

BRB No. 13-0202 BLA

RANDALL D. BELCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARTER BRANCH MINING COMPANY,	)	DATE ISSUED: 12/19/2013
INCORPORATED/OLD REPUBLIC	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (11-BLA-5476) of Administrative Law Judge Pamela J. Lakes rendered on a subsequent claim filed on March 30, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with 13.37 years of qualifying coal mine employment and adjudicated this subsequent

claim pursuant to the provisions at 20 C.F.R. Parts 718 and 725.<sup>1</sup> The administrative law judge found that claimant's prior claim was denied for failure to establish any element of entitlement. Considering the evidence developed since the previous denial of benefits, the administrative law judge found that it established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).<sup>2</sup> Considering all of the evidence of record, the administrative law judge found that it established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),<sup>3</sup> a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contests the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).<sup>4</sup> Employer contends that the administrative law judge mischaracterized, and selectively considered, the medical opinion evidence in concluding that the opinions of Drs. Rosenberg and Fino, unlike those of Drs. Rasmussen and Baker, failed to comport with the preamble to the 2001 regulations. Employer also contends that the administrative law judge improperly utilized the preamble as a "single criterion" in resolving the evidentiary conflicts in the medical opinion evidence. Employer's Brief at

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<sup>1</sup> Because claimant was credited with less than fifteen years of qualifying coal mine employment, a recent amendment to the Act does not affect this case. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)( to be codified at 20 C.F.R. §718.305); Decision and Order at 7.

<sup>2</sup> When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant failed to establish any element of entitlement; consequently, claimant had to submit new evidence establishing one of those elements in order to have his case considered on the merits. 20 C.F.R. §725.309(d)(2), (3).

<sup>3</sup> The administrative law judge found that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

<sup>4</sup> We construe employer's arguments respecting 20 C.F.R. §718.202(a)(4) as challenging, additionally, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d).

11, 15. Additionally, employer contends that the administrative law judge erred in finding that the inconsistencies in the medical opinions, regarding claimant's coal mine employment and smoking histories, did not detract from the probative value of the opinions. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the fact-finder's use of the preamble requires notice and an opportunity to be heard. *See* Director's Response at 1 n.1. In reply, employer reiterates its arguments and contends that the administrative law judge substituted her own view for that of the medical experts in violation of the requirements of the Administrative Procedure Act (APA).<sup>5</sup>

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.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order awarding benefits is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed. At the outset, we reject employer's argument that the administrative law judge erred in crediting the medical opinions of physicians who relied on an overstated work history, and an understated smoking history. Employer's Brief at 22-23; Employer's Reply Brief at 1, 9-10.

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<sup>5</sup> The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

<sup>6</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 2; Director's Exhibits 1 at 255-56, 4 at 2.

After extrapolating claimant's daily earnings/yearly income records, and finding "13.37 years in coal mine employment over a 23-year period," the administrative law judge recognized that "[a]ll of the doctors assumed an elevated coal mining history of 20 to 24 years[.]"<sup>7</sup> Decision and Order at 11. However, she reasoned: "as they all based their reports on roughly the same number of overall years during which [c]laimant worked in the coal mines, as opposed to a computation of the days that [he] worked in the mines, I will not accord any of their opinions less weight on that basis." *Id.* Consequently, she reasonably found that the doctors' reliance on an overstated work history was not dispositive in judging the credibility of their opinions. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Regarding claimant's smoking history, the administrative law judge found that the physicians "recorded inconsistent smoking histories[.]" and "it is not possible to accurately estimate a smoking history without knowing the number of years when the claimant stopped smoking or the number of years when his smoking was one-half pack as opposed to one pack daily[.]" Decision and Order at 11. She, therefore, concluded: "I cannot reliably estimate the number of pack years other than to say that, based upon his credible testimony, it amounted to less than 30-pack-years."<sup>8</sup> Decision and Order at 4. Thus, because "each of the reviewing physicians took into account a significant smoking history," the administrative law judge chose not to discredit any of the opinions on the basis of their respective estimated smoking histories.<sup>9</sup> *Id.* at 11. Employer's assertion that

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<sup>7</sup> Dr. Fino recorded 20 years of coal mining, ending in 1993; Dr. Rosenberg recorded 23-24 years of coal mining, ending in 1993; Dr. Rasmussen recorded 20 years of coal mining ending in 1992 and Dr. Baker recorded 20 years of coal mining, ending in 1993. Employer's Exhibits 1 at 2, 4 at 4; Director's Exhibit 11 at 39, 42; Claimant's Exhibit 3 at 1, 4.

<sup>8</sup> Claimant testified that, "he smoked on and off for about thirty years, usually less than a pack a day [and] he still smokes occasionally." Decision and Order at 4; *see* H. Tr. at 17, 25.

<sup>9</sup> Regarding claimant's smoking history, Dr. Fino recorded one-half pack daily for seventeen years; Dr. Rosenberg recorded "probably" twenty-eight pack-years beginning at age seventeen until around 2000, with several periods of cessation; Dr. Rasmussen recorded forty-pack years; Dr. Baker recorded a "significant" history of twenty-five pack-years at less than one pack a day starting at age twenty-one, and that claimant quit for ten years, but was smoking again at the time of his August 2011 examination. Employer's

the administrative law judge “ignore[d] relevant evidence[,]” and considered only claimant’s testimony, is belied by her summation of the smoking histories recorded by the physicians. *Id.*; Employer’s Brief at 22. Further, employer has not substantiated its contention that the documentary evidence reveals “a far greater [smoking] habit, as many as two packages daily, starting as early as 1972 and continuing as late as 2012.” Employer’s Brief at 22.

It is the province of the finder-of-fact to evaluate the medical evidence, draw inferences, and assess the probative value of the evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR at 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Thus, the administrative law judge recognized the inconsistencies in the evidence regarding claimant’s smoking and coal mine employment histories, and rationally accounted for them when weighing the medical opinion evidence. *See Anderson*, 11 BLR at 1-113; *Brown*, 7 BLR at 1-733. Employer’s argument concerning the administrative law judge’s evaluation of the evidence regarding the length of claimant’s coal mine employment and smoking history is, therefore, rejected.

We also reject employer’s contentions regarding the administrative law judge’s use of the preamble. The preamble to the 2001 regulations sets forth the resolution, by the Department of Labor (DOL), of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff’d Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Because the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond, an administrative law judge may, as here, evaluate expert opinions in conjunction with the DOL’s discussion of the medical science set forth in the preamble. *See Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. We, therefore, reject employer’s assertion that the administrative law judge was precluded from referencing the preamble to the 2001 regulations in evaluating the opinions of Drs. Rosenberg,<sup>10</sup> Fino,<sup>11</sup> Rasmussen,<sup>12</sup> and

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Exhibits 1 at 2; 4 at 4; 8 at 13; Director’s Exhibit 11 at 39-42; Claimant’s Exhibit 3 at 1-2, 4.

<sup>10</sup> Dr. Rosenberg, who opined that claimant does not have clinical or legal pneumoconiosis, diagnosed a diffuse pattern of emphysema due entirely to claimant’s smoking. Decision and Order at 13; Employer’s Exhibits 4 at 7-8; 8 at 17; 26.

Baker,<sup>13</sup> or that she considered the preamble as binding, without regard to the specifics of this case.

Rather, the administrative law judge properly examined the medical opinions of record in view of the DOL's recognition in the preamble: that smokers who mine have an "additive" risk for developing significant obstructive lung disease; that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms;" that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated; that coal dust, even in the absence of clinical pneumoconiosis, can cause clinically significant obstructive disease, as shown by a reduced FEV<sub>1</sub>/FVC ratio; and that centrilobular emphysema - a diffuse form of the disease - is significantly more common among coal workers than among non-coal workers.<sup>14</sup> See 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Freeman United Coal Mining*

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<sup>11</sup> Dr. Fino, who opined that claimant does not have clinical or legal pneumoconiosis, diagnosed severe bullous emphysema which is not caused by coal dust inhalation, but is due entirely to cigarette smoking. Decision and Order at 12; Employer's Exhibits 1; 9; 10-12; 9 at 27-28; 29; 30.

