BRB No. 05-0151

WILLIE M. RICHARDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	DATE ISSUED: 10/24/2005
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, and Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), 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:

Employer appeals the Decision and Order on Remand (1999-LHC-1508, 00-LHC-1188) of Administrative Law Judge Richard E. Huddleston rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Board for the second time.

Claimant alleged that he contracted an asbestos-related lung disease as a result of exposure to asbestos dust and fibers, and chronic obstructive pulmonary disease (COPD) from exposure to welding smoke and paint fumes, during the course of his approximately 30 years of work for employer. Claimant filed a claim for asbestosis in 1995 and for COPD in 1999; the claims eventually were consolidated before the administrative law judge. At the formal hearing, claimant averred that he did not presently have asbestosis and thus he sought to amend his asbestos claim to seek only an award for medical monitoring under Section 7 of the Act, 33 U.S.C. §907. Tr. at 5-7. The administrative law judge granted claimant's request.

While his claims were pending, claimant became involved in litigation against asbestos manufacturers and he entered into third-party settlements in two cases. Specifically, claimant received $6,500 in February 1999 from The Babcock and Wilcox Company, and $112 in June 1999 from Forty-Eight Insulations, as part of separately executed settlements. Employer thereafter argued that Section 33(g) of the Act, 33 U.S.C. §933(g), barred claimant's claims since he had entered into third-party settlements without employer's prior written approval.

In his initial decision, the administrative law judge determined that claimant was a "person entitled to compensation" at the time he entered into two third-party settlements and that he did not obtain employer's prior written approval in either instance. Thus, the administrative law judge found that Section 33(g) barred claimant's claim for medical benefits for his asbestos-related condition. The administrative law judge next concluded that as claimant suffers from a single disability caused by his exposure to asbestos fibers, smoke, dust, and fumes, Section 33(g) likewise barred his COPD claim for disability benefits. Accordingly, benefits were denied.

On appeal, claimant challenged the administrative law judge's finding that Section 33(g) barred his claims. In its decision, the Board initially affirmed the administrative law judge's determination that claimant was a "person entitled to compensation" at the time he entered into the third-party settlements in 1999. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004). The Board, however, vacated the administrative law judge's finding that Section 33(g) barred claimant's asbestos-related

claim for medical monitoring and claimant's entitlement to disability benefits on his COPD claim and remanded the case "for consideration of the entire record to discern the cause of claimant's disability." *Id.* at 11. Specifically, the Board instructed the administrative law judge to discern, based on a review of the entire record, the cause of claimant's disability, *i.e.*, whether it is due solely to asbestosis, solely to COPD, or to both conditions, as the resolution of that issue, pursuant to the Board's decision in *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998), is dispositive of the applicability of the Section 33(g) bar in this case.[1] *Richardson*, 38 BRBS at 11.

On remand, the administrative law judge initially determined that claimant invoked, but that employer rebutted, the Section 20(a) presumption with regard to his COPD claim. The administrative law judge then found, based on the record as a whole, that claimant established that his COPD is causally linked to his exposure to fumes and irritants while working for employer. The administrative law judge thus concluded that claimant's COPD claim is not barred by Section 33(g), and that his claim is compensable under the Act. He therefore awarded claimant permanent partial disability benefits and medical benefits as a result of his work-related COPD. 33 U.S.C. §§907, 908(c)(21), (h). The administrative law judge further denied employer's request for Section 8(f) relief, 33

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[1] *Chavez* involved a claimant who filed claims under the Act for asbestosis and hypertension and who also entered into several third-party asbestos settlements. The Board held, under Section 33(f), 33 U.S.C. §933(f), that if only claimant's asbestosis was work-related, then the employer was entitled to a full offset against the claimant's net recovery from his third-party asbestos settlements. The Board stated that such a finding is consistent with Section 33(a), as asbestosis is the disability "'for which compensation is payable under the Act.'" *Chavez*, 27 BRBS at 85. If, however, claimant's hypertension was his only work-related disability, then the asbestosis was not the disability compensable under the Act and employer would not be entitled to any Section 33(f) credit because the third-party suits were not for the same disability. *Chavez*, 27 BRBS at 85-87. The Board held that if both conditions were work-related, then claimant could have sought benefits for hypertension alone and received total disability benefits under the aggravation rule. Under this scenario, no offset is available because the tortfeasors' actions did not cause the compensable injury. *Id.*; *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *aff'g and modifying on recon.* 21 BRBS 355 (1988). The Ninth Circuit affirmed this interpretation of Section 33(f). *Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

U.S.C. §908(f), finding that the contribution element was not met. Lastly, the administrative law judge found that claimant suffered a harm as a result of asbestos exposure, and thus is entitled to medical monitoring, payable by employer. 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's findings that claimant's COPD is work-related, that the Section 33(g) bar is inapplicable to claimant's disability claim, and that it is not entitled to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Employer initially argues that the administrative law judge's finding that claimant's COPD is work-related cannot stand as he did not discuss the opinion of Dr. Freeman and objective evidence regarding the "reversibility" of any respiratory condition from which claimant suffers. Employer also contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Acosta over the contrary opinions of Drs. Childs, Ross, Shaw, and Freeman. Additionally, employer argues that the administrative law judge erred in crediting claimant's testimony that his asthma stopped when he was 12 years old as it is inconsistent with the objective evidence of record.

Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if claimant established a *prima facie* case by proving that he suffered a harm and that working conditions existed which could have caused the harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge initially found that claimant established he has a harm, *i.e.*, COPD, based on the opinions of Drs. Acosta and Childs, who each diagnosed severe obstructive lung disease, and Dr. Baker, who stated that claimant was suffering, at least in part, from a lung obstruction. The administrative law judge next determined, based on claimant's credible testimony that he worked in cramped quarters where he was regularly exposed to dust and fumes from grinding, sanding, painting and welding, that claimant established that working conditions existed with employer which could have caused his COPD.[2] Moreover, the administrative law judge found that Dr. Acosta and Dr. Baker both stated that claimant's exposure to welding fumes and dust at work significantly caused or aggravated

[2] As the administrative law judge recognized, claimant explicitly stated that he was exposed to paint fumes and other irritants resulting from the use of carbon steel, stainless steel, and copper-nickel alloys in his welding work. HT at 106, 113-115. As such, employer's contention that claimant has not identified any substance other than exposure to asbestos dust as the cause of his respiratory condition lacks merit.

claimant's obstructive lung condition. Consequently, the administrative law judge concluded that the evidence is sufficient to invoke the Section 20(a) presumption of a work-related respiratory condition. As the administrative law judge's finding that claimant established a *prima facie* case is supported by substantial evidence, it is affirmed. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Damiano v. Global Terminal & Container Serv.*, 32 BRBS 261 (1998).

Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If, as in the instant case, the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The administrative law judge found that claimant established by a preponderance of the evidence that his obstructive lung disability is causally linked to his working conditions. Decision and Order on Remand at 7. In resolving the conflicting evidence, the administrative law judge accorded greatest weight to the opinions of Drs. Acosta and Baker. In this regard, he explicitly accorded more weight to Dr. Acosta's unequivocal statement on July 12, 1999, that claimant's COPD is work-related, and tied to his "exposure to welding fumes," CX 3, because he is claimant's treating physician and has continuously monitored claimant's overall treatment for an extended period of time.[3] Additionally, the administrative law judge credited Dr. Baker's opinion that the obstruction in claimant's lungs is caused by exposure to substances while working for employer, because Dr. Baker is a board-certified pulmonary specialist who treated claimant over the course of seven months, and stated that claimant's lung abnormalities are ones which typically are caused by inhaled irritants. HT at 66, 67.

[3] The administrative law judge also addressed but rejected employer's assertion that Dr. Acosta's causation opinion was equivocal. Although Dr. Acosta had at one point informed an insurance company that claimant's disability did not arise out of his employment, the administrative law judge accorded no weight to the statement since on that very same form Dr. Acosta noted that claimant's condition was "aggravated by fumes," EX 11, and because he subsequently and unequivocally clarified, in writing, that claimant's COPD is work-related and due, in part, to "exposure to welding fumes." CX 3.

In contrast, the administrative law judge accorded little weight to Dr. Child's opinion, as he found the physician's December 1998 statement that claimant's shortness of breath may be related to his improper use of medication inconsistent with the fact that his diagnosis of obstructive lung disease in 1994 preceded his issuance of any prescriptions for pulmonary medication. CX 1; EX 12. Moreover, Dr. Childs noted that claimant had been off his pulmonary medication since January 1998. CX 1. The administrative law judge next found that while Dr. Ross "possesses impressive credentials," his opinion that claimant's disability stems from childhood asthma is entitled to less weight because he never actually examined claimant, he cannot remember the last time he even examined any patient with asthma, and because he was hired by employer for the specific purpose of soliciting an opinion in opposition to claimant's claim, a conclusion the administrative law judge found bolstered by the particular requests made by employer through correspondence sent to Dr. Ross along with claimant's medical records. HT at 144, 157. In addition, although it does not directly relate to the issue of causation, the administrative law judge found that Dr. Ross's statements regarding the AMA Guidelines are suspect in light of the fact that he did not physically examine claimant, which, as Dr. Ross acknowledged, is a requirement for valid results. HT at 155, 162, 168. The administrative law judge also found that Dr. Shaw's opinion, that claimant's exposure to welding fumes resulted in only a temporary exacerbation of his disability due to asthma which would resolve itself relatively soon after removal from the exposure, is flawed. Decision and Order at 9. The administrative law judge found that claimant continued to suffer shortness of breath almost one year after he ceased working, which Dr. Baker attributed to claimant's consistent work exposure to fumes. HT at 67. The administrative law judge also found that claimant credibly testified that he ceased suffering asthmatic symptoms when he was twelve years old. HT at 101.

Employer's contentions of error are without merit. We reject employer's assertions regarding the administrative law judge's decision to accord greatest weight to Drs. Acosta and Baker, as well as to claimant's testimony regarding his occupational exposure to welding fumes, and diminished weight to the opinions of Drs. Childs, Ross and Shaw, as the administrative law judge rationally explained his weighing of the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Contrary to employer's arguments, the administrative law judge sufficiently considered and rejected its assertions that claimant's non-work-related asthma is the cause of his respiratory condition, and that, at best, the work-related aspect of claimant's condition was merely temporary in nature. In this regard, the administrative law judge explicitly set out the first of these contentions in his opinion, Decision and Order on Remand at 5, and rejected it based on claimant's credible testimony that he stopped suffering from asthma when he was 12 years old. *Id.* The administrative law judge rejected employer's second

alternative theory on causation, *i.e.*, a work-related temporary exacerbation, by rationally according diminished weight to the opinion of Dr. Shaw, which served as the underlying basis for that theory. *Id.*

We note that, on remand, the administrative law judge did not address Dr. Freeman's opinion, as employer contends.[4] This omission, however, is harmless. Contrary to employer's contention, Dr. Freeman's opinion supports, rather than detracts from, the administrative law judge's finding that claimant has a lung impairment due to exposure to irritants at work other than asbestos. Dr. Freeman stated that claimant has a restrictive lung defect, but he identified claimant's exposure to irritants at work, other than asbestos, as the most likely cause. *See* Decision and Order at 31, 32-33; CXs 5, 10. The Board, in its prior decision, observed, "Dr. Freeman stated that the most likely cause for claimant's condition was something that he inhaled while employed at employer's shipyard, although to a reasonable degree of medical certainty, it is not due to any inhalation of asbestos. CXs 10, 14." *Richardson*, 38 BRBS at 11. Consequently, Dr. Freeman's opinion supports the administrative law judge's conclusion that claimant's lung defect is due to the inhalation of irritants, other than asbestos, over the course of his employment for employer. Therefore, we reject employer's assertion that the administrative law judge erred in not discussing Dr. Freeman's opinion on remand.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the administrative law judge's findings of fact are rational and supported by substantial evidence, his conclusion that claimant sustained a work-related obstructive disease as a result of his inhalation of welding fumes is affirmed. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT); *Santoro*, 30 BRBS 171 (1996).

Employer next asserts that the administrative law judge erred in finding the Section 33(g) bar inapplicable to this case. Specifically, employer maintains that claimant's disability in this case is the same disability that served as the subject of claimant's third-party recovery. Employer also asserts that the record establishes that even assuming that the administrative law judge rationally could distinguish between two respiratory impairments causing a combined disability, the third-party settlements in this case were not just for asbestosis due to asbestos exposure, but rather cover "exposure to

[4] In his original decision, the administrative law judge extensively discussed Dr. Freeman's notes, opinions, and testimony. Decision and Order at 29-37.

toxic substances including asbestos . . . which caused [claimant] to sustain severe injury to his body and respiratory system, resulting in his impairment and disability." EX 25.

Pursuant to *Chavez*, 27 BRBS 80, the Board instructed the administrative law judge that Section 33(g) can be invoked to bar claimant's claims *only* if he found that claimant is disabled *solely* by asbestosis since that is the condition upon which his third-party settlements were premised. *Richardson*, 38 BRBS at 11. The Board held that if, on remand, the administrative law judge found that claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar the claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore would not be the same disability for which claimant settled his third-party claims. *Id.* Having determined, on remand, that claimant's disability is caused, at least in part, by work-related COPD, the administrative law judge concluded that the aggravation rule prevents the application of the Section 33(g) bar since under that rule claimant's COPD is considered to be claimant's disabling, compensable condition, and therefore it is not the same disability for which claimant settled his third-party claims.

While claimant did, in his third-party lawsuit, claim that he suffered from "exposure to toxic substances including asbestos . . . which caused him to sustain severe injury to his body and respiratory system, resulting in his impairment and disability," EX 25, the only relevant information, for purposes of Section 33(g), is the actual terms of the settlement agreement. According to its terms, the settlement agreement between claimant and Babcock covered "all injuries and/or disorders, allegedly resulting from exposure to and/or contact with asbestos and/or products containing asbestos, including but not limited to, claims for asbestosis, pneumoconiosis and any other alleged asbestos-related injury, disease and/or disorder." EX 24. The document later reiterates that claimant agrees to release Babcock of any other claims "arising out of, relating to, or resulting from, or in any way connected to [claimant's] alleged exposure to asbestos products, or other products mined, manufactured, distributed, marketed and/or sold by [Babcock]."[5] *Id.*. Thus, it is clear that the disability claimed and covered by the third-party settlements is that related exclusively to claimant's exposure to asbestos, and it does not, by its very terms, cover claimant's disability related to his COPD.

As the Board previously held, in order for Section 33(g) to apply, the disability for which claimant seeks compensation under the Act must be for the same disability for which he recovered from third parties. 33 U.S.C. §933(a); *see United Brands Co. v.*

[5] Information regarding claimant's third-party settlement with Forty-Eight Insulations is limited to a letter from his counsel in accompaniment of the proceeds of that agreement. EX 6. As such, there is no evidence to indicate that the settlement was related to any exposure other than asbestos.

Melson, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979) (Section 33(g) limited to situation where third party is potentially liable to both the employee and the covered employer); *Goody v. Thames Valley Steel Co.*, 31 BRBS 29, *aff'd mem. sub nom. Thames Valley Steel Co. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997) (table); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *see also Richardson*, 38 BRBS at 9; *Chavez*, 27 BRBS at 85-87. As the third-party settlements are for asbestos-related conditions, they do not involve the same disability, *i.e.*, COPD related to inhalation of substances other than asbestos, for which claimant obtained benefits under the Act. *Id.* Therefore, we affirm the administrative law judge's finding that claimant's claim is not barred by Section 33(g). Consequently, we affirm the award of ongoing permanent partial disability benefits.

Employer lastly argues that the administrative law judge erred in finding that it did not establish the contribution element for Section 8(f) relief. To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuildi*ng & *Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *see also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003).

In order to establish the contribution element, an employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, employer must show that a pre-existing disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury alone and comparing it to the pre-existing disability. *Harcum I*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT); *see also Harcum II*, 131 F.3d at 1082-83, 31 BRBS at 166-67(CRT); *Pounders*, 326 F.3d 455, 37 BRBS 11(CRT); *Ward*, 326 F.3d 434, 37 BRBS 17(CRT); *Winn*, 326 F.3d 427, 37 BRBS 29(CRT).

The administrative law judge found that employer did not prove that claimant's current impairment is materially and substantially greater than the disability resulting from the work-related condition alone. In particular, the administrative law judge found that employer's "mere generalized statements" that claimant's pre-existing asthma is the primary, if not exclusive, cause of his present impairment, does not quantify the extent of claimant's permanent impairment from his work-related obstructive lung disease alone. It therefore was not possible for the administrative law judge to make a determination as to whether claimant's pre-existing disability due to his alleged asthma combined with his work-related obstructive lung disease to form a permanent partial disability materially and substantially greater than that which would have occurred due to the COPD alone. *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). On appeal, employer makes no argument addressing the administrative law judge's finding that it did not put forth sufficient evidence regarding quantification. *See* Employer's Brief at 19. We thus affirm the administrative law judge's finding that the contribution element is not met, as well as his consequent denial of Section 8(f) relief. *See generally Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum I*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT).

Accordingly, the administrative law judge's Decision on Order on Remand 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