different types of impairment, the validity of a qualifying pulmonary function study is not called into question by a contemporaneous normal blood gas study. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797 (1984). We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See McClendon*, 861 F.2d at 1514, 12 BLR at 2-109; *Stomps*, 816 F.2d at 1535, 10 BLR at 2-108.

Section 718.204(b)(2)(iv)

Employer next asserts that the administrative law judge erred in finding total disability established when there is "no well-reasoned physician's opinion supporting total disability." Employer's Brief at 21. Employer's argument is misplaced, as the administrative law judge accorded "little weight" to the two medical opinions of record on the issue of total disability, and found that they did not outweigh the qualifying pulmonary function study evidence. Decision and Order at 6.

[6] The administrative law judge properly found that, because the two blood gas studies of record produced non-qualifying results, claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 5.

Specifically, the administrative law judge permissibly found that, while Dr. Goldstein diagnosed a restrictive lung defect and hypoxemia based on claimant's objective test results, his opinion was ambiguous, as he did not clearly address the severity of claimant's pulmonary impairment. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 6; Director's Exhibit 12. The administrative law judge also permissibly found Dr. O'Reilly's opinion to be ambiguous, because although the physician diagnosed a "severe impairment," he also stated that claimant is "50-75% disabled," which the administrative law judge found did not clearly indicate whether claimant could perform his usual coal mine work. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-374-75; *Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; Decision and Order at 6; Director's Exhibit 11. Because the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed. *See McClendon*, 861 F.2d at 1514, 12 BLR at 2-109; *Stomps*, 816 F.2d at 1535, 10 BLR at 2-108.

Finally, the administrative law judge permissibly found that, as no physician of record concluded that claimant is capable of performing his usual coal mine employment from a respiratory standpoint, the medical opinions do not constitute sufficient evidence that could outweigh the qualifying pulmonary function studies. Decision and Order at 6. Consequently, we affirm the administrative law judge's conclusion that the evidence, when weighed together, 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 6.

In light of our affirmance of the administrative law judge's findings that claimant established at least 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 determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 6-7.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 3. The

administrative law judge found that employer did not establish rebuttal by either method. Decision and Order at 8-13.

Employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Employer specifically asserts that the administrative law judge erred in his evaluation of the x-ray, computerized tomography (CT) scan, and medical opinion evidence relevant to the existence of pneumoconiosis.

X-ray Rebuttal Evidence

Employer contends that, in finding that the x-rays established the existence of clinical pneumoconiosis, the administrative law judge erred in excluding from evidence Dr. Meyer's negative reading of the x-ray dated February 22, 2010, pursuant to 20 C.F.R. §725.414.[7] Employer's contention lacks merit.

Employer initially designated two negative readings of the February 22, 2010 x-ray, one by Dr. Goldstein and one by Dr. Meyer, as its affirmative-case x-ray readings. Employer's Post Hearing Brief at 13. Employer also proffered Dr. Meyer's negative interpretation of the June 17, 2009 x-ray, in rebuttal to the reading of that x-ray provided by the Department of Labor, pursuant to 20 C.F.R. §725.414(a)(3)(ii). Employer's Post Hearing Brief at 13. Because claimant submitted no affirmative-case x-ray interpretations, employer could not offer any additional rebuttal readings pursuant to 20 C.F.R. §725.414(a)(3)(ii). However, employer proffered an additional reading of a May 13, 2010 x-ray by Dr. Loveless, arguing that this reading was admissible "in rebuttal of [claimant's] general case." Employer's Post Hearing Brief at 14. Employer asserted that, if it was not permitted to rebut claimant's general case with Dr. Loveless's May 13, 2010 x-ray reading, it would withdraw Dr. Meyer's affirmative-case reading of the February 22, 2010 x-ray, and substitute Dr. Loveless's x-ray reading. Employer's Post Hearing Brief at 14. The administrative law judge rejected employer's proffer of Dr. Loveless's "general case" rebuttal reading, and instead admitted Dr. Loveless's reading of the May 13, 2010 x-ray as one of employer's affirmative-case readings, in accordance with

[7] The administrative law judge considered seven readings of three x-rays dated June 17, 2009, February 22, 2010, and May 13, 2010, and considered that all readings were rendered by dually-qualified Board-certified radiologists and B readers. Decision and Order at 9. The administrative law judge found that the June 17, 2009 x-ray was positive for pneumoconiosis, while the interpretations of the February 22, 2010 and May 13, 2010 x-rays were "in equipoise." Decision and Order at 10. The administrative law judge concluded that the preponderance of the probative x-rays was positive for the existence of pneumoconiosis. Decision and Order at 10.

employer's request. Decision and Order at 9. Further in accordance with employer's request, the administrative law judge excluded Dr. Meyer's reading of the February 22, 2010 x-ray, as its admission would exceed the allowable number of affirmative-case x-ray readings. Decision and Order at 9 n.5.

Employer asserts that, because the Board has held that rebuttal evidence need not contradict a specific item of evidence, but need only refute the case presented by the opposing party, the administrative law judge erred in rejecting its proffer of Dr. Loveless's x-ray reading as rebuttal of claimant's "general case." Employer's Brief at 27-30. Employer contends that the administrative law judge therefore erred in excluding Dr. Meyer's February 22, 2010 affirmative-case x-ray reading, as in excess of the evidentiary limitations. Employer's Brief at 27-30. We disagree.

In *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008), the Board held that rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) need not contradict the specific item of evidence to which it is responsive, but rather, need only refute the case presented by the opposing party. Thus, while a rebuttal reading need not actually refute or contradict the opposing party's proffered evidence, it nonetheless must be responsive to a specific item of evidence submitted by the opposing party, pursuant to the provisions set forth at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).[8] Here, unlike in *Stowers*, Dr. Loveless's May 13, 2010 x-ray reading is an original interpretation, and is not responsive to any x-ray submitted by claimant or the Director, pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

In addition, to the extent employer asserts that Dr. Loveless's x-ray interpretation was specifically responsive to, and refuted, the diagnosis of coal workers' pneumoconiosis by Dr. Hawkins, claimant's treating physician, its assertion lacks merit. As claimant and the Director properly contend, the rebuttal provisions do not contain any specific provision governing the rebuttal of medical reports or treatment records. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); *see Stowers*, 24 BLR at 1-86.

Thus, having properly found that that Dr. Loveless's x-ray reading was not admissible as rebuttal of claimant's "general case," the administrative law judge

[8] Pursuant to 20 C.F.R. §725.414(a), absent a finding of good cause, each party is entitled to submit two x-ray readings, one autopsy report, one report of each biopsy, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

complied with employer's alternative request to substitute Dr. Loveless's reading for Dr. Meyer's reading of the February 22, 2010 x-ray, as one of employer's affirmative-case x-ray interpretations.[9] We, therefore, affirm the administrative law judge's exclusion of Dr. Meyer's reading of the February 22, 2010 x-ray. As employer raises no other challenges to the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's finding that the preponderance of the x-ray evidence is positive for the existence of pneumoconiosis. Decision and Order at 9-10.

Computerized Tomography Evidence

Employer next asserts that the administrative law judge erred in failing to consider the readings of two CT scans, dated June 16, 2010 and December 30, 2010, contained in Dr. Hawkins' medical treatment notes. Employer's Brief at 30-31. Contrary to employer's contention, as the record contains no evidence demonstrating that the CT scans are "medically acceptable and relevant to establishing or refuting" the existence of pneumoconiosis, the administrative law judge did not err in not considering this evidence. *See* 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133-35 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

Medical Opinion Evidence

In considering whether employer disproved the existence of pneumoconiosis, the administrative law judge considered the medical opinions of Drs. O'Reilly and Goldstein. Decision and Order at 11. Dr. O'Reilly opined that claimant has pneumoconiosis, while Dr. Goldstein opined that claimant does not suffer from the disease. Director's Exhibits 11, 12. The administrative law judge discounted the opinion of Dr. Goldstein because he relied on a single negative chest x-ray to conclude that claimant does not have pneumoconiosis, contrary to the administrative law judge's finding that the x-rays establish the existence of pneumoconiosis. The administrative law judge also determined

[9] Employer asserts that "given the necessity of admitting [Dr. Loveless's reading of] the May 13, 2010 x-ray" in order to fully understand the opinion of Dr. Hawkins, the administrative law judge "should have admitted the x-ray under the 'good cause' standard of [20 C.F.R.] §725.456." Employer's Brief at 29-30. However, employer did not argue before the administrative law judge that good cause existed for the submission of excess x-ray evidence. Rather, employer requested that Dr. Loveless's x-ray reading be substituted for the reading of Dr. Meyer. Moreover, as the administrative law judge admitted Dr. Loveless's x-ray reading, as employer requested, employer has not shown how it was prejudiced by the administrative law judge's evidentiary rulings.

to accord greater weight to Dr. O'Reilly's opinion because he possesses an additional Board-certification in Critical Care Medicine.[10]

Employer asserts the administrative law judge erred in according greater weight to Dr. O'Reilly's opinion based on his additional Board-certification in Critical Care Medicine. Employer's Brief at 31. We need not address employer's assertion, however, as the administrative law judge provided a valid alternative reason for discounting the opinion of Dr. Goldstein, which employer does not challenge. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). The administrative law judge permissibly discounted Dr. Goldstein's opinion because he relied on a negative chest x-ray, which was contrary to the administrative law judge's finding that the x-rays establish the existence of pneumoconiosis. *See Jordan*, 876 F.2d at 1460, 12 BLR at 2-374-75; *Taylor v. Ala. By-Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989); Decision and Order at 11. Therefore, as the administrative law judge permissibly discounted the opinion of Dr. Goldstein, we affirm the administrative law judge's finding that the medical opinion evidence did not disprove the existence of pneumoconiosis. Decision and Order at 11.

The remainder of employer's arguments do not address the administrative law judge's rebuttal findings. Rather, employer contends that the medical evidence of record, including the opinion of claimant's treating physician, Dr. Hawkins, is not sufficient to meet claimant's burden to establish the existence of pneumoconiosis.[11] Contrary to employer's argument, the sufficiency of claimant's evidence is not at issue on rebuttal, since employer bears the burden of proof and must disprove the existence of pneumoconiosis. 30 U.S.C. §921(c)(4). Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

[10] Both Dr. O'Reilly and Dr. Goldstein are Board-certified in Internal Medicine and Pulmonary Disease.

[11] As Dr. Hawkins opined that claimant "likely [has] coal workers' pneumoconiosis," his opinion cannot support employer's burden to disprove the existence of pneumoconiosis. Claimant's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is 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