

BRB Nos. 09-0729 BLA
and 10-0149 BLA

JANET HUMPHRIES)	
(Widow of JAMES C. HUMPHRIES))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 08/31/2010
)	
UNITED STATES STEEL MINING)	
COMPANY)	
)	
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 on Remand – Denying Benefits in the Miner’s Claim; Denying Benefits in the Survivor’s Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton (Singleton Law Office), Bessemer, Alabama, for claimant.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits in the Miner’s Claim; Denying Benefits in the Survivor’s Claim (2005-BLA-05068 and 2005-

BLA-05069) of Administrative Law Judge Edward Terhune Miller with respect to claims 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). This case has a lengthy procedural history.¹ In his Decision and Order issued on April 25, 2007, the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and, therefore, sufficient to establish a mistake in a determination of fact in the denial of the miner's claim that warranted modification pursuant to 20 C.F.R. §725.310 (2000).² On the merits of entitlement, the administrative law judge found that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that his pneumoconiosis was a contributing cause of his total disability under 20 C.F.R. §§718.204(b)(2)(i), (iv), 718.204(c). Accordingly, benefits were awarded in the miner's

¹ The miner filed applications for black lung benefits on August 12, 1991, March 23, 1992, December 17, 1997, June 12, 2000, and May 1, 2002. Director's Exhibits 1, 26, 27, 32, 34. In a Decision and Order dated October 23, 2003, Administrative Law Judge Robert J. Lesnick stated that, pursuant to 20 C.F.R. §725.310 (2000), the miner's most recent filing, dated May 1, 2002, constituted a request for modification of the denial of benefits issued by Administrative Law Judge Gerald Tierney. Judge Lesnick noted that Judge Tierney determined that, although the miner established that he was totally disabled, he did not prove that he had pneumoconiosis. Judge Lesnick found that the miner failed to establish a change in conditions or a mistake in a determination of fact with respect to the existence of pneumoconiosis and denied benefits accordingly.

The miner died on July 22, 2003, prior to the issuance of Judge Lesnick's Decision and Order. Director's Exhibits 45, 48. Claimant, the miner's surviving spouse, submitted the miner's death certificate to the district director on February 2, 2004 and filed an application for survivor's benefits on the same date. Director's Exhibit 45. The district director treated the submission of the death certificate as a request for modification of the denial of the miner's most recent claim and consolidated the pending miner's claim with the survivor's claim. Director's Exhibit 47. After the district director's issuance of a proposed Decision and Order denying the request for modification and the survivor's claim, the case was transferred to the Office of Administrative Law Judges for a hearing, which was held before Administrative Law Judge Edward Terhune Miller (the administrative law judge) on April 19, 2005.

² Although the Department of Labor amended the regulations, effective on January 19, 2001, the revised version of 20 C.F.R. §725.310 does not apply in this case, as the miner's June 12, 2000, claim was pending on the effective date of the amended regulations. 20 C.F.R. §725.2(c).

claim. With respect to the survivor's claim, however, the administrative law judge determined that claimant failed to prove that pneumoconiosis caused the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied in the survivor's claim.

Employer appealed the award of benefits in the miner's claim and claimant appealed of the denial of benefits in the survivor's claim. In the miner's claim, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), 725.310 (2000). *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 06-0647 BLA and 06-0647 BLA-A (Apr. 27, 2007)(unpub.). The Board also affirmed the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2)(i), but vacated the administrative law judge's determination that Dr. Rosenberg's opinion was entitled to less weight than the opinions of Drs. Shad and Sherman, and remanded the case to the administrative law judge for reconsideration of the medical opinion evidence relevant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c).

With respect to claimant's appeal of the denial of benefits in the survivor's claim, however, the Board held that the administrative law judge rationally determined that claimant had not proved that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), as the record did not contain any evidence connecting the miner's pneumoconiosis and his death, which was due to myocardial infarction. *Humphries*, slip op. at 4-5. Accordingly, the denial of benefits in the survivor's claim was affirmed.

On remand, the administrative law judge reconsidered the medical opinion evidence in the miner's claim regarding total disability and disability causation pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(c). The administrative law judge determined that the evidence established the miner's total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), but failed to prove that the miner's pneumoconiosis was a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c), by a preponderance of the evidence. The administrative law judge also noted that he had previously determined that claimant failed to prove that the miner's death was due to pneumoconiosis and had denied benefits in the survivor's claim. Accordingly, the administrative law judge denied benefits in the miner's claim and, without addressing the merits of the survivor's claim, reaffirmed the denial of benefits in the survivor's claim.

On appeal, claimant contends that, in the miner's claim, the administrative law judge erred in finding that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and, in the survivor's claim, that he erred in finding that the miner's death was not due to pneumoconiosis. Employer has not responded. The Director, Office of Workers' Compensation Programs (the Director),

filed a limited response, agreeing with claimant that the administrative law judge erred in finding that the miner's total disability was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant filed a reply brief, reiterating her contentions.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed after January 1, 1982, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that he was totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant and the Director argue that the administrative law judge erred in finding that total disability due to pneumoconiosis was not established under 20 C.F.R. §718.204(c). Claimant argues that the miner was entitled to a presumption of total disability due to pneumoconiosis, while the Director argues that the administrative law judge's weighing of the conflicting opinions of Drs. Shad and Rosenberg was flawed. In reports dated August 9, 2004 and February 21, 2005, Dr. Rosenberg diagnosed a minimal degree of simple pneumoconiosis that did not cause any disabling respiratory impairment.

³ By Order dated April 7, 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, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims, filed after January 1, 2005 and pending on, or after, March 23, 2010, the effective date of the amendments. *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 09-0729 BLA and 10-0149 BLA (Apr. 7, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), responded, arguing that Section 1556 does not apply to the instant claims as both claims were filed prior to January 1, 2005. Claimant also responded and asserted that, based on the miner's forty-one years of coal mine employment, Section 1556 applies and, therefore, the claims should be remanded for further administrative proceedings. We hold that the recent amendments to the Act are not applicable, as the relevant claims were filed prior to January 1, 2005.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's coal mine employment was in Alabama. Director's Exhibits 2, 7, 26, 27; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer's Exhibit 1. In a report dated July 7, 2000, Dr. Shad diagnosed pneumoconiosis and determined that the miner's total disability was due to coal dust-related obstructive lung disease. Director's Exhibit 10.

In rendering his findings under 20 C.F.R. §718.204(c) on remand, the administrative law judge found that Dr. Shad's opinion was reasoned and documented with respect to the existence of pneumoconiosis and total disability, in light of the autopsy finding of pneumoconiosis and the qualifying pulmonary function studies. Decision and Order on Remand at 11-12. However, the administrative law judge found that "the minimal extent of the disease disclosed on autopsy undermines Dr. Shad's assessment of disability causation." *Id.* at 12. Although the administrative law judge found that Dr. Rosenberg's opinion was "equivocal regarding the very existence of total disability,"⁵ he noted the doctor's statement that the miner's restrictive impairment could not have been caused or hastened by past coal dust exposure because the miner's gas exchange was normal, citing to an increasing PO₂ level with exercise, which he opined was indicative of an intact alveolar capillary bed. *Id.*; see Employer's Exhibit 1. In addition, the administrative law judge noted that Dr. Rosenberg referred to academic studies that analyzed impairment in relation to degrees of pneumoconiosis, which demonstrated no restrictive impairment without the presence of advanced roentgenographic findings of pneumoconiosis. Decision and Order on Remand at 12. The administrative law judge concluded that:

Given Dr. Rosenberg's credentials and his thorough analysis of all relevant medical evidence, his report is well-reasoned and convincingly explains how any disability the Miner had was not caused or hastened by past coal dust exposure or the presence of the Miner's minimal level of [coal workers' pneumoconiosis].

Id. Upon finding that the reports of Drs. Shad and Rosenberg were "similarly probative," the administrative law judge concluded that claimant failed to establish that the miner's total disability was due to pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.204(c). *Id.*

⁵ The administrative law judge found that:

Dr. Rosenberg's report, while clearly stating that [coal workers' pneumoconiosis] did not cause total disability, is equivocal regarding the very existence of total disability, given the seemingly contradictory assessments found in different portions of the report.

Decision and Order on Remand at 11.

