

BRB No. 06-0324 BLA

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| DENZEL RICHARDSON             | ) |                         |
|                               | ) |                         |
| Claimant-Respondent           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| PARAMOUNT COAL COMPANY        | ) |                         |
|                               | ) | DATE ISSUED: 10/31/2006 |
| Employer-Petitioner           | ) |                         |
|                               | ) |                         |
| DIRECTOR, OFFICE OF WORKERS'  | ) |                         |
| COMPENSATION PROGRAMS, UNITED | ) |                         |
| STATES DEPARTMENT OF LABOR    | ) |                         |
|                               | ) |                         |
| Party-in-Interest             | ) | DECISION and ORDER      |

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

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Employer appeals the Decision and Order on Remand Awarding Benefits (03-BLA-6026) of Administrative Law Judge Linda S. Chapman on a claim filed pursuant to the provisions of

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The procedural history of this case was set out in the Board’s Decision and Order issued on April 28, 2005. *Richardson v. Paramount Coal Co.*, BRB No. 04-0696 BLA (Apr. 28, 2005)(unpub.). In that Decision and Order, the Board noted that the instant claim is a subsequent claim. The Board determined that the administrative law judge misinterpreted *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), and the Board held that the administrative law judge had not weighed all of the evidence relevant to the existence of pneumoconiosis, both simple and complicated, as well as the evidence of no pneumoconiosis. Thus, the Board vacated the administrative law judge’s finding that claimant established invocation of the irrebuttable presumption contained in 20 C.F.R. §718.304. The Board also vacated the administrative law judge’s discrediting of the x-ray interpretations of Drs. Scott, Wheeler and Scatarige, all diagnosing a mass in claimant’s lungs that was not pneumoconiosis, as well as her findings regarding Dr. DePonte’s x-ray interpretation of complicated pneumoconiosis. The Board instructed the administrative law judge to independently evaluate the CT scan evidence pursuant to Section 718.304(c) to determine whether it is sufficient to establish the existence of complicated pneumoconiosis at this subsection. The Board ruled that Dr. Scott’s x-ray reading constitutes rebuttal evidence pursuant to 20 C.F.R. §725.414(c)(3)(ii), and the Board instructed the administrative law judge to “consider the evidence regarding the date of the x-ray and render a finding based upon this evidence.” *Richardson*, slip op. at 6. Finally, the Board stated that if, on remand, the administrative law judge found that the newly submitted evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must then consider whether the newly submitted evidence supports a finding of a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *Id.*

On remand, the administrative law judge reconsidered the newly submitted x-ray and CT scan evidence. The administrative law judge found claimant entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, and she awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant has established invocation of the presumption contained in Section 718.304. Employer maintains that the administrative law judge erred by misinterpreting *Scarbro*, and by shifting the burden of proof to employer, after claimant presented evidence supportive of a finding of complicated pneumoconiosis. Employer also asserts that the administrative law judge disregarded the Board’s instructions regarding the weighing of the x-ray interpretations, as she used the same analysis as in her 2004 Decision and Order, to discredit the interpretations of Drs. Scott, Wheeler and Scatarige. Employer contends that the administrative law judge erred by applying the same analysis to Dr. DePonte’s interpretation, disregarding the Board’s instructions concerning her opinion. Employer maintains that in addition to refusing to require claimant to establish the existence of complicated pneumoconiosis by a preponderance of the evidence, the administrative law judge also failed to “weigh all relevant evidence regarding whether claimant

suffers from a chronic dust disease of the lung that produced radiographic opacities greater than one centimeter classified as Category A, B, or C” before invoking the irrebuttable presumption. Employer's Brief at 7. Further, employer maintains that “Under the ILO system an opacity exceeding one centimeter is not synonymous with a Category A, B, or C opacity.” *Id.* at 13. Employer also asserts that the administrative law judge ignored the Board’s instructions regarding the consideration of Dr. Hippensteel’s opinion at Section 718.304(c), and that she erred by substituting her opinion for that of Dr. Hippensteel. Employer requests that the Board vacate the award of benefits and remand the case to another administrative law judge.

Claimant responds, urging affirmance of the administrative law judge’s award of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has submitted a letter asserting that the administrative law judge failed to acknowledge that the x-ray evidence is in dispute and that she must reconcile this evidence. The Director suggests that the case be remanded to the administrative law judge to determine whether the x-ray interpretations that show A and B opacities are more persuasive than the interpretations of the physicians who opine that the large mass seen on the x-rays is not classified as A, B, or C. The Director notes that the administrative law judge has shifted the burden of proof to employer, and he urges that the administrative law judge must provide a valid basis for her conclusion, without shifting this burden to employer. The Director also asserts that to establish invocation of the Section 921(c)(3) presumption by x-ray evidence, claimant must prove, by the weight of the evidence, that he has at least one opacity classified as Category A, B, or C, based on the ILO classification system. The Director asserts that no further proof that this condition is a chronic dust disease is required. Further, the Director maintains that claimant, with more than ten years of coal mine employment, benefits from the presumption that his pneumoconiosis arose out of his coal mine employment, pursuant to 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b). Employer has filed a reply brief, disagreeing with the Director’s statement that the Section 921(c)(3) presumption can be invoked without *establishing* the causal relationship between the opacities and coal dust exposure.

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

### The Administrative Law Judge’s Findings on Remand

On remand, the administrative law judge reviewed the Board’s April 28, 2005 Decision and Order and her own 2004 Decision and Order. The administrative law judge considered the evidence under each prong of Section 718.304. She noted eight interpretations of three x-rays, and stated that the Board misconstrued her prior discussion of Dr. DePonte’s interpretation. The administrative law judge found that claimant had established the presence of an opacity measuring at least one centimeter in diameter, as required by 30 U.S.C. §921(c)(3)(A). The

administrative law judge then considered the etiology of this opacity. In summarizing the decision of the United States Court of Appeals for the Fourth Circuit in *Scarbro*, the administrative law judge stated “Under *Scarbro*, once the Claimant establishes the etiology, the Employer must provide evidence that affirmatively shows the opacities are not there or that they are from a disease process other than complicated pneumoconiosis.” 2005 Decision and Order at 8. The administrative law judge stated that the x-ray interpretations of Drs. Scott, Wheeler and Scatarige are “equivocal, in that they do not make a diagnosis or an ‘objective determination,’ but instead speculate on the various possible etiologies for the abnormalities or masses that they acknowledge are there.” *Id.* at 8-9.

The administrative law judge considered Dr. Hippensteel’s interpretation of the CT scan and found that it does not “independently establish the existence of the condition referred to as ‘complicated pneumoconiosis,’ as it is defined in the Act.” 2005 Decision and Order at 10. The administrative law judge then weighed all of the evidence together and found that claimant has established invocation of the presumption contained in Section 718.304, since “the preponderance of the persuasive x-ray evidence establishes that the Claimant has a condition that has resulted in the presence of a large opacity on x-ray, due to his twenty two years of occupational exposure to coal dust.” *Id.* at 11. The administrative law judge determined that “Employer has not offered persuasive affirmative evidence that this large opacity is due to something other than exposure to coal dust.” *Id.* Accordingly, the administrative law judge awarded benefits.

### Evidence

At issue are the x-ray reports of complicated pneumoconiosis and the one medical opinion which addresses the question of the existence of complicated pneumoconiosis, based on the physician’s consideration of a CT scan, in addition to other medical evidence. Dr. Patel read the November 20, 2001 x-ray as 1/1, t, q, size A. He checked the boxes labeled “ax,” which is defined as coalescence of small pneumoconiotic opacities, and “bu,” which is defined as bulla. He also reported “R UL mass ~ 3cm dia DDx Large opacity. Rx Comparison CXR F/U CXR c apical hordotic [sp?] view.” Director's Exhibit 12. Dr. DePonte read the December 5, 2001 chest x-ray as 1/0, q, q, size B. She noted “Large opacity in RUL may represent cancer or pleural lesion. Lesion may be better visualized by CT and this is recommended.” Director's Exhibit 27. In a subsequent deposition, Dr. DePonte stated “I think the findings are consistent with complicated pneumoconiosis.” Claimant's Exhibit 4 at 7. Dr. DePonte stated that there is “the question that there may [be] another ideology (sic)for those large opacities,” which is why she had recommended a CT scan. Claimant's Exhibit 4 at 10. Dr. Wheeler read the August 20, 2002 chest x-ray and found no pleural or parenchymal abnormalities consistent with pneumoconiosis. He put a question mark over the box for tuberculosis. He commented “oval 5x3 cm mass medial subapical RUL and lower right apex compatible with conglomerate TB or possible tumor. Subtle interstitial infiltrate or fibrosis in LUL between anterior ribs 1-2 compatible with TB unknown activity.” He recommended a CT scan because “this film is a

light PA view.” Director's Exhibit 28. Dr. Patel read the film of claimant’s March 11, 2003 chest x-ray as 1/1, t, q, size A.<sup>1</sup> Dr. Patel checked the boxes indicating coalescence of small pneumoconiotic opacities, bulla, and definite emphysema. Dr. Patel commented “RUL mass; 4 cm dia, F/U CXR CT chest, DDx Large opacity.” Claimant's Exhibit 1. Dr. Scott read the March 12, 2003 film of claimant’s chest. He stated that it did not show parenchymal or pleural abnormalities consistent with pneumoconiosis. He put question marks over the boxes for cancer of the lung or pleura and tuberculosis. Dr. Scott stated “3.5 cm mass or focal infiltrate right apex: tb versus cancer. Advise CT. Minimal peripheral LUL infiltrate with probable granulomata, some calcified compatible with Tb, unknown activity.” Employer's Exhibit 2. Dr. Scatarige interpreted the September 3, 2003 chest x-ray. He found no parenchymal or pleural abnormalities consistent with pneumoconiosis, and he put a question mark over the box for tuberculosis. Dr. Scatarige stated:

1. 3x4 mass RUL with some volume loss – conglomerate inflammatory disease vs. cancer. – advise CT of lungs.
2. Few scattered 3-5 mm nodules in LUL, periphery, some calcified-favor healed TB – asymmetry make pneumoconiosis unlikely.
3. Few scattered calcified granulomata elsewhere in L lung
4. Mild tortuosity [sp?], thoracic aorta.

Employer’s Exhibit 1. The record indicates that all of these physicians are both B-readers and Board-certified radiologists.

The record also contains Dr. Hippensteel’s report, based on his examination of claimant, review of additional medical evidence and a review of a CT scan of claimant’s chest. Dr. Hippensteel concluded that claimant’s CT scan shows that claimant “has a conglomerate lesion from sarcoidosis, which is a granulomatous disease, rather than coal workers’ pneumoconiosis.” Director's Exhibit 28. In his conclusion, based on all of the medical data and evidence, Dr. Hippensteel states:

With an elevated ACE level, it appears that sarcoidosis is the most likely cause for interstitial changes and conglomerate lesion in right upper lobe, associated with some minor calcification in hilar lymph nodes. No angiotensin converting enzyme level was done apparently before my exam. Angiotensin converting enzyme is not elevated in coal workers’

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<sup>1</sup> The administrative law judge determined that Dr. Patel provided an incorrect date for the x-ray he reviewed. The administrative law judge determined that the correct date of this film was March 12, 2003, rather than March 11, 2003. 2005 Decision and Order at 7 n.6.

pneumoconiosis. This adds a new light on x-ray findings and complements the findings of no respiratory impairment, which would be unusual if this were complicated pneumoconiosis.

Director's Exhibit 28.

### Analysis

As an initial matter, we hold that the administrative law judge erred in her interpretation of *Scarbro*. Once the administrative law judge found that claimant had presented evidence supportive of a finding of complicated pneumoconiosis, she improperly shifted the burden to employer to “affirmatively establish” rebuttal of the presumption. We therefore vacate her findings pursuant to Section 718.304(a). As we previously held:

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *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). . . . On remand, the administrative law judge must first determine whether the relevant evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a), (b) and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

*Richardson*, slip op. at 3.

Employer asserts that the administrative law judge erred in discrediting the x-ray interpretations of Drs. Scott, Wheeler and Scatarige, using the same reasoning as in her 2004 Decision and Order, which was previously vacated by the Board. We agree. The administrative law judge's analysis of these interpretations on remand is effectively the same as it was in her 2004 Decision and Order; she again discredited the x-ray interpretations of Drs. Scott, Wheeler and Scatarige because these physicians do not refer to corroborating evidence of the cancer and

tuberculosis, which they suggested were the causes of the mass in claimant's lung. In so finding, the administrative law judge disregarded the prior holding of the Board. *Richardson*, slip op. at 4. Consequently, we vacate the administrative law judge's discrediting of the x-ray interpretations of Drs. Scott, Wheeler and Scatarige. While comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis, comments in an x-ray report that undermine the credibility of a positive ILO classification are relevant to the issue of the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). On remand, the administrative law judge must determine whether the comments made by Drs. Scott, Wheeler and Scatarige call into question their respective findings of complicated pneumoconiosis pursuant to Section 718.304(a). *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In addition, as we noted in our prior Decision and Order, the interpretation of objective data is a medical determination for which the administrative law judge cannot substitute her opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

We next turn to employer's assertion that the administrative law judge has not fully addressed Dr. DePonte's comments regarding other possible disease processes, as instructed by the Board. We agree. The Board previously instructed the administrative law judge to address Dr. DePonte's statements regarding whether the large opacity was attributable to a chronic dust disease of the lung. *Richardson*, slip op. at 4. Because the administrative law judge has not complied with our previous instructions, we vacate the administrative law judge's findings regarding Dr. DePonte's x-ray interpretation, and remand this case for consideration of the entirety of Dr. DePonte's opinion. *See Jarrell, supra; Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge must follow the instructions provided by the Board. *Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993).

Employer also contends that the administrative law judge erred in holding that the x-ray interpretations of Drs. Scott, Wheeler and Scatarige support her finding that claimant's x-rays show Category A and B opacities. Employer asserts that none of these physicians identified Category A or B opacities. The administrative law judge found that claimant established that he has a condition "that shows up on x-ray as a one centimeter or greater opacity in his lungs. Thus, every physician who reviewed the Claimant's x-rays noted either a category A or B opacity, or a corresponding mass that measured greater than one centimeter." 2005 Decision and Order at 8. Therefore the administrative law judge found that claimant has established the presence of an opacity measuring at least one centimeter in diameter. The administrative law judge then addressed the etiology of this mass. *Id.*

We vacate the entirety of the administrative law judge's analysis in this regard. On remand, the administrative law judge must consider each x-ray interpretation independently and determine whether or not it supports a finding of complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge must then weigh all of the x-ray evidence

together and determine whether it establishes the existence of complicated pneumoconiosis at Section 718.304(a). *Melnick, supra*. Further, the administrative law judge is advised that under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the “Comments” section, but which does not diagnose pneumoconiosis with an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a).

Employer also asserts that the administrative law judge erred in her consideration of Dr. Hippensteel’s opinion at Section 718.304(c). Employer asserts that the administrative law judge did not properly weigh Dr. Hippensteel’s opinion that claimant does not suffer from pneumoconiosis, before shifting the burden to employer to prove that the large opacities identified in claimant are related to a disease other than pneumoconiosis. Employer also suggests that the administrative law judge erred by substituting her opinion, that claimant suffers from pneumoconiosis, for Dr. Hippensteel’s opinion that claimant does not have pneumoconiosis. Employer therefore urges the Board to vacate the administrative law judge’s findings regarding Dr. Hippensteel’s opinion.

On remand, however, the administrative law judge found that, although Dr. Hippensteel noted a large mass in claimant’s lung, he did not indicate whether it would show up on an x-ray as category A, B, or C size opacity. The administrative law judge therefore determined that this opinion does “not independently establish the existence of the condition referred to as ‘complicated pneumoconiosis,’ as it is defined in the Act.” 2005 Decision and Order at 10. We affirm this finding as it is supported by substantial evidence. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

In weighing all of the evidence together, the administrative law judge found that employer has not offered “persuasive affirmative evidence” that a large opacity does not exist or that it was caused by something other than coal dust exposure. *See* 2005 Decision and Order at 11. The administrative law judge has improperly shifted the burden to employer, rather than weighing all of the evidence together, to determine whether the existence of complicated pneumoconiosis is established by a preponderance of the evidence. Moreover, in view of the administrative law judge’s error in dividing the analysis of the evidence within each subsection of Section 718.304 into two questions, *i.e.*, the existence of any mass, and the etiology of any mass, we vacate the administrative law judge’s weighing of the evidence. On remand, the administrative law judge must evaluate the evidence at each subsection of Section 718.304, and then weigh all of the evidence together.<sup>2</sup> *See Scarbro, supra; Melnick, supra*.

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<sup>2</sup> We note that the issue of the *cause* of claimant’s pneumoconiosis is not properly before us. When the first claim was before Judge Romano in 1994, employer conceded that claimant’s pneumoconiosis arose out of his coal mine employment. This stipulation was accepted by Judge Romano. Because the instant claim is a subsequent claim, and employer conceded the causal connection between pneumoconiosis and coal mine employment in the prior claim, the causal

Further, we note that in adjudicating this case, the administrative law judge overlooked the posture of this case, *i.e.*, the fact that she was only considering the newly submitted evidence to determine whether claimant had established a change in one of the applicable conditions of entitlement pursuant to Section 725.309. Once the administrative law judge determined that the newly submitted evidence established invocation of the Section 718.304 presumption, she *should have* considered all of the evidence of record to determine whether it established each element of entitlement pursuant to Part 718, rather than automatically awarding benefits. *See Richardson*, 04-0696 BLA, slip op. at 6.

On remand, if the administrative law judge finds the newly submitted evidence sufficient to establish invocation of the irrebuttable presumption at Section 718.304, claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, if the administrative law judge finds that the newly submitted evidence is insufficient to establish invocation of the irrebuttable presumption contained in Section 718.304, she must alternatively consider whether the newly submitted evidence supports a finding of a change in an applicable condition of entitlement under Section 718.204. 20 C.F.R. § 725.309(d); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997). If the administrative law judge finds a change in one of the applicable conditions of entitlement, she must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits.

Finally, we consider employer's request to assign this case to another administrative law judge on remand. Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we hold that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a "fresh look at the evidence" and for application of the law in light of the evidence. *Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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connection between pneumoconiosis and coal mine employment is not an element of entitlement which is subject to change. Therefore, the cause of claimant's pneumoconiosis is not relevant to the determination of whether claimant has established a change in one of the applicable conditions of entitlement in this subsequent claim. 20 C.F.R. §§725.202(d), 725.309.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the Office of Administrative Law Judges for reassignment to another administrative law judge.

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