BRB No. 11-0160 BLA

DONALD JUSTUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOW BRANCH COAL COMPANY	)	DATE ISSUED: 11/30/2011
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C. for employer/carrier.

Rita Roppolo (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2007-BLA-5790) of Administrative Law Judge Linda S. Chapman (the administrative law judge), rendered on a subsequent claim filed pursuant to 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).[1] Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with 20.56 years of coal mine employment. The administrative law judge determined that transfer of liability for the payment of benefits in the current subsequent claim, filed on March 7, 2003, to the Black Lung Disability Trust Fund (Trust Fund) was not appropriate in this case and, therefore, employer was properly designated as the responsible operator.[2] The administrative law judge found that the preponderance of the newly submitted evidence, when considered as a whole, was sufficient to establish the existence of simple and complicated pneumoconiosis. The administrative law judge further found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, commencing in March 2003.

On appeal, employer argues that the administrative law judge erred in failing to transfer liability to the Trust Fund and in finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation

[1] The recent amendments to the Act, which became effective on March 23, 2010, do not apply in this case, as claimant's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 3.

[2] Claimant filed a Part B application for benefits with the Social Security Administration (SSA) on March 23, 1973. Director's Exhibit 1. The SSA denied his claim on December 10, 1974 and on February 20, 1975. *Id.* Claimant elected review by the SSA. *Id.* The SSA denied benefits on May 4, 1979 and advised claimant that his claim would be forwarded to the Department of Labor and treated as a new claim. *Id.* In a Decision and Order issued on February 4, 1987, Administrative Law Judge Bernard J. Gilday, Jr., denied benefits, finding that the interim presumption was invoked as a matter of law under 20 C.F.R. §727.203(a)(1), but was rebutted pursuant to 20 C.F.R. §727.203(b)(2). *Id.* Claimant took no further action with regard to the denial of that claim, but filed his current subsequent claim on March 7, 2003. Director's Exhibit 3.

Programs, has filed a letter brief requesting that the Board affirm the award of benefits. Employer has submitted a combined reply brief reiterating its arguments on appeal.[3]

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.[4] 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. Responsible Operator

The administrative law judge found that claimant's subsequent claim is not eligible for transfer of liability to the Trust Fund, as it was filed on March 7, 2003, after the expiration of the period of eligibility for transfer to the Trust Fund. Decision and Order at 5. Based on this determination, and her finding that employer is the operator that most recently employed claimant for not less than one year, the administrative law judge concluded that employer is the properly designated responsible operator. *Id.*

Employer asserts that the Director stipulated in the 1973 claim that the Trust Fund is responsible for the payment of any benefits and that this stipulation is binding in the subsequent claim pursuant to 20 C.F.R. §725.309(d)(4), regardless of whether claimant's subsequent claim was filed after expiration of the period of eligibility for transfer. The Director concedes that the Trust Fund was liable for claimant's 1973 claim under 20 C.F.R. §725.496. However, the Director asserts that the transfer provisions do not apply to the 2003 claim because it was not denied prior to March 1, 1978. The Director further contends that there has been no stipulation concerning liability for claimant's 2003 claim. Claimant agrees with the Director. We hold that employer's contentions are without merit.

In relevant part, Section 725.496 provides that "liability for payment of certain special claims" will be transferred from operators to the Fund. 20 C.F.R. §725.496(a). Section 725.496 applies, *inter alia*, to claims filed with, and denied by, the Social Security Administration (SSA) prior to March 1, 1978, in which benefits are subsequently awarded pursuant to Part C of the Act. 20 C.F.R. §725.496(b). During the course of the adjudication of claimant's 1973 claim by the Department of Labor, the

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established 20.56 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

district director determined that, if benefits were awarded, the transfer provisions of Section 725.496 would apply and the Trust Fund would be liable for the payment of benefits, as SSA denied the claim before March 1, 1978. *See* Director's Exhibit 1 (Decision and Order dated Feb. 4, 1987, at 4-5). Thus, the parties did not contest the responsible operator issue. *Id*. Contrary to employer's contention, although the Director conceded that Section 725.496 applied to claimant's 1973 claim, he did not concede, or stipulate, that the Trust Fund would be liable for the payment of benefits awarded in any subsequent claims. Based on these facts, the administrative law judge's conclusion, that the transfer provisions set forth in Section 725.496 do not apply to claimant's 2003 subsequent claim because it was filed after the period during which the transfer provisions were operative, is rational and supported by substantial evidence. *See Hagerman v. Island Creek Coal Co.*, 11 BLR 1-116 (1988); Decision and Order at 5. Accordingly, we affirm the administrative law judge's finding that employer was properly designated as the responsible operator.

II. The Subsequent Claim and the Merits of Entitlement

A. The Administrative Law Judge's Findings

When a claimant 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). 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, because claimant's prior claim was denied on the ground that he did not establish the existence of pneumoconiosis or that he was totally disabled, claimant was required to submit new evidence establishing either of these elements of entitlement in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(d)(2), (3); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In determining whether claimant established a change in an applicable condition of entitlement, the administrative law judge initially considered whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), (2) and (4). Decision and Order at 12. In so doing, the administrative law judge did not address any diagnoses of complicated pneumoconiosis. *Id*. Pursuant to Section 718.202(a)(1), the administrative law judge considered nine readings of four x-rays dated April 24, 2003, November 5, 2004, October 31, 2005 and December 1, 2005. In assessing each x-ray, the administrative law judge accorded greater weight to the readings performed by physicians who were dually qualified as Board-certified radiologists and B readers. *Id*. The administrative law judge determined

that the April 24, 2003 x-ray "does not establish the existence of pneumoconiosis," as Dr. Alexander, a dually qualified radiologist, read the x-ray as positive for pneumoconiosis, while Dr. Wheeler, also a dually qualified radiologist, interpreted this film as negative.[5] *Id*.; Claimant's Exhibit 7; Employer's Exhibit 2. The administrative law judge credited the November 5, 2004 x-ray as positive for pneumoconiosis, as the reading by Dr. DePonte, a dually qualified radiologist, outweighed the negative reading by Dr. Fino, a B reader. Decision and Order at 12; Claimant's Exhibit 6; Employer's Exhibit 1. With respect to the October 31, 2005 x-ray, the administrative law judge determined that it was positive for pneumoconiosis, based on the uncontradicted readings by Dr. DePonte and Dr. Rasmussen, a B reader. Decision and Order at 12; Claimant's Exhibits 2, 4. The administrative law judge found that the interpretations of the December 1, 2005 x-ray were in equipoise, as it was read by Dr. DePonte as positive for pneumoconiosis, and by Dr. Wheeler, as negative. Decision and Order at 12; Claimant's Exhibit 1; Employer's Exhibit 2.

The administrative law judge concluded, pursuant to Section 718.202(a)(1), that "of the four x-rays that were the subject of ILO interpretations, two establish the existence of pneumoconiosis, while two are in equipoise. As it is [claimant's] burden to establish the existence of pneumoconiosis, I find that the ILO x-ray interpretations do not establish the existence of pneumoconiosis." Decision and Order at 12. The administrative law judge further found that the narrative x-ray interpretations contained in claimant's treatment records did not establish the existence of pneumoconiosis because "they do not include findings of pneumoconiosis." *Id*. The administrative law judge also determined that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(2) and (4), as the record does not contain any biopsy evidence and the medical opinions containing diagnoses of pneumoconiosis were premised upon the x-ray evidence that the administrative law judge found was insufficient to meet claimant's burden. *Id*. at 12-13.

The administrative law judge then considered whether claimant had invoked the irrebuttable presumption of total disability due to pneumoconiosis referenced in Section 718.202(a)(3) and set forth in Section 718.304. Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis, if claimant suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when

[5] The administrative law judge noted that Dr. Forehand, a B reader, interpreted the April 24, 2003 x-ray as positive for pneumoconiosis. Decision and Order at 12; Director's Exhibit 12. Dr. Navani read this film for quality purposes only. Director's Exhibit 13.

diagnosed by other means, is a condition which would yield results equivalent to (a) or (b).[6] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C), would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Relevant to Section 718.304(a), the administrative law judge noted that Drs. Alexander and Forehand read claimant's April 24, 2003 x-ray as positive for complicated pneumoconiosis with Category A opacities. Decision and Order at 15; Director's Exhibit 12; Claimant's Exhibit 7. The administrative law judge further indicated that, although Dr. Wheeler read this x-ray as negative for pneumoconiosis, he "described a partly ill[-]defined mass in the lateral right apex and periphery of the right upper lung, with a few small nodules below it, compatible with conglomerate granulomatous disease, as well as an ill[-]defined 'CT proven' mass in the lateral periphery of the lower left lung, compatible with granulomatous disease more likely than metastasis." Decision and Order at 15, *quoting* Employer's Exhibit 2.

Regarding the November 5, 2004 x-ray, the administrative law judge credited Dr. DePonte's finding of Category B opacities and reported that although Dr. Fino read this x-ray as negative for pneumoconiosis, he stated that it contained findings similar to earlier x-rays containing an oval density measuring approximately 1.5 centimeters in the upper lobe of claimant's right lung. Decision and Order at 15; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge also noted that Dr. DePonte

[6] The record in this case does not include any biopsy evidence relevant to 20 C.F.R. §718.304(b).

interpreted claimant's October 31, 2005 x-ray as containing Category B opacities, while Dr. Rasmussen detected Category A opacities. Decision and Order at 15; Claimant's Exhibits 2, 4. The administrative law judge credited Dr. DePonte's finding that the December 1, 2005 film demonstrated the presence of a Category B opacity and noted that, although Dr. Wheeler read this x-ray as negative for pneumoconiosis, he reported an ill-defined mass in the lateral right apex, with a few small masses below it, and an ill-defined "CT proven" mass in the lateral left lower lobe, compatible with conglomerate granulomatous disease. Decision and Order at 15; Claimant's Exhibit 1; Employer's Exhibit 2.

Pursuant to Section 718.304(c), the administrative law judge concluded that the narrative x-ray interpretations and readings of a CT scan dated August 2, 2004, supported a determination that claimant had large opacities of complicated pneumoconiosis in his lungs. Decision and Order at 15; Claimant's Exhibit 8; Employer's Exhibit 3.

Upon weighing all of the evidence relevant to Section 718.304 together, the administrative law judge stated:

> [Claimant] has a disease process that has resulted in the development of large masses, described as larger than one centimeter in diameter, in his lungs. Dr. DePonte, Dr. Alexander, Dr. Forehand, and Dr. Rasmussen, who reviewed the x-rays specifically for the purpose of determining if they reflected pneumoconiosis, have indicated, on their review of a total of six x-rays, that these masses qualify as [C]ategory A or B opacities due to pneumoconiosis. Dr. Wheeler also described these masses, which he attributed to granulomatous disease, either histoplasmosis or tuberculosis. However, the record does not include any medical history to support Dr. Wheeler's speculations; there is no suggestion that [claimant] has ever suffered from or been exposed to histoplasmosis or tuberculosis. Nor is [claimant] required to undergo a biopsy to confirm the etiology of the masses.

Decision and Order at 16. The administrative law judge discredited Dr. Fino's opinion, that the conditions viewed on claimant's x-rays represented sarcoidosis or granulomatous disease, as it was speculative and inadequately explained. *Id*. The administrative law judge also noted that Dr. Fino had relied on x-ray evidence, the admission of which would exceed the evidentiary limitations. *Id*. Based on these findings, the administrative law judge determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. *Id*. at 17.

B. Arguments on Appeal

Employer argues that the administrative law judge credited the diagnoses of complicated pneumoconiosis made by Drs. DePonte, Alexander, Forehand and Rasmussen under Section 718.304(a), without assessing whether they "were reasoned and documented opinions." Employer's Brief at 9. Employer further contends that the administrative law judge's finding, that claimant established the existence of complicated pneumoconiosis at Section 718.304(a), cannot be reconciled with her finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). In response, the Director asserts that any error made by the administrative law judge is harmless because she rationally determined that the evidence of record is sufficient to establish the existence of complicated pneumoconiosis. Claimant argues that the administrative law judge's finding under Section 718.202(a)(1) was erroneous, as the record contains six x-ray readings that are positive for both simple and complicated pneumoconiosis, while there are only three readings that are negative for pneumoconiosis. *Id.*

Employer's allegations of error regarding the administrative law judge's consideration of the newly submitted x-ray evidence at Section 718.304(a) are without merit. The administrative law judge acted within her discretion in determining that the six x-ray readings in which Drs. DePonte, Alexander, Forehand and Rasmussen unequivocally identified Category A or B opacities, outweighed the three negative readings by Drs. Wheeler and Fino. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 15-16. Regarding the conflict between the administrative law judge's findings at Section 718.202(a)(1) and Section 718.304(a), because the administrative law judge rendered independent, rational findings at Section 718.304(a), any error in her consideration of the x-ray evidence at Section 718.202(a)(1) is harmless. *See Clinchfield Coal Co. v. Fuller*, 1880 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order 5-6, 12, 15-16. We therefore affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis under Section 718.304(a), based on the six ILO classified x-ray readings of Category A or B opacities due to pneumoconiosis. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; Decision and Order at 15-16.

With respect to the administrative law judge's findings under 20 C.F.R. §718.304(c), employer argues that the administrative law judge erred in shifting the burden of proof to employer by requiring Drs. Wheeler and Fino to identify the cause of the lesions they observed in order to establish that they were not the large opacities of complicated pneumoconiosis. We disagree, as the findings cited by employer constitute

permissible credibility determinations, rather than a shift in the burden of proof. *See Melnick*, 16 BLR at 1-33-34. The administrative law judge rationally found that Dr. Wheeler's notations attributing these lesions to granulomatous disease, either histoplasmosis or tuberculosis, were speculative, as the record does not include any medical history to support Dr. Wheeler's conclusion. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); Decision and Order at 16.

Similarly, the administrative law judge acted within her discretion in according little weight to Dr. Fino's opinion, that the lesions seen on x-ray did not represent complicated pneumoconiosis, based on the appearance, distribution, time frame and absence of a background pattern of simple pneumoconiosis, because he did not explain how these factors supported his conclusion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-334-35 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 16. Furthermore, the administrative law judge rationally deemed misleading Dr. Fino's statement, that there was "no background pattern of simple coal workers' pneumoconiosis," as the majority of readings by other physicians that Dr. Fino recorded in his flow chart reflected findings of pneumoconiosis. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-334-35; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149; Decision and Order at 13. Finally, the administrative law judge rationally discredited Dr. Fino's statement, that the lesions seen on x-ray were "most likely" due to granulomatous condition or sarcoidosis," as there is no evidence in the record to indicate that claimant suffers from either of these conditions. *See Cox*, 602 F.3d 276, 24 BLR 2-269; Decision and Order at 16, *quoting* Employer's Exhibit 1.

Employer also alleges that the administrative law judge did not adequately address the evidence in claimant's treatment records. Contrary to employer's contention, the administrative law judge considered claimant's treatment records, including narrative x-ray readings from June 3, 1991 through May 19, 2006. Decision and Order at 13, 15. The administrative law judge permissibly found that, although these readings include references to pneumoconiosis, "there is no discussion in those records of the basis for those assessments." Decision and Order at 13; *see Hicks*, 138 F.3d at 532-33, 21 BLR at 2-334-35; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer also argues that the administrative law judge selectively analyzed the evidence at Section 718.304(c), by failing to discredit the medical opinions of Drs. Forehand and Rasmussen on the ground that they did not consider x-rays other than their own and did not explain their reasoning. We reject employer's contention. In the administrative law judge's analysis of all relevant evidence at Section 718.304, she rationally accorded great weight to the newly submitted x-ray interpretations, including the positive readings for complicated pneumoconiosis by Drs. Forehand and Rasmussen that were corroborated by Drs. Alexander and DePonte, who are dually qualified

radiologists. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; Decision and Order at 15-16.

Finally, employer asserts that the administrative law judge erred in failing to address the fact that none of the arterial blood gas testing values, spirometry values or other diagnostic testing revealed a pulmonary impairment that would establish entitlement to benefits. Contrary to employer's assertion, a totally disabling respiratory or pulmonary impairment is not a prerequisite for invocation of the irrebuttable presumption. *See* 20 C.F.R. §718.304(a)-(c). Once claimant proves that he has complicated pneumoconiosis, he is irrebuttably presumed to be totally disabled. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a).

We affirm, therefore, the administrative law judge's weighing of the evidence and her finding that claimant established the existence of complicated pneumoconiosis at Section 718.304. Thus, we also affirm the administrative law judge's determination that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis and that claimant demonstrated a change in an applicable condition of entitlement under Section 725.309(d).[7]

[7] In addition, we affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant satisfied his burden of establishing that his complicated pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Skrack*, 6 BLR at 1-711; Decision and Order at 17.

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