The Director states that “Dr. Rosenberg’s opinion is based on reasoning hostile to the Act.”⁶ Director’s Brief at 1 (unpaginated). Specifically, the Director asserts that Dr. Rosenberg’s statement, that “[i]f [the miner] had any clinically significant [coal workers’ pneumoconiosis], it would have caused gas exchange abnormalities with exercise,” is contrary to the Act, to the extent that Dr. Rosenberg conveys a belief that “pneumoconiosis does not cause impairment unless the miner’s blood gas study results show impairment.” *Id.* The Director contends, moreover, that “under the implementing regulations, a miner may be found entitled to benefits if, despite negative blood gas study results, the pulmonary function study results show impairment,” since blood gas studies and pulmonary function studies measure different types of impairment. *Id.* The Director further argues that Dr. Rosenberg’s opinion is inconsistent with the spirit of the Act, in light of his statement that “various [scientific] studies have demonstrated no restrictive impairment, without the presence of advanced roentgenographic findings of [coal workers’ pneumoconiosis],” thus suggesting that simple pneumoconiosis never causes impairment. *Id.* at 2. The Director avers that Dr. Rosenberg’s assumption that simple pneumoconiosis is not disabling is undermined by the fact that the Act assumes that pneumoconiosis – even simple pneumoconiosis – may lead to total disability or death. *Id.* Alternatively, the Director asserts that, even if Dr. Rosenberg’s opinion is not hostile to the Act and regulation, his opinion “loses its persuasiveness when called into question by the Act and regulations.” *Id.* The Director argues that Dr. Rosenberg’s conclusion, that the miner did not suffer from a totally disabling respiratory impairment, conflicts with the administrative law judge’s finding that total disability was established. *Id.* As such, the Director urges that the case be remanded to the administrative law judge for reconsideration of Dr. Rosenberg’s reports. *Id.*

The Director also argues that the administrative law judge erred in giving less weight to Dr. Shad’s opinion regarding disability causation, upon concluding that “the minimal extent of the disease [pneumoconiosis] disclosed on autopsy undermines Dr. Shad’s assessment of disability causation.” Director’s Brief at 2; Decision and Order on Remand at 12. The Director maintains that only Dr. Rosenberg indicated that the miner’s pneumoconiosis was too minimal to cause impairment, but that Dr. Rosenberg’s opinion is undermined by assumptions contrary to the Act. Director’s Brief at 2. The Director also asserts that claimant is not required to prove that pneumoconiosis is the sole cause of the miner’s impairment, but only that it had a materially adverse effect on the miner’s respiratory or pulmonary condition. *Id.* As such, the Director alleges that there is no credible evidence undermining Dr. Shad’s opinion. *Id.* The Director thus contends that the administrative law judge’s failure to consider Dr. Rosenberg’s deficiencies and

⁶ In her reply brief, claimant states that she “joins” the Director in arguing that the administrative law judge’s deference to Dr. Rosenberg was misplaced. Claimant’s Reply Brief at 1.

recognize Dr. Shad's contrary opinion when weighing the opinions on disability causation, requires remand. *Id.* at 2-3.

The United States Court of Appeals for the Eleventh Circuit held in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990), that in order to qualify for benefits under 20 C.F.R. §718.204 (2000), a claimant must establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability. In *Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996), the Eleventh Circuit clarified its holding in *Lollar* with regard to the substantial contributing cause standard, by explaining that “[a] conclusion that a contributing cause played more than an infinitesimal or *de minimis* part does not mean that the contributing cause was substantial.” *Marcum*, 95 F.3d at 1083, 20 BLR at 2-333.

Subsequent to the Eleventh Circuit's decisions in *Lollar* and *Marcum*, the Department of Labor (DOL) implemented a revised regulation at 20 C.F.R. §718.204(c) which addresses disability causation. The amended regulation at 20 C.F.R. §718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). The DOL commented that the “substantially contributing cause” standard set forth in 20 C.F.R. §718.204(c) implements the standard developed “in court of appeals precedent since 1989 which varie[s] little from circuit to circuit.” 65 Fed. Reg. 79,946 (2000). The DOL also stated that, in order to clarify this consistent intent, it added the word “material” to 20 C.F.R. §718.204(c)(1), establishing that “evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability” is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability. *Id.* Moreover, the Eleventh Circuit has held that an administrative law judge may reject the opinion of a

physician whose basic medical assumptions are contrary to, or in conflict with, the spirit and purpose of the Act. *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d 1478, 13 BLR 2-400 (11th Cir. 1990); *Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); *Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-67 (1985).

We agree with claimant and the Director that the administrative law judge's disability causation findings with respect to Drs. Rosenberg and Shad cannot be affirmed. In this case, the administrative law judge did not address whether Dr. Rosenberg's statements indicate that he believes that pneumoconiosis does not cause impairment unless blood gas studies show impairment. *See Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984); *see generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1981); *Walker v. Brown Badgett, Inc.*, 8 BLR 1-220 (1985); *Cunningham v. Pittsburg & Midway Coal Co.*, 7 BLR 1-93 (1984). Furthermore, the administrative law judge did not address whether Dr. Rosenberg's opinions are based on a belief that simple pneumoconiosis is not disabling in the absence of x-ray evidence of advanced pneumoconiosis, which is inconsistent with the Act. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Consequently, because the administrative law judge failed to adequately consider the credibility of Dr. Rosenberg's opinion in light of his statements, we vacate the administrative law judge's determination that the opinions of Drs. Rosenberg and Shad are "similarly probative" and remand this case to the administrative law judge for reconsideration of the medical opinion evidence relevant to disability causation pursuant to 20 C.F.R. §718.204(c).

Turning to the survivor's claim, the administrative law judge, on remand, noted that, in his 2006 decision, he had "determined that that Claimant did not prove that the Miner's death was due to pneumoconiosis and denied benefits." Decision and Order on Remand at 3. He also acknowledged that the Board had affirmed the denial of benefits in the survivor's claim. Decision and Order on Remand at 4; *see Humphries*, slip op. at 4-5. The administrative law judge did not further address the merits of the survivor's claim on remand, but stated that "the denial of the survivor's claim of [claimant], as surviving spouse of the Miner, for Black Lung benefits under the Act is reaffirmed." Decision and Order on Remand at 12

Under the circumstances of this case, we hold that the Board lacks jurisdiction to consider the specific issues raised by claimant before the Board in the present appeal of the denial of her survivor's claim. A Board decision "become[s] final 60 days after the issuance of such decision unless a written petition for review . . . is filed in the appropriate U.S. court of appeals prior to the expiration of the 60-day period . . . or . . . a timely request for reconsideration by the Board has been filed" 20 C.F.R. §802.406. To be timely, a motion for reconsideration to the Board must be filed within thirty days from the filing of the Board's decision, *see* 20 C.F.R. §802.407(a), and a petition for

review filed with the appropriate United States Court of Appeals must be filed within sixty days of the Board's decision, *see* 20 C.F.R. §802.410(a). The Board's decision was filed on April 27, 2007. Because claimant did not seek reconsideration of the Board's decision or file an appeal with the United States Court of Appeals, the Board's decision became final as of April 27, 2007, the date it was filed with the Clerk of the Board. *See* 20 C.F.R. §§802.403(b), 802.406, 802.407(a), 802.410(a); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-11 (2003).

A request for modification, however, may be filed "at any time prior to one year after the rejection of a claim..." 33 U.S.C. §922; as incorporated into the Act by Section 422(a), 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.310(a). A claim is rejected when the denial becomes "final." *See* 33 U.S.C. §921(c); *Youghioghny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999); *see also Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990), *aff'd sub nom. Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). The modification process remains available throughout appellate proceedings. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see generally Director, OWCP v. Peabody Coal Co.*, [Sisk], 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Ashworth v. Blue Diamond Coal Co.*, 11 BLR 1-167 (1988); *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988). A request for modification need not be formal in nature. Any written notice by, or on behalf of, claimant within one year of an administrative denial evidencing an intention to make a request for modification may constitute a request for modification. *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Claimant filed a Brief on Remand with the administrative law judge on February 22, 2008, within one year of the issuance of the Board's decision. In her brief, claimant argued in support of reconsideration of the evidence in both the miner's and the survivor's claims. With respect to the survivor's claim, claimant asserted that the evidence of record establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. Although the administrative law judge reaffirmed the denial of benefits in the survivor's claim, he did not consider the merits of claimant's arguments raised on remand. Because claimant raised an issue regarding her survivor's claim within one year of the denial of the Board's decision, we hereby construe claimant's Brief on Remand as a request for modification of the survivor's claim, and remand the survivor's claim to the administrative law judge for modification proceedings. 20 C.F.R. §725.310.

The relevant inquiry for the administrative law judge is whether a mistake in a determination of fact was demonstrated, and, if so, whether reopening the case would render justice under the Act. *See O’Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *Branham v. Bethenergy Mines, Inc. [Branham II]*, 21 BLR 1-79 (1998). The administrative law judge is not required to hold a formal hearing on every modification request, but rather, has the discretion to decide whether a modification hearing is necessary to render justice in a particular case. The administrative law judge’s disposition of the request for modification must comport with the requirements of the Administrative Procedure Act set forth at 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Decision and Order on Remand – Denying Benefits in the Miner’s Claim; Denying Benefits in the Survivor’s Claim of the administrative law judge is vacated and this case is remanded to the administrative law judge for further consideration of both the miner’s claim and the survivor’s claim, consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge