BRB No. 10-0120 BLA

LLOYD HILLMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 10/21/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Lloyd Hillman, Clintwood, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2008-BLA-5906) of Administrative Law Judge Linda S. Chapman

[1] Before the administrative law judge, claimant was represented by Jerry Murphree, a benefits counselor with Stone Mountain Health Services. Mr. Murphree has

rendered on a subsequent claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Upon stipulation of the parties, the administrative law judge credited claimant with 37.91 years of qualifying coal mine employment, and adjudicated this claim, filed on December 22, 2005, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[3] The administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and thus, that claimant had failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's weighing of the evidence and her denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal.

By Order dated June 15, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Hillman v. Clinchfield Coal Co.*, BRB No. 10-0120 BLA (June 15, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] The Director and employer have responded, asserting,

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requested, on behalf of claimant, that the Board review the claim in its entirety, as he is not representing claimant on appeal. Hearing Transcript at 4-5; Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant's initial claim was filed on April 7, 1982, and was denied on November 22, 1991 by Administrative Law Judge Thomas M. Burke for failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 1.

[3] At the hearing, employer withdrew the previously contested issues of timeliness and that employer was the properly designated responsible operator. Hearing Transcript at 18-19.

[4] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due

inter alia, that if the Board affirms the administrative law judge's finding that total respiratory disability was not established, the amended Section 411(c)(4) has no bearing on this case and a remand would be unnecessary.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement 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. 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit evidence establishing the existence of pneumoconiosis or total respiratory disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d).

In finding that the newly submitted x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered the ten interpretations of four x-rays taken in 2005 and 2006. The administrative law judge determined that the December 16, 2005 x-ray was in equipoise,

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to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[5] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

as it was read as positive by Dr. Alexander and as negative by Dr. Scatarige, both physicians who are dually-qualified as B readers and Board-certified radiologists.[6] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 4, 15; Director's Exhibits 14, 15. The January 31, 2006 x-ray was read as positive by both Dr. Forehand, a B reader, and by Dr. Ahmed, a dually-qualified physician, and as negative by Dr. Scott, a dually-qualified physician. Decision and Order at 4, 15; Director's Exhibits 12, 16; Claimant's Exhibit 3. According the greatest probative weight to the reading by the dually-qualified readers, the administrative law judge permissibly found this x-ray to be in equipoise, based on Dr. Ahmed's and Dr. Scott's equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Chaffin*, 22 BLR at 1-300; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985); *Sheckler*, 7 BLR at 1-131; Decision and Order at 15. The administrative law judge determined that the June 13, 2006 x-ray was in equipoise, as it was read as positive by Drs. Ahmed and Miller, and as negative by Drs. Scott and Scatarige, all dually-qualified physicians. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Chaffin*, 22 BLR at 1-300; *Sheckler*, 7 BLR at 1-131; Decision and Order at 16; Director's Exhibits 17, 18; Employer's Exhibit 4; Claimant's Exhibit 2. The administrative law judge found that Dr. Scott, a dually-qualified physician, interpreted the September 28, 2006 x-ray as negative for pneumoconiosis and that there were no contrary interpretations.[7] Decision and Order at 5, 16; Director's Exhibit 19. Lastly, the administrative law judge reviewed claimant's hospitalization and treatment records for narrative x-ray reports, and determined that there were no findings suggestive of pneumoconiosis. *See J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008); Decision and Order at 16; Claimant's Exhibit 4; Director's Exhibits 6, 7, 8, 9, 10, 11; Employer's Exhibits 1, 2, 6, 7.

[6] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[7] The administrative law judge allowed claimant additional time to obtain Dr. Miller's interpretation of the September 28, 2006 x-ray, and to submit the interpretation post-hearing as Claimant's Exhibit 1. However, no post-hearing interpretation was submitted for inclusion in the record. Hearing Transcript at 6-7, 9-10, 12; Decision and Order at 5, 16.

After determining that three x-rays were in equipoise and that the remaining x-ray was negative for pneumoconiosis, the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of clinical pneumoconiosis by x-ray evidence at Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 16. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(1), they are affirmed.

At Section 718.202(a)(2), the administrative law judge determined that claimant underwent a needle aspiration biopsy of the right lung on September 24, 2004. Employer's Exhibit 1; Decision and Order at 16. Dr. Adelson prepared a cytopathology report, and provided a microscopic interpretation of the pathology slides, finding that there were no cells considered diagnostic of malignancy. The administrative law judge permissibly determined that the biopsy evidence was insufficient to establish the existence of pneumoconiosis.[8] As substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(2), it is affirmed.

At Section 718.202(a)(3), the administrative law judge properly found that claimant was not entitled to the statutory presumptions set forth in 20 C.F.R. §§718.305 and 718.306.[9] With respect to the presumption at 20 C.F.R. §718.304, the administrative law judge noted that while a Category A opacity of pneumoconiosis was diagnosed on x-ray by Dr. Alexander in 2005, Dr. Scatarige read the same x-ray as negative for pneumoconiosis, and none of the eight physicians who interpreted later x-rays reported any large opacities of Category A, B, or C.[10] Decision and Order at 16. The

[8] Dr. Adelson's cytopathology report was developed as part of claimant's treatment, and, therefore, is not subject to the quality standards set forth at 20 C.F.R. §718.106. *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008); 20 C.F.R. §718.101(b).

[9] With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *infra*, this amendment does not apply in the present case, as claimant failed to establish total respiratory disability under the criteria contained in 20 C.F.R. §718.204(b). As this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is inapplicable.

[10] Section 718.304 of the regulations provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner 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

administrative law judge found, therefore, that the preponderance of the x-ray evidence failed to establish the existence of complicated pneumoconiosis, and that claimant was not entitled to the presumption at Section 718.304. Because the administrative law judge's finding is supported by substantial evidence, it is affirmed.

At Section 718.202(a)(4), the administrative law judge accurately summarized claimant's hospitalization and treatment records, the CT scan evidence, the digital x-ray evidence, and the newly submitted medical opinions of Drs. Forehand, Hippensteel, and Castle relevant to the existence of pneumoconiosis.[11] Decision and Order at 6-11; Director's Exhibits 12, 13; Employer's Exhibits 5, 10, 11. The administrative law judge accurately concluded that the hospitalization and treatment records reflect, at most, a "history" of black lung, but do not include any x-ray or diagnostic findings of pneumoconiosis. Decision and Order at 18; Claimant's Exhibit 4; Director's Exhibits 6, 7, 8, 9, 10, 11; Employer's Exhibits 1, 2, 6, 7. The administrative law judge also noted that Dr. Castle interpreted a digital x-ray dated December 16, 2008 as negative for pneumoconiosis, Employer's Exhibit 5, and no doctor diagnosed pneumoconiosis on any of the five different CT scans of record.[12] Decision and Order at 9, 11-12; Director's

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C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at Section 718.304. The burden of establishing that the large opacities, as defined at Section 718.304, are due to coal mine dust exposure, rests with claimant. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*); *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.).

[11] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "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).

[12] The March 15, 2004 CT scan, ordered by Dr. Smiddy, was read as diagnosing vague nodular densities of nonspecific character and appearance; scarring; and

Exhibits 6, 11, 13. Turning to the three medical opinions of record, the administrative law judge noted that Dr. Forehand examined claimant and diagnosed coal workers' pneumoconiosis based on a positive x-ray, claimant's symptoms and occupational history of coal dust exposure, and an arterial blood gas study that revealed hypoxemia at rest. Director's Exhibit 12. Drs. Hippensteel and Castle both opined that claimant does not have coal workers' pneumoconiosis or any pulmonary or respiratory impairment attributable to coal dust exposure. Employer's Exhibits 5, 10, 11; Director's Exhibit 13. The administrative law judge acted within her discretion in finding that Dr. Forehand's opinion was unreasoned and entitled to diminished weight, as he failed to explain how claimant's symptoms or his arterial blood gas study results supported a finding of pneumoconiosis, in light of the administrative law judge's finding that the preponderance of the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 17-18; Director's Exhibit 13. As substantial evidence supports the administrative law judge's determination to discredit the opinion of Dr. Forehand, the only physician to diagnose the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant has not met his burden to establish that he has pneumoconiosis by a preponderance of the medical opinion evidence at Section 718.202(a)(4). Decision and Order at 18.

The regulations at 20 C.F.R. §718.204(b)(2) provide four methods by which claimant may establish total disability. At Section 718.204(b)(2)(i), we affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment, as the five pulmonary function studies of record, dated December 16, 2005, January 31, 2006, April 11, 2006, September 28, 2006, and

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bronchiectatic changes bilaterally. Director's Exhibit 6. Dr. Hippensteel interpreted the September 10, 2004 CT scan as showing a 1.4 cm nodule in the right lower lobe; an approximately 5 mm satellite density in the right infrahilar area; and small pleural effusion in the left lung base. Director's Exhibit 13. Dr. Hippensteel reported that the January 27, 2005 CT scan showed a decrease in the large right lower lobe nodule to 7 mm with no evidence of other smaller nodules. *Id*. Dr. Hippensteel interpreted the June 15, 2005 CT scan as indicating stable findings with the 7 mm nodule remaining in the superior segment of the right lower lobe. Dr. Hippensteel opined that none of the CT scans showed evidence of simple or complicated coal workers' pneumoconiosis. *Id*. The October 25, 2005 CT scan was interpreted by Dr. Gopalan, who noted small pericardial effusion and coronary artery calcification; small nodular densities in the pleural margin of the right upper lobe and superior segment of the right lower lobe; mild bronchiectatic changes; and mildly distended esophagus and hiatal hernia. Director's Exhibit 11.

December 16, 2008, are non-qualifying for total disability.[13] Decision and Order at 18-19; Director's Exhibits 6, 12, 13, Employer's Exhibit 5.

We also affirm the administrative law judge's finding that the weight of the blood gas study evidence of record was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), as the administrative law judge correctly determined that only the earliest study, conducted on January 31, 2006, produced qualifying values at rest, while the exercise results of that date and later studies performed on September 28, 2006 and December 16, 2008, produced non-qualifying values. Decision and Order at 19. The administrative law judge also properly found that claimant failed to establish total disability at Section 718.204(b)(2)(iii), as the record contained some evidence that claimant has a history of congestive heart failure, but there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 18.

Lastly, in finding that the weight of the evidence was insufficient to support a finding of total respiratory disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge accurately summarized and compared the newly submitted medical opinions of Drs. Forehand, Hippensteel, and Castle. Decision and Order at 6-11, 19-20. The administrative law judge acknowledged that only Dr. Forehand diagnosed claimant with a totally disabling respiratory impairment, while Drs. Hippensteel and Castle determined that claimant had normal pulmonary function for his age, but could not return to his prior coal mine employment due to his age and other non-pulmonary reasons. The administrative law judge rationally determined that Dr. Forehand's opinion

[13] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii). A "non-qualifying test" produces results that exceed the table values.

The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height for purposes of the studies was 60.8 inches. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 18.

Pulmonary function studies performed on a miner who is older than 71 years old (the maximum age for which qualifying values are reported in Appendix B to Part 718) must be treated as qualifying if the values produced by the miner would be qualifying for a 71-year-old. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008). Decision and Order at 19, n.5.

was not supported by the totality of the medical evidence and, therefore, was insufficient to establish total disability, because the doctor failed to explain how his diagnosis of arterial hypoxia based on resting blood gas study results supported a finding of total disability, when claimant's blood gas study results improved with exercise during that same study, and were above disability levels eight months later when claimant was tested by Dr. Hippensteel. The administrative law judge further found that Dr. Forehand's normal pulmonary function study results and his examination findings, that claimant's "breath sounds were of normal quality and distribution on auscultation," also failed to support his opinion. *See Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields*, 10 BLR 1-19; Decision and Order at 19; Director's Exhibit 12. The administrative law judge rationally found that the contrary opinions of Drs. Hippensteel and Castle, that claimant was not disabled from a pulmonary standpoint but could not return to his usual coal mine employment due to non-pulmonary or respiratory reasons, were the most persuasive and were entitled to greater weight, as they were better supported by the objective evidence and the totality of the medical evidence of record. *See Clark*, 12 BLR at 1-155; Decision and Order at 19; Employer's Exhibits 5, 10, 11; Director's Exhibit 13. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), they are affirmed.

Since claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv) in this subsequent claim and in his earlier claim, we hold that application of the recent amendments to the Act would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4). Further, because claimant failed to present new evidence sufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See White*, 23 BLR at 1-3. Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying 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