<sup>12</sup> Dr. Rasmussen diagnosed legal pneumoconiosis in the form of emphysema and chronic obstructive pulmonary disease (COPD), as well as clinical pneumoconiosis. He stated that while claimant's smoking appeared to be a greater risk factor, his coal mine employment was also a significant co-contributor. Decision and Order at 12; Director's Exhibit 11 at 40, 42.

<sup>13</sup> Dr. Baker diagnosed legal pneumoconiosis in the form of COPD with severe obstructive defect, and chronic bronchitis due to both coal dust exposure and smoking. He concluded that claimant's "condition has been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment." Decision and Order at 14; Claimant's Exhibit 3 at 3-4.

<sup>14</sup> Further, the regulations recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); see *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009). We, therefore, reject employer's contention that: "[n]othing in the preamble permits an [administrative law judge] to discredit a doctor's opinion that a particular claimant's pulmonary problems are due to cigarette smoking where that claimant started smoking as a teenager and kept smoking cigarettes while he worked as a coal miner, and long after his mining ended and where the duration of [his smoking] far eclipsed his coal mine employment." Employer's Brief at 21.

*Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Obush*, 24 BLR at 1-125-26; Decision and Order at 12-14.

Specifically, in addressing the medical opinions of record, the administrative law judge observed that, although all the physicians diagnosed claimant with emphysema/chronic obstructive pulmonary disease (COPD), Drs. Rosenberg and Fino opined that emphysema does not constitute legal pneumoconiosis. Decision and Order at 14. The administrative law judge noted that Dr. Rosenberg explained: that coal mine dust and smoking cause different types of tissue damage; that “coal mine dust causes a more localized form of emphysema, whereas cigarette smoke caused a diffuse pattern of emphysema;” and that the FEV<sub>1</sub>/FVC ratio is generally preserved with coal mine dust exposure, whereas claimant’s was significantly reduced. *Id.* at 13; Employer’s Exhibits 4 at 5-6; 7; 8 at 23-24; 26; 33; 35; 39. The administrative law judge concluded, however, that Dr. Rosenberg’s views fail to comport with those accepted by the DOL. *See* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Summers*, 272 F.3d at 483, 22 BLR at 2-281; *Obush*, 24 BLR at 1-125-26. She, therefore, properly assigned “little weight” to Dr. Rosenberg’s opinion that claimant’s emphysema was entirely due to smoking.

Next, the administrative law judge noted that, although Dr. Fino identified claimant’s elevated lung volumes and reduced diffusing capacity as demonstrating emphysema, he ruled out a diagnosis of legal pneumoconiosis, in part because he believed that claimant’s reduction in lung function was not clinically significant. However, the administrative law judge noted that Dr. Fino’s view, based on the Attfield and Hodous predictive model, that claimant would lose no more than a clinically insignificant amount of 60 ccs. of FEV<sub>1</sub> due to coal dust inhalation, was “internally inconsistent” with his testimony that claimant’s FEV<sub>1</sub> “showed a loss of 2,000 ccs., and his acknowledgment that an above average loss could be clinically significant.” Decision and Order at 12; Employer’s Exhibits 4, 8. Moreover, she noted that Dr. Fino’s opinion diverged from the DOL’s view that coal mine dust exposure can cause clinically significant airway obstruction.<sup>15</sup> Decision and Order at 13; *see* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 999, 23 BLR 2-302, 2-318 (7th Cir. 2005). Therefore, the administrative law judge properly accorded “little weight” to Dr. Fino’s opinion because the doctor made inconsistent statements, and “focused on generalities rather than the specifics of the case at hand[.]” Decision and Order at 12; 65 Fed. Reg. at 79,941 (Dec. 20, 2000); *Beeler*,

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<sup>15</sup> Moreover, in the amended definition of legal pneumoconiosis, set forth in the preamble to the 2001 regulations, the Department of Labor recognized that “emphysema can be aggravated by coal dust exposure.” 65 Fed. Reg. at 79,943 (Dec. 20, 2000); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124, 7 BLR 2-72, 2-81 (4th Cir. 1984).

521 F.3d at 726, 24 BLR at 2-103; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Based on the foregoing, we reject employer's assertion that the medical opinions of Drs. Rosenberg and Fino were mischaracterized or unfairly scrutinized. Rather, the administrative law judge correctly identified the deficiencies and discrepancies in their underlying documentation, and the premises of their opinions attributing claimant's emphysema solely to smoking. The administrative law judge, therefore, rationally accorded little weight to their opinions. Decision and Order at 12-14; *see* 65 Fed. Reg. at 79,920, 79,938-42 (Dec. 20, 2000); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Napier*, 301 F.3d at 713-14, 22 BLR at 2-551; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121-22; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. As the administrative law judge's credibility determinations regarding the opinions of Drs. Rosenberg and Fino are rational, supported by substantial evidence, and in accordance with law, they are affirmed.

The administrative law judge's consideration of the medical opinions of Drs. Rasmussen<sup>16</sup> and Baker<sup>17</sup> confirms that the bases of their documentation and reasoning accords with the views of the DOL regarding the definition of legal pneumoconiosis. Decision and Order at 14; 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. at 79,938 (Dec. 20, 2000); *see Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-551; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121-22; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Hence, the administrative law judge properly recognized that Dr. Rasmussen's and Dr. Baker's diagnosis of emphysema due to both coal dust exposure *and* smoking constitutes a diagnosis of legal pneumoconiosis. *See* 65 Fed. Reg. 79,940-43 (Dec. 20, 2000); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-120-21; *see also Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87; *Crisp*, 866 F.2d at 185, 12 BLR at 2-

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<sup>16</sup> For example, the administrative law judge found that Dr. Rasmussen acknowledged that coal mine dust causes identical forms of COPD, including emphysema, by the same mechanisms, and that dust-induced emphysema and smoke-induced emphysema "occur through similar mechanisms." Decision and Order at 12; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000).

<sup>17</sup> Moreover, the administrative law judge summarized Dr. Baker's view that "the effects of coal mine dust and cigarette smoke are additive and that legal pneumoconiosis will be worse when both types of exposure are present." Decision and Order at 14; Claimant's Exhibit 3 at 4 ("The combination of coal dust exposure and tobacco exposure can be either synergistic or additive in terms of the effects on the lungs. When both exposures are present the condition would be worse than if there was only one exposure and not both."); *see* 65 Fed. Reg. 79,939-943 (Dec. 20, 2000); Employer's Brief at 18.

129. The administrative law judge, therefore, rationally assigned “full probative weight” to their opinions in finding the existence of legal pneumoconiosis established. Thus, we reject employer’s assertion that the administrative law judge’s analysis of these opinions was improperly selective, or that she substituted her own view for that of the medical experts in evaluating their opinions. The administrative law judge’s finding that claimant established legal pneumoconiosis at Section 718.202(a)(4) based on the medical opinion evidence is rational, supported by substantial evidence, and in accordance with law;<sup>18</sup> it is, therefore, affirmed. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Further, as employer has not challenged the administrative law judge’s findings that the evidence of record established a total respiratory disability at Section 718.204(b)(2) and disability causation pursuant to Section 718.204(c), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 19-20. We, therefore, affirm the administrative law judge’s finding that the evidence of record established entitlement to benefits pursuant to 20 C.F.R. Part 718.

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<sup>18</sup> The administrative law judge’s finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d) is, likewise, affirmed.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge