BRB No. 13-0010 BLA

AVERY R. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED: 09/26/2013
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5667) of Administrative Law Judge Richard A. Morgan with respect to a request for modification of a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] In his Decision and Order, dated October 2, 2012, the administrative law judge determined that claimant had over seventeen years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Relying on *Mullins v. ANR Coal Co.*, 25 BLR 1-49 (2012), the administrative law judge found that claimant established a mistake in a determination in fact based on the application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that, based on the newly submitted evidence, claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement and a change in conditions at 20 C.F.R. §§725.309(d), 725.310. The administrative law judge concluded that claimant invoked the rebuttable presumption at amended Section 411(c)(4), but that employer rebutted it by establishing that claimant does not have pneumoconiosis and that coal dust exposure was not a contributing cause

[1] Claimant filed his initial claim for benefits on June 23, 1997, which was denied by the district director on September 30, 1997, as claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant's second and third claims, filed on August 23, 1999 and January 31, 2001, respectively, were denied by the district director on the same basis on January 31, 2000 and May 3, 2003, respectively. Director's Exhibits 2, 3. On November 3, 2003, claimant filed a request for modification, which the district director denied because claimant did not establish total disability. Director's Exhibit 3. Claimant requested a hearing, and Administrative Law Judge Pamela Lakes Wood denied the claim on January 6, 2006 because, although claimant established a basis for modification by proving that he is totally disabled, he did not establish the existence of pneumoconiosis. *Id*. The Board affirmed the denial of benefits on November 30, 2006. *Morgan v. Eastern Associated Coal Corp.*, BRB No. 06-0338 BLA (Nov. 30, 2006)(unpub.). Claimant filed a request for modification on January 26, 2007, which the district director denied on June 5, 2007. Director's Exhibit 3. Claimant filed his fourth and current claim on January 15, 2009. Director's Exhibit 5. On February 23, 2010, the district director denied the claim because claimant did not prove any element of entitlement. Director's Exhibit 41. Claimant requested modification on June 21, 2010, and the district director awarded benefits on February 16, 2011. Director's Exhibits 43, 51. Employer requested a hearing and the case was assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge).

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

of claimant's totally disabling impairment. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the amended Section 411(c)(4) presumption. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

A. Clinical Pneumoconiosis

Prior to addressing the x-ray and CT scan evidence relevant to the existence of clinical pneumoconiosis,[4] the administrative law judge summarized the physicians' qualifications and stated:

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[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] Pursuant to 20 C.F.R. §718.201(a)(1):

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

20 C.F.R. §718.201(a)(1).

> Based on the credentials set forth above, including [B]oard-certification, B[]reader status, radiology experience and publications related to black lung and/or miners, professorships, publications, and affiliation with a sizeable hospital, I find that Dr. Wheeler is the best qualified radiologist, followed by Drs. Scatarige, Scott, and Alexander. Although well-qualified, Dr. Miller's credentials are not as good as the formers'.

Decision and Order at 27-28. The administrative law judge then considered nine readings of five x-rays dated December 20, 2006, May 31, 2007, April 2, 2009, December 9, 2009 and April 6, 2011, and two readings of CT scans dated July 19, 2001 and August 11, 2004.

Drs. Wheeler and Scatarige, both Board-certified radiologists and B readers, interpreted the December 20, 2006 x-ray as negative for pneumoconiosis. Director's Exhibit 3; Employer's Exhibit 10. Dr. Wheeler also read the x-ray dated May 31, 2007 as negative. Director's Exhibit 3. The April 2, 2009 film was read by Dr. Miller, a B reader and Board-certified radiologist, and Dr. Ranavaya, a B reader, as positive for pneumoconiosis, while Dr. Scott, a B reader and Board-certified radiologist, interpreted it as negative. Director's Exhibits 16, 38, 43. The film dated December 9, 2009 was read as positive by Dr. Alexander, a Board-certified radiologist and B reader, and as negative by Dr. Scott. Director's Exhibit 39; Claimant's Exhibit 1. The April 6, 2011 x-ray was interpreted as negative by Dr. Wheeler. Employer's Exhibit 1. Dr. Tuteur, a B reader, read both CT scans as negative, while Dr. Scott read the most recent scan as negative. Director's Exhibits 2, 3. The administrative law judge concluded:

> The radiology evidence from the prior claim does not establish the existence of pneumoconiosis. Here, the 12/20/06, 5/31/07, and 4/6/11 x-rays had only negative readings. I find the 4/2/09 x-ray is negative based upon the negative readings by the much better qualified Dr. Scott. I find the 12/9/09 x-ray is in equipoise given the opposing readings by equally qualified radiologists. The x-ray evidence as a whole refutes the existence of clinical pneumoconiosis . . . The two negative CT scans refute the existence of clinical pneumoconiosis.

Decision and Order at 28 (footnote omitted).

Claimant contends that the administrative law judge did not adequately explain why Dr. Scott was better qualified than Dr. Miller to interpret the April 2, 2009 x-ray. In support of his argument, claimant notes that the administrative law judge acknowledged Dr. Scott's current status as an Associate Professor of Radiology at The Johns Hopkins Medical Institutions, but did not recognize that Dr. Miller is an Assistant Professor of Radiology at Columbia University. Claimant further contends that the administrative law

judge erred in failing to address Dr. Ranavaya's positive interpretation of the April 2, 2009 x-ray. Claimant maintains that if the administrative law judge properly considered the readings by Drs. Miller, Scott and Ranavaya, he would find this x-ray to be positive for pneumoconiosis, which would shift the balance of the most recent x-ray evidence such that it would be insufficient to rebut the presumed existence of clinical pneumoconiosis.

Although claimant is correct in asserting that Dr. Miller's resume identified the position of Assistant Professor of Radiology at Columbia University, it does not indicate if the position was held in the past or if he, like Dr. Scott, is currently holding it. *See* Director's Exhibit 43. Claimant also has not challenged the administrative law judge's permissible reliance on the fact that, unlike Dr. Miller, Dr. Scott "has published multiple peer-reviewed scientific articles and books." *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Regarding Dr. Ranavaya's positive reading of the April 2, 2009 x-ray, the administrative law judge included this interpretation in his summary of the x-ray evidence, but did not err in omitting it from his discussion at 20 C.F.R. §718.202(a)(1) as he rationally found that "[r]eaders who are Board-certified radiologists and/or B-readers are classified as the most qualified." Decision and Order at 27; *see Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Accordingly, we affirm the administrative law judge's finding that the April 2, 2009 x-ray was negative for pneumoconiosis, based on Dr. Scott's interpretation.

We further affirm the administrative law judge's determination that employer established the absence of clinical pneumoconiosis by a preponderance of the x-ray, medical opinion and CT scan evidence, as claimant has raised no additional challenges to the administrative law judge's weighing of this evidence. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983). We affirm, therefore, the administrative law judge's finding that employer rebutted the presumed existence of clinical pneumoconiosis pursuant to amended Section 411(c)(4).

B. Legal Pneumoconiosis

Relevant to the existence of legal pneumoconiosis,[5] the administrative law judge considered the opinions of Drs. Ranavaya, Rosenberg and Zaldivar. Dr. Ranavaya stated that claimant's totally disabling pulmonary impairment was caused by smoking and coal

[5] Under 20 C.F.R. §718.201(a)(2), "'legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

dust exposure, and that it was scientifically impossible to apportion or ascertain their respective contributions. Director's Exhibit 16; Claimant's Exhibit 3 at 17. Drs. Rosenberg and Zaldivar opined that claimant's severe obstructive impairment was caused solely by cigarette smoking. Director's Exhibit 40; Employer's Exhibits 3, 6-9.

The administrative law judge found that Dr. Ranavaya's opinion was "questionable in light of the likely invalidity of his [pulmonary function study] and [the] absence of lung volume testing to confirm a restrictive defect as Dr. Rosenberg noted." Decision and Order at 30. The administrative law judge accorded greater weight to the opinions of Drs. Rosenberg and Zaldivar because they were supported by references to medical literature that post-dated the 2001 revisions to the regulatory definition of legal pneumoconiosis and were well-explained. *Id*. at 33. Based on these credibility determinations, the administrative law judge found that employer established the absence of legal pneumoconiosis. *Id*.

Claimant argues that the administrative law judge erred in essentially excusing Dr. Rosenberg's and Dr. Zaldivar's reliance on numerous premises that conflict with the views expressed by the Department of Labor (DOL) in the preamble to the revised regulations, simply because they cited more recent medical studies. Claimant alleges that, contrary to the DOL's comments in the preamble, Drs. Rosenberg and Zaldivar espouse the view that coal dust exposure and cigarette smoking cause different forms of emphysema. Claimant also maintains that Dr. Rosenberg's determination, that the decline in the FEV1/FVC ratio precluded the identification of coal dust inhalation as a cause of claimant's respiratory impairment, conflicts with the DOL's view that coal dust exposure could be detected through a decrease in the FEV1/FVC ratio. In addition, claimant alleges that the conclusions rendered by Drs. Rosenberg and Zaldivar are poorly reasoned because they indicated that "it is statistically more probable that the miner's smoking has contributed to his pulmonary impairment than has his coal dust exposure," while the DOL has stated that, "looking only at the average loss among coal miners constitutes statistical averaging, a concept which the preamble states is not appropriate to use[,]" as "individual miners affected can have quite severe disease and statistical averaging hides this [e]ffect." Claimant's Brief at 20-21, citing 65 Fed. Reg. 79,941 (Dec. 20, 2000). Claimant further states that Drs. Rosenberg's and Zaldivar's reliance on statistical averaging ignores the DOL's acceptance of the view that smoking and coal dust cause similar decrements in the FEV1 and cause respiratory impairment in the same manner.

Claimant additionally contends that the administrative law judge erred in crediting Dr. Zaldivar's opinion, because he attributed claimant's hypoxemia to usual interstitial pneumonitis (UIP), which is a disease of unknown origin. In support of this argument, claimant cites the proposed regulation implementing the amended Section 411(c)(4) presumption, which provides that if a physician attributes the pulmonary impairment to

unknown causes, his or her opinion is not sufficiently reasoned to rebut the presumption. 77 Fed. Reg. 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305(d)(3)). Claimant also notes that Drs. Rosenberg and Zaldivar cited the reversibility of claimant's impairment, after the administration of a bronchodilator, in ruling out a contribution from coal dust exposure, without addressing the significance of the residual, totally disabling impairment. Finally, claimant asserts that the administrative law judge erred in not finding that Dr. Ranavaya's opinion, that coal dust contributed to claimant's disabling respiratory impairment, outweighed the opinions of Drs. Rosenberg and Zaldivar, as it is consistent with the preamble to the regulations and supported by objective studies.

Claimant's contentions have merit, in part. The DOL's comments in the preamble to the revised definition of legal pneumoconiosis make clear that a medical opinion that is based on the premise that coal dust exposure cannot cause obstructive lung disease is invalid. The DOL stated:

> Whether coal mine dust exposure can cause chronic obstructive pulmonary disease is a question of medical and scientific fact that will not vary from case to case; thus, it is an appropriate question for the Department to answer by regulation. The revised definition will eliminate the need for litigation of the issue on a claim-by-claim basis, and *render invalid as inconsistent with the regulations medical opinions which categorically exclude obstructive lung disorders from occupationally related pathologies*.

65 Fed. Reg. 79,938 (Dec. 20, 2000)(emphasis added)(internal citations omitted). The DOL was careful to explain, however, that its determination that coal dust exposure can cause obstruction does not establish that coal dust exposure is a cause of obstructive lung disease in every claim:

> The Department reiterates, however, that the revised definition does not alter the former regulation's (20 C.F.R. 718.202(a)(4), 718.203 (1999)) requirement that *each miner bear the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment, and not from another source*. Thus, instead of attempting to force the conclusion, as one commenter contends, that all obstructive lung disorders are compensable, or to require responsible operators to compensate miners for non-occupationally related diseases, the language of the proposed regulation makes plain that only "obstructive pulmonary disease arising out of coal mine employment" falls within the definition of pneumoconiosis.

Id. (emphasis added). Consistent with the DOL's comments, therefore, an administrative law judge may accord greater weight to an opinion attributing the miner's obstructive lung disease solely to smoking if the opinion is supported by more recent medical

literature which reflects that, since the development of the evidence cited in the preamble, there has been a scientific advance in distinguishing between the effects of smoking and coal dust exposure. Recently, the Fourth Circuit rejected an employer's argument that the administrative law judge was required to credit the opinions of its experts over a contrary opinion because the employer's doctors had relied on advancements in science and medicine since the implementation of the preamble. *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013). The court upheld the administrative law judge's determination to credit the medical opinion which accorded with the science approved by the DOL in the preamble. The court also observed that neither of the employer's doctors had "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble." *Id*. at 324. Hence, while a party may dispute the science credited by the DOL in the preamble by laying the appropriate foundation, a party cannot dispute the science which has been incorporated into the regulations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004).

In the present case, the administrative law judge did not initially apply the latter principles to the opinions of Drs. Rosenberg and Zaldivar, and the studies they cited. The administrative law judge also did not explain, as required by the Administrative Procedure Act (APA),[6] why these studies are more credible than those relied on by the DOL, other than the fact that they are more recent. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993)("A bare appeal to 'recency' is an abdication of rational decisionmaking."). For these reasons, we must vacate the administrative law judge's decision to accord greater weight to the opinions of Drs. Rosenberg and Zaldivar, and his finding that employer established the absence of legal pneumoconiosis and remand to case to him for reconsideration.

In addition, we agree with claimant that the administrative law judge did not adequately address other factors that may be relevant to the credibility of the opinions of Drs. Rosenberg and Zaldivar on the issue of legal pneumoconiosis. As claimant alleges, the administrative law judge did not address Dr. Rosenberg's statement on cross-examination that, although there are studies that describe "the penetration into the lungs" of dust particles and the inorganic material contained in gases, "[a]s far as the comparison

[6] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

of coal dust and smoking, in a head-[to]-head assessment of what I portray here, there isn't an actual study that has looked at it." Employer's Exhibit 7 at 26-27. The administrative law judge also did not explain how the studies that Drs. Rosenberg and Zaldivar cited nullified the DOL's explicit determination that statistical averaging "is not appropriate to use." 65 Fed. Reg. 79,941 (Dec. 20, 2000). Additionally, the administrative law judge did not consider whether Drs. Rosenberg and Zaldivar explained why the partial reversibility of claimant's disabling obstructive impairment necessarily ruled out coal dust exposure as a cause of the fixed, irreversible component of the impairment.[7] *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Moreover, the administrative law judge did not provide a rationale for his crediting of Dr. Zaldivar's opinion attributing claimant's obstructive disease to UIP, when both the current and proposed versions of the regulation implementing the presumption bar reliance on such an opinion to find rebuttal established. *See Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs* [*Bailey*], 721 F.3d 789, BLR (7th Cir. 2013); *Wojtowicz*, 12 BLR at 1-165. Pursuant to 20 C.F.R. §718.305(d) (2009):

> Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

20 C.F.R. 718.305(d)(2009). As claimant has noted, the proposed version states, "where a physician attributes the pulmonary impairment to unknown causes, such does not

[7] Dr. Rosenberg relied on a study by Kohansal, showing that smoking causes a greater reduction in the FEV1 and is therefore more destructive than coal dust exposure, to support his opinion that it is more likely that claimant's smoking caused his respiratory impairment. Employer's Exhibit 9. In addition, relying on a 1983 Churg and Wright study, Dr. Rosenberg indicated that claimant's significant bronchodilator response is inconsistent with an impairment due to coal dust, which would be fixed. Employer's Exhibit 3. Like Dr. Rosenberg, Dr. Zaldivar testified that because smoking causes more damage overall when compared to coal dust, there is a statistically greater chance that claimant's impairment is due to smoking. Employer's Exhibit 6 at 20. Dr. Zaldivar also found that claimant has "an asthmatic component with fully reversible airway obstruction on some occasions, and that's typical of a smoker because smoking also precipitates asthma in individuals who are susceptible to have it." Employer's Exhibit 6 at 47.

constitute a sufficiently reasoned opinion so as to rebut the presumption." 77 Fed. Reg. 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305(d)(3)).

Because the administrative law judge relied on his weighing of the opinions on the issue of the existence of legal pneumoconiosis to conclude that employer also rebutted the presumed fact that claimant's totally disabling impairment was due to pneumoconiosis, we vacate this finding and further vacate the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption. On remand, the administrative law judge should initially reconsider whether employer has rebutted the presumed existence of legal pneumoconiosis. When weighing the opinions of Drs. Rosenberg and Zaldivar on this issue, the administrative law judge must render a finding on each of the factors relevant to their probative value, including the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In so doing, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge determines that employer has proven that claimant does not have legal pneumoconiosis, employer will have established rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). If the administrative law judge finds that employer has not rebutted the presumed fact that claimant has pneumoconiosis, he must reconsider his finding that employer established rebuttal by proving that claimant is not totally disabled due to pneumoconiosis. *Id*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent 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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REGINA C. McGRANERY
Administrative Appeals Judge