U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0180
and 15-0180A

PHYLLIS MATHEWS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: Feb. 17, 2016
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2011-LHC-00999, 01000, 01001) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law.

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a sales clerk in the cosmetics department of employer's San Diego Navy Exchange. On May 8, 2008, she sustained bilateral thumb injuries during the course of her employment. Claimant underwent surgery on her right thumb on July 31, 2008, and on her left thumb on November 13, 2008. Claimant returned to work on January 9, 2009. On June 13, 2009, she experienced lower back pain while lifting boxes. Claimant sought and received medical treatment for her back complaints, and she attempted to work within her physical restrictions on four occasions. After each such attempt, claimant stated that she was unable to perform her employment duties; she last worked for employer on April 22, 2010. On July 10, 2010, claimant underwent back surgery. Relevant to this appeal, claimant filed claims for her thumb and back injuries.

In his Decision and Order, the administrative law judge found that claimant's back condition reached maximum medical improvement on April 21, 2010, and that claimant's thumb conditions reached maximum medical improvement on May 10, 2010. The administrative law judge accepted employer's concession that claimant is unable to return to her usual employment duties as a result of her work related injuries and found that employer established the availability of suitable alternate employment at its facility until February 22, 2012. The administrative law judge awarded claimant temporary total disability benefits for several periods between June 18, 2009 and April 21, 2010, scheduled permanent partial disability benefits for a 14 percent left arm impairment and an 11 percent right arm impairment during the period suitable alternate employment existed, and continuing permanent total disability benefits commencing February 22, 2012. 33 U.S.C. §908(a), (b), (c)(1).

On appeal, employer challenges the administrative law judge's award of permanent partial disability benefits for impairments to claimant's arms rather than to her thumbs, as well as his findings regarding the physical restrictions claimant has due to her back condition. BRB No. 15-0180. In her cross-appeal, claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Claimant additionally challenges the administrative law judge's finding that Dr. Korsh was not an authorized treating physician and the administrative law judge's consequent denial of reimbursement for the charges related to that physician's treatment of claimant. BRB No. 15-0180A. Each party has filed a brief in response to the other's appeal.

Scheduled Award

Employer challenges the administrative law judge's finding that claimant is entitled to permanent partial disability compensation for impairments to her arms

pursuant to Section 8(c)(1), rather than for impairments to her thumbs pursuant to Section 8(c)(6). 33 U.S.C. §908(c)(1), (6).

Where, as here, claimant has sustained an injury to a member specified in the schedule contained in Sections 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), and she is not totally disabled, claimant's permanent partial disability must be compensated under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Where an injury to a lesser member covered by the schedule also results in an impairment to a greater member covered by the schedule, a claimant may receive an award for the loss of use of the greater member.[1] *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). With regard to the calculation of claimant's permanent impairment to a scheduled member, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's descriptions of her symptoms and the physical effects of her injuries. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Serv. Inc.*, 27 BRBS 154 (1993).

Both Dr. Ohayon and Dr. Scalone used the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) in this case in rating the impairments to claimant's thumbs individually and to her hands and arms as a result of her residual thumb impairments.[2] *See* JXs 35, 50. In awarding claimant benefits for an 11 percent impairment to claimant's right arm and a 14 percent impairment to her left arm, the administrative law judge relied on the opinion of Dr. Ohayon, which he found to be better reasoned and documented than that of Dr. Scalone. Decision and Order at 27. The administrative law judge found that Dr. Ohayon, as claimant's treating physician, is in a better position to evaluate claimant's condition and progress over time,[3] and that her

[1] Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), compensates permanent partial disability due to an arm impairment, whereas Section 8(c)(6) of the Act, 33 U.S.C. §908(c)(6), compensates permanent partial disability due to a thumb impairment.

[2] The Act does not require impairment ratings based on medical opinions using the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) except in cases involving compensation for hearing loss and voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10); *Pimpinella*, 27 BRBS 154.

[3] Dr. Ohayon stated that, under the AMA *Guides*, claimant has a two percent impairment to each thumb, a one percent impairment to each hand, and an 11 percent impairment to the right arm and a 14 percent impairment to the left arm. JX 2 at 137-138. The impairments to the arms are based on Table 16-27 of the Fifth Edition of the AMA *Guides*, and account for the "nature of resectional arthroplasty at the CMC joint,"

impairment ratings, which included the effects of claimant's surgeries and pain, are more consistent with the AMA *Guides*. *Id.* at 25-27.

We affirm the administrative law judge's award of benefits for impairments to claimant's arms rather than to only her thumbs. The administrative law judge provided rational reasons for giving greater weight to Dr. Ohayon's opinion. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1984). With regard to the specific issue raised by employer, we note that both physicians gave impairment ratings to claimant's hands and arms, as well as to her thumbs. Dr. Ohayon's opinion supports the administrative law judge's finding that claimant sustained impairments to her arms as a result of her work-related thumb injuries. On July 31, 2008, Dr. Ohayon performed a right thumb carpometacarpal tendon arthroplasty with tendon transfer, JX 1 at 78-79; on November 13, 2008, she performed the same procedure on claimant's left thumb. *Id.* at 43-44. In rating claimant's impairments due to her thumb injuries, resultant surgeries, and residual pain, Dr. Ohayon stated that the AMA *Guides* recognize that the nature of the surgical procedures on claimant's thumbs does not result in the restoration of a normal thumb and that impairment ratings to claimant's upper extremities are therefore appropriate. JX 35 at 1824-1825 (citing AMA *Guides* (5th ed.) at 506); *see* JX 2 at 137-138. Dr. Ohayon also referenced the AMA *Guides* discussion which allows for a patient's pain to increase an impairment rating. *See* JX 2 at 138 (citing AMA *Guides* (5th ed.) at 573).

Thus, as Dr. Ohayon discussed the rationale underlying her calculation of the impairment ratings resulting from claimant's work-related thumb conditions and surgeries, her opinion constitutes substantial evidence supportive of the administrative law judge's findings on this issue. We therefore affirm the administrative law judge's award of permanent partial disability benefits under Section 8(c)(1) for eleven and fourteen percent impairments to claimant's arms. The credited evidence establishes that claimant has an impairment to the greater members due to injuries to the lesser members. *See Young*, 17 BRBS 201; *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 272 (1981).

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plus claimant's pain in the left arm. *Id.*; JX 35. Dr. Scalone examined claimant on behalf of employer. He opined that, pursuant to the AMA *Guides*, on the left side claimant has a five percent thumb impairment for lack of abduction, no impairment for adduction, and no impairment for opposition, which combine for a two percent hand and a two percent upper extremity impairments. On the right side, claimant has a nine percent thumb impairment for lack of abduction, a one percent impairment for lack of adduction, and a one percent impairment for opposition, resulting in a hand impairment of four percent and an upper extremity impairment of four percent. JX 50.

Claimant's Physical Restrictions

Employer next challenges the administrative law judge's finding that claimant's work-related physical restrictions changed as of February 22, 2012, and thus, implicitly, the administrative law judge's award of ongoing permanent total disability benefits as of that date. Specifically, employer contends the administrative law judge erred in relying on the newly imposed restrictions of Dr. Korsh, rather than the prior restrictions of Dr. Pallia. Dr. Pallia commenced treating claimant on June 24, 2009; on October 19, 2009, Dr. Pallia placed physical restrictions on claimant which included no lifting or carrying greater than fifteen pounds, no repetitive bending or stooping, and sitting as tolerated for five minutes every hour. *See* JX 10 at 873-874. On April 28, 2010, Dr. Pallia modified claimant's restrictions to include no prolonged standing or walking for more than one hour without a fifteen minute break. *See id*. at 810-814. On May 16, 2010, claimant commenced treating with Dr. Korsh, who performed lumbar surgery on July 13, 2010.[4] On February 22, 2012, Dr. Korsh examined claimant and placed restrictions which included lying down for one-half to one hour after two to three hours of work, alternating sitting and standing at claimant's discretion, and no frequent lifting greater than ten pounds. *See* JX 37 at 1850-1851, 1869.

In addressing the extent of claimant's disability, the administrative law judge initially relied on the restrictions of Dr. Pallia, determined that employer was willing and able to accommodate those restrictions, and concluded that employer established the availability of suitable alternate employment from October 2009 until February 22, 2012. *See* Decision and Order at 36-39; *see* discussion, *infra*. The administrative law judge then found that, as of February 22, 2012, the work restrictions of Dr. Korsh are applicable because Dr. Korsh, as claimant's treating physician for the prior two years, offered an opinion which reflects the best available evidence of claimant's appropriate work restrictions at that time. *Id.* at 40.

Employer challenges the administrative law judge's finding that claimant's restrictions changed on February 22, 2012, asserting that substantial evidence does not support a finding that new work restrictions were "suddenly appropriate almost two years" after the restrictions placed on claimant by Dr. Pallia. *See* Emp. Br. at 6-8. We reject this contention. In addressing the evidence on this issue, the administrative law judge found that Dr. Korsh testified that only after claimant underwent one year of non-operative care without success, such that claimant had exhausted all non-operative

[4] Specifically, on July 13, 2010, Dr. Korsh performed multiple back procedures on claimant including: partial corpectomies at L3, L4 and L5; anterior lumbar fusions at L3-L4 and L4-L5; and the insertion of interbody cages at L3-L4 and L4-L5. *See* JX 4 at 224.

modalities, was surgery recommended in an attempt to alleviate her back pain. Claimant then underwent multiple surgical procedures. Thus, after Dr. Pallia's last examination of claimant on April 20, 2010, claimant underwent significant medical care for the treatment of her back injury and the administrative law judge rationally concluded that claimant's physical condition changed after those procedures. The Board is not empowered to reweigh the evidence, *see Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010), but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge rationally concluded that the opinion of Dr. Korsh, as claimant's treating physician after May 16, 2010, established that increased restrictions were warranted after February 22, 2012 due to her back injury.[5] Thus, we affirm the administrative law judge's conclusion that claimant's physical restrictions increased as of February 22, 2012, as it is supported by substantial evidence.[6]

Suitable Alternate Employment

In her cross-appeal, claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment during the period between April 22, 2010 and February 21, 2012. Claimant challenges the administrative law judge's credibility determinations and, additionally, asserts the administrative law judge did not discuss the all of the evidence relevant to this issue.

Where, as in this case, claimant has established her inability to return to her usual work due to her injury, the burden shifts to employer to establish the availability of suitable alternate employment. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). An employer can establish suitable alternate employment by offering an injured employee a light-duty job at its facility which is

[5] As the administrative law judge rationally relied upon Dr. Korsh's opinion as claimant's treating physician, we reject employer's assertion that the administrative law judge committed error in failing to specifically delineate the reasons for his rejection of Dr. Moon's "less limiting" work restrictions, which that physician placed on claimant on June 26, 2012.

[6] As employer does not challenge the administrative law judge's finding that it did not present evidence of suitable alternate employment available to claimant within the restrictions placed on claimant by Dr. Korsh, that finding, and the administrative law judge's award of permanent total disability benefits to claimant commencing February 22, 2012, is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

The administrative law judge found that the testimony of Ms. Bakich and Ms. Pipes establishes that employer was willing and able to accommodate all of claimant's restrictions until February 22, 2012. Decision and Order at 27-40. The administrative law judge accepted the testimony of Ms. Bakich, a division manager for employer, that she and claimant's department manager would discuss claimant's restrictions with claimant each time claimant attempted to return to work, and that employer was able to accommodate claimant's physical restrictions.[7] *Id.* at 29-35. Ms. Pipes, claimant's department manager on her last day of employment in April 2010, similarly testified that claimant, on her last day of work, was assigned only duties which complied with her physical restrictions. *Id.* at 35-36.

In challenging the administrative law judge's finding that employer established the availability of suitable alternate employment through February 21, 2012, claimant contends the administrative law judge erred in relying on the testimony of Ms. Bakich and Ms. Pipes since neither of these individuals personally observed claimant and her assigned employment duties. In this regard, claimant avers that while the administrative law judge focused on employer's stated policy of accommodating its returning disabled employees, it did not present evidence that its policies were implemented on the sales floor. The administrative law judge addressed at considerable length the testimony of claimant, Ms. Bakich, and Ms. Pipes regarding the duties assigned to claimant upon her return to work, and he rationally found that Ms. Bakich and Ms. Pipes testified consistently regarding employer's efforts to accommodate claimant's work restrictions. *See Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). The administrative law judge found that employer discussed claimant's restrictions with her and that the testimony of Ms. Bakich and Ms. Pipes establishes that employer was willing and able to accommodate claimant's restrictions. Decision and Order at 37-39. It is well established that an administrative law judge is entitled to weigh the evidence and draw his own inferences therefrom. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). In this case, claimant has not established reversible error in the administrative law judge's decision to rely on the testimony of Ms. Bakich and Ms. Pipes to find that employer established the availability of suitable alternate employment during relevant periods when claimant was able to work. Accordingly, we reject claimant's contention of error in this

[7] Claimant returned to work on or about October 5, November 12, and December 21, 2009, and April 22, 2010. After each attempt, claimant told employer that she was unable to perform the assigned duties. *See* Tr. at 66.

regard. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

We cannot, however, affirm the administrative law judge's finding that employer established the availability of suitable alternate employment until February 22, 2012. Decision and Order 37-40. In addressing employer's accommodation of claimant's physical restrictions, the administrative law judge used the most demanding physical restrictions placed on claimant by Dr. Pallia between October 2009 and February 22, 2012, when Dr. Korsh placed additional restrictions on claimant. Dr. Pallia's restrictions included 15 pound lifting and carrying limits, and 15 minute rest breaks after one hour of prolonged walking or standing, JX 10 at 811, 818, whereas Dr. Korsh stated that claimant should be allowed to lie down for a half-hour to one hour after two to three hours of work. JX 34 at 1823. In determining that employer was able and willing to accommodate claimant's restrictions until February 22, 2012, the administrative law judge did not consider the effect of claimant's July 13, 2010 back surgeries on her ability to return to work after that date, nor did he address the post-surgical restrictions placed on claimant by Dr. Korsh on August 10, 2010, which included a ten pound lifting restriction. *See* JX 4 at 190. Moreover, claimant cites evidence which, if credited by the administrative law judge, could support a finding that claimant's alternate employment position became unavailable prior to February 22, 2012.[8] We therefore vacate the administrative law judge's finding that employer established the availability of suitable alternate employment through February 21, 2012, and we remand the case for further consideration of this issue. If employer fails to establish the availability of suitable alternate employment, claimant will be entitled to permanent total disability benefits.

Medical Expenses

Claimant next contends the administrative law judge erred in determining that employer is not liable for the medical expenses she incurred as a result of her treatment with Dr. Korsh. We disagree.

[8] Claimant cites a September 20, 2011 email wherein employer's human resource manager states that claimant's manager "will not be able to accommodate these restrictions." JX 42 at 2017. Contrary to employer's position that this document is "completely irrelevant to the issue at hand," Emp. Resp. Br. at 4, if employer made alternate work unavailable to claimant, employer bore a renewed burden of establishing the availability of suitable alternate employment in order to avoid liability for total disability benefits. *See Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *see generally Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Vasquez v. Continental Maritime of San Francisco*, 23 BRBS 428 (1990).

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006). Thus, once claimant has established that her injury is work-related, employer is liable for reasonable and necessary medical expenses related to that injury. *See Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2003); 20 C.F.R. §702.402. Pursuant to Section 7(d)(1), 33 U.S.C. §907(d)(1), however, claimant must request employer's authorization for treatment; where employer refuses a request for treatment, claimant is released from the continuing obligation to seek employer's approval and employer is liable for any treatment claimant thereafter procures on her own initiative if it is reasonable and necessary for the work-related injury.[9] *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).

The administrative law judge found that Dr. Pallia continued to provide claimant with all necessary medical treatment as of April 28, 2010. Additionally, the administrative law judge found that claimant did not seek employer's authorization to treat with Dr. Korsh and that employer, therefore, did not refuse to provide claimant medical treatment. Pursuant to these findings, the administrative law judge concluded that claimant was not entitled to a change of physician in April 2010, and that, consequently, employer is not required to pay for the treatment subsequently provided by Dr. Korsh. *See* Decision and Order at 42-43.

On appeal, claimant contends Dr. Pallia had no further treatment to offer claimant as of April 2010 and that the administrative law judge erred in disbelieving claimant's hearing testimony that she asked employer's nurse case manager, Ms. Snitkin, for a referral to a spinal surgeon sometime in March or April 2010, but that her request was refused. *See* Cl. Br. at 29 (citing Tr. at 39). Thus, claimant avers that because employer denied her request to be treated by a spinal specialist, employer should be held liable for any subsequent reasonable and necessary medical treatment. Stating that there is no contemporaneous documentation supportive of claimant's testimony that she requested a referral from employer, and observing that employer had approved the prior referrals recommended by Dr. Pallia, the administrative law judge declined to credit claimant's testimony that she requested authorization. Thus, the administrative law judge concluded

[9] In this regard, the Act and its implementing regulations provide that employer's consent shall be given in cases where the claimant's initial choice of a physician was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of her injury. *See* 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a).

that employer is not liable for the cost of Dr. Korsh's treatment. Decision and Order at 43.

We reject claimant's contention of error. It is well-established that an administrative law judge is not bound to accept the testimony of any particular witness, *see Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), but, rather, the administrative law judge is entitled to evaluate the credibility of all witnesses. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, on the basis of the record before us, the administrative law judge's decision to reject claimant's testimony regarding her purported conversations with employer's nurse case manager is neither inherently incredible nor patently unreasonable.[10] *See Cordero v. Triple a Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's finding that claimant failed to establish that she requested authorization from employer prior to treating with Dr. Korsh and his consequent finding that employer is not liable for Dr. Korsh's fees, as it accords with law. 33 U.S.C. §907(d)(1); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

[10] Claimant's hearing testimony appears to be at odds with her deposition testimony, wherein she stated she had not contacted either employer or its adjusting company prior to treating with Dr. Korsh. *See* JX 30 at 1754. Moreover, we note that the record contains no correspondence between claimant's counsel and employer regarding a request for treatment by Dr. Korsh, even though claimant's counsel appeared to be attempting to limit Ms. Snitkin's direct contact with claimant. *See* JX 10 at 756-757.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment through February 21, 2012, is vacated, and the case remanded for further findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge