BRB No. 04-0742

JOHN T. WHEELER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/21/2005
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson and Matthew D. Meadows (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

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

Mark A. Reinhalter and Richard A. Seid (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-2674) of Administrative Law Judge Fletcher E. Campbell, 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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 senior engineering analyst by employer when, on February 17, 2000, he slipped and fell to the ground outside of Building 6 at the shipyard. As a result of this incident, claimant experienced pain from his left hip through his foot, and he was unable to perform his usual employment duties for some period thereafter. Claimant had a pre-existing work-related back condition, for which he had undergone five surgical procedures and was receiving permanent partial disability benefits from the Special Fund. Tr. at 9, 20.

In his Decision and Order, the administrative law judge determined that claimant was not excluded from the Act's coverage as a clerical employee under Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). Specifically, the administrative law judge found that claimant's duties as a senior engineering analyst were not performed exclusively in an office, and that those duties involved the exercise of judgment and expertise beyond that exhibited by clerical workers. Next, the administrative law judge awarded claimant permanent total disability compensation from the date of his work-related injury, February 17, 2000, through January 28, 2004, the date on which claimant was released to return to work with restrictions by Dr. Garner. 33 U.S.C. §908(a). Lastly, the administrative law judge denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that claimant is not excluded from coverage under the Act as a clerical or data processing worker. Alternatively, employer avers that the administrative law judge erred in his determination of the nature and extent of claimant's disability, as well as his finding that employer is not entitled to relief pursuant to Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of the administrative law judge's determination that claimant is an employee covered under the Act, and that employer is not entitled to relief pursuant to Section 8(f).

Clerical Worker Exclusion

Employer first contends that the administrative law judge erred in failing to find that claimant was a clerical or data processing worker excluded from coverage pursuant to Section 2(3)(A) of the Act. For a claim to be covered by the Act, a claimant must

establish that his injury occurred in an area covered by Section 3(a) and that his work constitutes "maritime employment" under Section 2(3).[1] 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Generally, a claimant satisfies the status requirement as a maritime employee if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of his time" in indisputably maritime activities. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. Section 2(3) provides, in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--
>
> (A) individuals employed *exclusively to perform office clerical*, secretarial, security, or *data processing work* [if such persons are covered by State workers' compensation laws];

33 U.S.C. §902(3) (emphasis added); *see also* 20 C.F.R. §701.301(a)(12)(iii)(A). The legislative history of Section 2(3)(A) supports the conclusion that this provision is intended to exclude specifically enumerated employees who perform clerical or similar services in an office setting, *see Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005); *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003), and that the term "exclusively" modifies all four classifications of work. 1984 U.S.C.C.A.N. 2734, 2736; *see also Stone*, 30 BRBS 209.

In support of its contention of error in the instant case, employer posits that claimant's employment duties as a senior engineering analyst constitute office clerical and data entry work. Specifically, employer asserts that claimant's position as a senior engineering analyst is a desk job which requires that claimant utilize a computer in an office setting in order to catalogue parts to be used by employer. Accordingly, employer argues that these employment duties are essentially administrative in nature, much like

[1] The administrative law judge found, and employer does not challenge, that claimant meets the situs requirement contained in Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 5-6.

those of a clerical or data processing employee, and that as those duties are performed in an administrative area, claimant is excluded from coverage under the Act. We reject this contention. Initially, we decline employer's invitation to expand the four specifically enumerated job classifications excluded from coverage under Section 2(3)(A) to include all employees who perform work in an office setting. The plain language of Section 2(3)(A), which is tracked in its implementing regulation, unequivocally sets forth four specific job classifications that are excluded from coverage under the Act; we therefore reject employer's assertion that this subsection of the Act should be expanded to include all work performed within an administrative setting. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)(plain language of the statute controls).

In this case, substantial evidence supports the administrative law judge's finding that claimant's employment duties as a senior engineering analyst do not involve exclusively clerical or data processing work. In his testimony, claimant described his employment duties as including reviewing specifications for parts to be used in the construction or repair of vessels within employer's shipyard in order to ensure their accuracy and suitability, verifying that the proper parts had been requisitioned, and ensuring that those parts had been received and used as requested. Tr. at 89. Claimant testified that, in performing the aforementioned duties, he would utilize various database systems, computer programs, or, if necessary, visual inspection of the parts and materials to determine whether they were appropriate. *Id.* at 87-90, 100-103. Claimant stated that if the requisitioned parts were incorrect for the purpose for which they were designated, he would determine what parts were in fact required and he would then meet with employer's engineers to recommend the appropriate part.[2] *Id.* at 89-90.

Ms. Adams, claimant's co-worker who also is employed as a senior engineering analyst by employer, similarly testified that the duties entailed by that job involved taking technical information from design engineering and design drawings, or military and ship specifications, to create, monitor and modify a catalog item or part to support ship construction. Tr. at 36, 40. She described those duties as involving reading and interpreting stacks of paperwork, drawings and data and thereafter determining what should go on a part so that the correct material would support the ultimate construction.[3]

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[2] By way of example, claimant testified that regular cable may have been requested to accompany a bolt, but that a job's specifications might require a specific type of cable, for example, high-fire retardant, coaxial, or fiberoptic. In such a case, claimant would notify employer's engineers that the wrong cable had been requested. Tr. at 90.

[3] As an example of the duties of a senior engineering analyst, Ms. Adams described a situation involving a specification for a bolt two inches in length by one-half inch in diameter. Ms. Adams testified that, as an engineering analyst, she or claimant would be relied upon to determine the bolt's specific strength, color, and type of thread

Id. at 64. Ms. Adams additionally testified that, in processing and analyzing this information so that the correct part was procured, senior engineering analysts were required to work with and make suggestions to employer's engineers and designers. *Id.* at 38-39, 42-43, 65-67. Although the majority of analysts' work was performed in Building 6, the duties required of that position entailed occasional visits to employer's shops, warehouses, or vessels. *Id.* at 36, 43-44, 51, 57, 60. Ms. Adams also testified that since senior engineering analysts were paid more than employer's office assistants, employer's supervisors instructed analysts not to perform clerical work but, rather, that such work should be undertaken by the office assistants.[4] *Id.* at 48-49; *see also* Tr. at 93.

The testimony of claimant and Ms. Adams regarding the employment duties required of employer's senior engineering analysts was corroborated by Mr. Bell, claimant's former supervisor, who testified that although the majority of claimant's time was spent at his workstation, claimant would on occasion undertake visual inspections of parts. Tr. at 113, 117-118. Mr. Bell also testified that while senior engineering analysts would make recommendations to engineers, the ultimate decision on whether to use a part rested with the engineer. *Id.* at 118, 122. Lastly, although senior engineering analysts generated the paperwork necessary to obtain the parts when such replacements were required, Mr. Bell acknowledged that employer employed an administrative staff to perform the office duties of filing, typing correspondence, sending facsimiles, and copying, and that senior engineering analyst work was billed as production work, while clerical work was billed as overhead. *Id.* at 124.

In discussing the evidence regarding claimant's duties, the administrative law judge rationally found that as a senior engineering analyst, claimant did not work exclusively in an office setting but was required on occasion to leave his work station in order to either meet with employer's engineers or inspect parts. He also found that the job required the exercise of judgment and expertise of a kind that goes beyond the simple record making or record storage typical of clerical work. Contrary to employer's description of claimant's work as essentially one of "cataloguing parts," the testimony of claimant and Ms. Adams supports the administrative law judge's description of the duties of senior engineering analysts as involving, *inter alia*, reviewing plan specifications in order to determine the part best suited for the task described in those specifications, inspecting parts, verifying that parts requisitioned were correct for the desired purposes, and consulting with employer's engineers when necessary.[5] Moreover, the administrative

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required to perform the job described. Tr. at 66-67.

[4] In this regard, claimant submitted into evidence pages procured during a search of employer's company internet web site on which claimant's position is listed under the category of "production" rather than that of "clerical." *See* CXs 1, 2.

[5] The instant case is thus distinguished from the Board's decisions in *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998)(production clerk held excluded under

law judge rationally determined that claimant's use of a computer did not convert his position as a senior engineering analyst into clerical work. *See Morganti*, 37 BRBS 126. The administrative law judge's findings are also supported by the uncontroverted testimony of claimant, Ms. Adams, and Mr. Bell that employer employed other employees to perform exclusively traditional office clerical functions such as typing and filing. Accordingly, as substantial evidence supports the administrative law judge's determination that as a senior engineering analyst, claimant was not employed exclusively to perform office clerical work, we affirm the administrative law judge's conclusion that claimant is not excluded from coverage as a clerical or data processing worker under Section 2(3)(A) of the Act.[6]

Section 2(3)(A)), and *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996)(joiner helper whose sporadic trips outside of an office were only incidental to her office work held excluded by Section 2(3)(A)). Unlike the claimants in *Ladd* and *Stone*, claimant in the case at bar engaged, when necessary, in the decision-making process in conjunction with employer's engineers. Although it is undisputed that the engineers were ultimately responsible for the final decision regarding what part was appropriate for the use intended, the record establishes that employer's senior engineering analysts rendered their expertise when required and their duties were not clerical in nature.

[6] Employer's assertion to the contrary, our affirmance of the administrative law judge's determination that claimant in the instant case is not excluded from coverage under the Act by Section 2(3)(A) will not open a floodgate of claims by covered employees who work within the confines of employer's shipyard; such employees, as set forth by employer in its brief, must still establish that they were engaged in work which is integral to constructing or repairing vessels in order to satisfy the "status" requirement for coverage under the Act. *See* 33 U.S.C. §902(3).

Nature and Extent of Claimant's Disability

Employer next contends that the administrative law judge's finding that claimant's condition became permanent as of the date of his work-related injury, February 17, 2000, is not supported by substantial evidence; rather, employer alleges that claimant's slip and fall resulted in a temporary aggravation of a pre-existing impairment. *See* Emp. br. at 2, 16, 18. A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). It is well established that an employee may be considered to be permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Moreover, an employee has reached maximum medical improvement, and thus permanency, when he is no longer undergoing treatment with a view toward improving his condition. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Accordingly, the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

In an April 7, 2000 report, Dr. Garner wrote that claimant's condition was improving following physical therapy. EX 12 at 21. In his decision, the administrative law judge relied upon Dr. Garner's subsequent May 1, 2000, report, which stated that claimant was "permanently disabled from any type of work," EX 12 at 22, in summarily concluding that claimant was permanently disabled as of the date of his injury, February 7, 2000. Decision and Order at 7-8. Although Dr. Garner stated that his May 2000 report represented his opinion at that time, when he was specifically asked at his deposition in March 2004 if he felt that claimant had sustained a permanent disability as a result of his February 7, 2000, slip and fall, Dr. Garner responded that he could not answer the question of whether claimant's fall caused a permanent injury. *See* ALJX 2 at 18-21, 26, 32. As the administrative law judge did not address this testimony, his finding that claimant sustained a permanent disability cannot be affirmed. Accordingly, we vacate the administrative law judge's finding that claimant's condition became permanent as of the date of his slip and fall, February 7, 2000, and we remand the case for the administrative law judge to fully discuss the relevant evidence regarding this issue in accordance with the applicable legal standards. *See Louisiana Ins. Guaranty Ass'n*, 40 F.3d 122, 29 BRBS 22(CRT); *Watson*, 400 F.2d 649; *Trask*, 17 BRBS 56.

Employer next assigns error to the administrative law judge's finding that claimant remained totally disabled due to his work-related condition through January 28, 2004. Specifically, employer contends that claimant was capable of returning to his usual

employment duties with employer as of April 7, 2000, or, alternatively, September 12, 2001, the date on which a Functional Capacity Evaluation (FCE) indicated that claimant could return to light physical work with restrictions.

In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002). After his May 2000 report that claimant was unable to work, EX 12 at 22, Dr. Garner saw claimant in January 2001 and found that claimant remained totally and permanently disabled from any employment.[7] EX 12 at 23. The record contains no evidence that claimant received medical treatment subsequent to January 2001. However, an FCE performed by a physical therapist in September 2001 described claimant's ability to work with restrictions in the light physical demand category. EX 13. Employer contends that claimant was able to return to his pre-injury work at least by the date of the FCE, September 12, 2001.

In his decision, however, the administrative law judge summarily determined that claimant remained totally disabled until January 28, 2004, the date Dr. Garner wrote a letter explicitly stating that claimant could return to work with restrictions. In that letter, Dr. Garner stated that his opinion was based upon his review of his medical records regarding claimant, the FCE performed in September 2001, employer's surveillance videotape of claimant taken in May 2003, and the fact that four years had elapsed since the date of claimant's work-incident. EX 17.

We agree with employer that the administrative law judge's determination that claimant remained totally disabled until January 28, 2004, cannot be affirmed since, in addressing this issue, the administrative law judge did not consider the totality of the evidence documenting claimant's post-injury restrictions. Specifically, in considering this issue, the administrative law judge summarily concluded that, without the opinion of Dr. Garner or another qualified physician to the contrary, he could not conclude that the evidence establishes that claimant could have worked at any job prior to January 28, 2004, the date of Dr. Garner's letter. The administrative law judge did not, however, discuss Dr. Garner's deposition testimony or the September 12, 2001, FCE report upon

[7] Thus, contrary to employer's argument, there is evidence that claimant was unable to work after April 2000.

which employer relies in support of its contention of error.[8] In this regard, in his January 2004 letter, Dr. Garner accepted the restrictions stated by the physical therapist in the September 2001 FCE, which found claimant to be capable of light physical demand work within specified restrictions. EX 13. Moreover, Dr. Garner testified on deposition that at the time of his January 28, 2004, letter he had not seen claimant for three years, that he was uncertain whether claimant's fall caused a permanent injury when compared to claimant's prior condition, and that although he could not definitively place a recovery date on claimant's injury "2001 in September was probably as good a date as any." ALJX 2 at 19-20; *see* EX 17. Therefore, as the administrative law judge did not discuss the totality of the record evidence on this issue, we vacate his determination that claimant remained totally disabled until January 28, 2004; on remand, the administrative law judge must reconsider this issue in light of Dr. Garner's report and deposition, as well as the September 2001 FCE.

Section 8(f) - Contribution

Lastly, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury; specifically, a claimant's total disability must have been caused by both his work injury and his pre-existing condition. 33 U.S.C. §908(f); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

Prior to the 2000 slip and fall that is the subject of this claim, claimant sustained prior work-related back injuries; he was treated by Dr. Garner starting in 1979 and underwent five back surgeries. It is uncontested that claimant is receiving permanent partial disability benefits and that employer was granted relief from the Special Fund on this disability. Tr. at 9, 20; Dir. Brief at 2, n.1. The Director conceded that the pre-existing permanent partial disability and manifest elements were met, but contended the contribution element was not established. Relevant to this issue, Dr. Garner opined that claimant's February 17, 2000, fall aggravated his pre-existing condition. *See* ALJX 2. In

[8] Although performed by a physical therapist, the FCE is relevant evidence to be weighed in addressing claimant's work capacities.

September 2003, Dr. Apostoles reviewed claimant's medical records, set forth a summary of those records, and concluded that claimant's disability is not caused by the subject work injury alone. Rather, Dr. Apostoles stated that claimant's disability

> is materially contributed to, and made materially and substantially worse by his pre-existing chronic back disability. Mr. Wheeler's 2000 injury was rather minor and was treated conservatively. If he had had a normal back, it may have resolved with no permanent disability. Even after multiple surgeries, Mr. Wheeler performed light duty and sedentary work assignments.

EX 8 at 4. The administrative law judge found that this opinion, which he described as a conclusory statement by an in-house physician, was not properly reasoned and documented and was thus insufficient to establish contribution. Decision and Order at 8.

Employer avers that it is entitled to Section 8(f) relief on any permanent disability resulting from the 2000 injury as it was previously awarded Section 8(f) relief for the permanent partial disability from the prior injuries, claimant's 2000 injury was minor in comparison, and it submitted sufficient evidence that claimant was not totally disabled by the last injury alone. The Director asserts that, as the evidence, when properly considered, supports a finding that claimant's disability following the 2000 injury was only temporary, employer is not entitled to Section 8(f) relief on that injury.

We vacate the administrative law judge's denial of Section 8(f) relief. We have previously remanded this case for reconsideration of whether claimant's disability after the 2000 injury was permanent. Assuming claimant has a permanent disability of more than 104 weeks,[9] then the administrative law judge must reconsider employer's entitlement to Section 8(f) relief. Although the administrative law judge found Dr. Apostoles's opinion to be conclusory, that physician's report sets out at length the medical reports upon which he relied in rendering his opinion. Moreover, the administrative law judge did not address the opinions of Drs. Garner and Apostoles in the context of the other evidence relevant to the contribution issue, specifically claimant's medical restrictions following the injuries which he sustained prior to the subject injury. Thus, on remand, should the administrative law judge once again determine that claimant's condition resulted in a permanent disability post-injury, he must reconsider the

[9] While employer correctly states that where a permanent partial disability for which claimant is being compensated under Section 8(f) becomes a permanent total disability, employer is liable for only one period of 104 weeks of compensation, claimant's February 17, 2000, work incident constituted a new injury, *see Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990), and employer cites no evidence supportive of a finding that claimant's February 2000 aggravation resolved and his pre-existing permanent partial disability became total in extent. *See* Er's br. at 18-20.

contribution element in light of the entirety of the relevant evidence of record. *See generally Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order is vacated with regard to his findings regarding the nature and extent of claimant's disability and the denial of Section 8(f) relief, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge