



BRB No. 19-0245 BLA

CARL DEAN HAMILTON (DECEASED) )

Claimant-Respondent )

v. )

HOPE MINING COMPANY )

and )

ARMCO STEEL COMPANY, c/o )  
EMPLOYER SERVICE CORPORATION )

DATE ISSUED: 04/15/2020

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 Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2016-BLA-05169) of Administrative Judge Clement J. Kennington issued on a subsequent claim filed on March 27, 2015,<sup>2</sup> pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with up to twelve years of coal mine employment. Because claimant established fewer than fifteen years of coal mine employment, he was unable to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>3</sup> 30 U.S.C. §921(c)(4) (2012). Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found claimant failed to prove legal pneumoconiosis but established clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203. Based on the new medical evidence, he also found claimant established total disability and therefore a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). However, the administrative law judge found claimant did not prove his total disability was due to clinical pneumoconiosis and therefore denied benefits. 20 C.F.R. §718.204(c).

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<sup>1</sup> On October 8, 2019, claimant's counsel filed a Motion to Substitute Party informing the Board that claimant died on July 20, 2019, and that his widow, Barbara Hamilton, would be pursuing his claim. Although the Board updated its records to reflect that claimant is deceased, the Board denied the Motion to Substitute Party. *Hamilton v. Hope Mining Co.*, BRB No. 19-0245 BLA (Dec. 10, 2019) (Order) (upub.).

<sup>2</sup> Claimant filed three prior claims each of which were denied. Director's Exhibit 1-3. The district director denied the last claim on January 13, 2004, for failure to establish any element of entitlement. Director's Exhibit 3.

<sup>3</sup> Under Section 411(c)(4), there is a rebuttable presumption claimant was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

On appeal, claimant contends the administrative law judge erred in finding he established less than fifteen years of coal mine employment and therefore could not invoke the Section 411(c)(4) presumption. Claimant also contends the administrative law judge erred in finding legal pneumoconiosis not established and total disability due to both legal and clinical pneumoconiosis not established. Additionally, claimant argues the Director, Office of Workers' Compensation Programs (the Director), did not provide him with a complete pulmonary evaluation as the Act requires. Employer/carrier (employer) responds in support of the denial of benefits. The Director has filed a limited response asserting she satisfied her obligation to provide claimant with a complete pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Denying Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</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).

### **Invocation of the Section 411(c)(4) Presumption Length of Coal Mine Employment**

Claimant bears the burden of proof to establish the number of years worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge noted claimant alleged fifteen years of coal mine employment in each of his claims. Decision and Order at 10. The administrative law judge considered claimant's state workers' compensation award,<sup>5</sup> his federal black lung benefits

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<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

<sup>5</sup> Claimant received a state award for black lung benefits on November 23, 1981, from the Kentucky Workers' Compensation Board. Director's Exhibit 9 at 1. The Kentucky state board made the following findings: "3. Plaintiff, 36 years of age, with 15 years of exposure, became totally and permanently disabled on or about January 9, 1980, as a result of the occupational disease of pneumoconiosis and/or silicosis, arising out of and in the course of his employment as a coal miner." *Id.* at 3.

applications, his reported work histories, his wife's testimony,<sup>6</sup> and his Social Security Administration (SSA) earnings records. *Id.* at 10-12. He found the SSA earnings records the most reliable evidence of claimant's coal mine employment and noted they showed intermittent earnings from 1963 to 1980, except for the six consecutive years claimant worked for employer. *Id.* at 13. He also noted claimant did "not assert the [SSA] earnings records are inaccurate or that he was paid in cash for his coal mine work." *Id.*

The administrative law judge found there were at least two methods to calculate the length of claimant's coal mine employment. He noted that the administrative law judge in the prior claim found claimant established twelve years of coal mine employment because claimant's SSA earnings records showed "48 qualifying quarters," defined as calendar quarters in which claimant had earnings from coal mine operators in excess of fifty dollars. Decision and Order at 15; Director's Exhibit 2 at 10-11; *see Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Alternatively, the administrative law judge applied the regulatory formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 15. He divided claimant's yearly earnings, as reflected in his SSA earnings records, by the average daily earnings for coal miners for each year as set forth in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual* and found claimant established 9.24 years of coal mine employment. *Id.*; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019). Based on either method, the administrative law judge found claimant was unable to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Id.*

Claimant asserts the administrative law judge erred in not relying on the self-reported work history on various CM-911a forms he submitted (alleging coal mine employment from 1963 until January 1, 1980) and the Kentucky Workers' Compensation Board's finding he proved at least fifteen years of coal mine employment in his state claim. Claimant's Brief at 15-17. We disagree. The administrative law judge reviewed each of the employment history forms (CM-911a) claimant completed in his prior claims, as well as in his current claim, and permissibly found them to be "inconsistent and confusing."<sup>7</sup>

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<sup>6</sup> Mrs. Hamilton testified her husband worked as a coal miner from 1968 to 1980. August 8, 2017 Hearing Transcript 9-10.

<sup>7</sup> The administrative law judge found the coal mine operators listed on the employment history form claimant submitted with the current claim were also listed in the Social Security Administration (SSA) earnings records but the dates of employment claimant listed did not exactly match the quarters in which he actually earned wages. Decision and Order at 12. The administrative law judge permissibly found the SSA records more credible because they are "government records that were compiled contemporaneously with [c]laimant's employment, whereas the Form CM-911a is a

Decision and Order at 12; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, the Board has long held that determinations by state occupational pneumoconiosis boards and other agencies, while relevant, are not binding. *See Schegan v. Waste Mgmt. & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Clark*, 12 BLR at 1-152; *Miles v. Cent. Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985). The administrative law judge permissibly assigned little weight to the Kentucky Workers' Compensation Board's summary determination of fifteen years because he was unable to discern how the Kentucky state board reached its finding. *See Schegan*, 18 BLR at 1-46; Decision and Order at 15.

Claimant points to no specific error in the administrative law judge's calculations, nor does he explain why the administrative law judge's methods were unreasonable. *See Muncy*, 25 BLR at 1-27. The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore affirm the administrative law judge's finding that claimant was unable to establish fifteen years of coal mine employment and did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

### **Part 718 Entitlement**

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge determined claimant established clinical pneumoconiosis by a preponderance of the x-ray evidence. 20 C.F.R. §718.202(a)(1); Decision and Order at 46. He found the medical opinion evidence established neither

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retrospective listing that required [claimant] to recall events 50+ years in the past.” *Id.*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

clinical nor legal pneumoconiosis.<sup>8</sup> 20 C.F.R. §718.202(a)(4); Decision and Order at 46. Giving greater weight to the x-ray evidence over the medical opinion evidence, the administrative law judge found claimant established clinical pneumoconiosis. 20 C.F.R. §718.204(a); Decision and Order at 42. He further determined claimant established total disability but not disability causation because claimant failed to prove clinical pneumoconiosis substantially contributed to his disabling respiratory impairment. 20 C.F.R. §718.204(c); Decision and Order at 48.

Claimant's failure to prove legal pneumoconiosis precluded a finding that his total disability was due to legal pneumoconiosis. Thus, we initially address claimant's arguments on legal pneumoconiosis as they are relevant to disability causation.

### **Legal Pneumoconiosis**

To establish legal pneumoconiosis, claimant must demonstrate that he had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Drs. Forehand and Sikder diagnosed legal pneumoconiosis, while Drs. Broudy and Rosenberg did not.<sup>9</sup> The administrative law judge found "there is no well-reasoned or well-documented opinion" to establish legal pneumoconiosis, although he gave some weight to Dr. Rosenberg's opinion. Decision and Order at 44.

Citing *Martin v. Ligon Preparation Co.*, 400 F.3d 302 (6th Cir. 2005), claimant contends the administrative law judge erred in finding he did not establish legal pneumoconiosis because the United States Court of Appeals for the Sixth Circuit, within

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<sup>8</sup> We affirm, as unchallenged, the administrative law judge's finding that claimant did not establish clinical pneumoconiosis based on the medical opinions. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 46.

<sup>9</sup> Dr. Forehand examined claimant for the Department of Labor and diagnosed clinical coal workers' pneumoconiosis by x-ray. He opined the pulmonary function study results showed a mixed restrictive and obstructive lung impairment due to cigarette smoking and coal mine dust exposure. Director's Exhibit 14. Dr. Sikder, claimant's treating physician, diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal dust and cigarette smoking. Claimant's Exhibit 9. Dr. Broudy diagnosed an obstructive lung disease caused by cigarette smoking, heart disease, and renal failure. Employer's Exhibits 2, 6. Dr. Rosenberg diagnosed COPD due to smoking and attributed claimant's respiratory impairment to smoking, heart disease, associated surgeries, and general weakness. Employer's Exhibits 1, 5.

whose jurisdiction this case arises, has stated that an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis. Claimant's Brief at 18. Claimant maintains that employer's physicians did not rebut the presumption he has legal pneumoconiosis. *Id.* at 19. Claimant's arguments are without merit.

Claimant must prove legal pneumoconiosis based on reasoned medical opinion evidence. 20 C.F.R. §718.202(a)(4). While claimant established clinical pneumoconiosis arising out of coal mine employment, he was also diagnosed with chronic obstructive pulmonary disease (COPD), obstructive respiratory impairment, and a mixed obstructive and restrictive respiratory impairment. Director's Exhibit 14; Claimant's Exhibit 9; Employer's Exhibits 1, 2, 5, 6. Contrary to claimant's contention, the administrative law judge's determination that claimant had clinical pneumoconiosis arising out of coal mine employment did not create a presumption or reciprocity that his COPD or respiratory impairments satisfied the definition of legal pneumoconiosis. *See White v. Director, OWCP*, 6 BLR 1-368 (1983) (claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence). Rather, claimant had to affirmatively establish by a reasoned medical opinion that his COPD or respiratory impairments were significantly related to or substantially aggravated by coal mine dust exposure in order to prove legal pneumoconiosis. 20 C.F.R. §§718.201(b), 718.202(a)(4).

In weighing the conflicting medical opinions on legal pneumoconiosis, the administrative law judge permissibly gave Dr. Forehand's opinion less weight regarding the etiology of claimant's respiratory impairment because he reviewed less evidence than Dr. Rosenberg.<sup>10</sup> *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order at 41. He also noted that, unlike employer's physicians, Dr. Forehand did not address "all of the factors that may have played a role in [c]laimant's respiratory impairment."<sup>11</sup> Decision and Order at 41. As the trier-of-fact, the

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<sup>10</sup> The administrative law judge noted Dr. Forehand relied solely on his examination findings and objective tests; Dr. Rosenberg reviewed Dr. Forehand's report, his own examination findings, and some of the evidence from claimant's prior claims; and Dr. Broudy reviewed Dr. Forehand's report, some of Dr. Sikder's treatment records, and some of the evidence in claimant's prior claims. Decision and Order at 40.

<sup>11</sup> We reject claimant's contention that the administrative law judge gave greater consideration to claimant's heart condition than the physicians did. Claimant's Brief at 24. As the administrative law judge noted, Dr. Broudy opined claimant's coronary artery disease and renal failure could have affected his respiratory function. Decision and Order at 26; Employer's Exhibit 6 at 14-16. Dr. Broudy stated congestive heart failure can help to explain claimant's impairment because such condition "can make the lungs stiffer by having the fluid in the lungs and reduce the ability to ventilate." Decision and Order at 26,

administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations the physicians give for their diagnoses, and assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002). Thus, we affirm the administrative law judge's finding Dr. Forehand's opinion is not adequately reasoned to establish claimant's mixed obstructive and restrictive respiratory impairment constitutes legal pneumoconiosis. Decision and Order at 41.

We further reject claimant's argument that the administrative law judge erred in not giving determinative weight to Dr. Sikder's opinion because he was claimant's treating physician. Claimant's Brief at 21. An administrative law judge is not required to accord greater weight to a treating physician's opinion if it is not adequately reasoned. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (opinions of treating physicians get the deference they deserve based on their power to persuade). The administrative law judge noted Dr. Sikder treated claimant for approximately five years, from 2012 to 2017. Decision and Order at 42. He noted her "opinion is limited in that it consists of responses to a form, rather than a narrative explaining the basis for her conclusions." *Id.* He also found it "unclear whether Dr. Sikder considered claimant "to have smoked at a level of one pack per day or one-half pack per day as her treatment notes cite both amounts."<sup>12</sup> *Id.*; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (effect of an inaccurate smoking history on the credibility of a medical opinion is a determination for the administrative law judge to make); Claimant's Exhibits 12-14. Because the administrative law judge, within his discretion, permissibly found Dr. Sikder's opinion conclusory and inadequately reasoned, we affirm his decision to give it little probative weight. *See Williams*, 338 F.3d at 513; *Rowe*, 710 F.2d at 255; Decision and Order at 42.

Lastly, we reject claimant's assertion the administrative law judge erred in crediting Dr. Rosenberg's opinion on legal pneumoconiosis because he did not diagnose clinical pneumoconiosis. Claimant's Brief at 22. Because the definition of legal pneumoconiosis

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*quoting* Employer's Exhibit 6 at 17-20. Dr. Rosenberg stated that claimant's respiratory impairment was caused by a combination of factors, including smoking, general weakness, his previous heart surgery, pleural fluid accumulation, and heart failure. Employer's Exhibits 1, 5.

<sup>12</sup> We affirm as unchallenged the administrative law judge's finding that claimant smoked one pack of cigarettes a day for approximately fifty years. *See Skrack, supra*; Decision and Order at 6.

at 20 C.F.R. §718.201(b) encompasses a broader spectrum of lung diseases than only clinical pneumoconiosis (including any chronic lung disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment”), Dr. Rosenberg’s opinion is not necessarily unreasoned on the etiology of claimant’s COPD and it was within the administrative law judge’s discretion to determine the credibility of his conclusion. *See Ogle*, 737 F.3d at 1072-73; *Napier*, 301 F.3d at 713-714; *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (en banc). Claimant does not identify any specific error in the administrative law judge’s reasons for finding Dr. Rosenberg’s opinion better-reasoned than the other physicians’ opinions. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21.

Claimant’s arguments on legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) (The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge.). Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that claimant did not establish legal pneumoconiosis based on the medical opinions.

### **Disability Causation**

To establish his total disability was due to pneumoconiosis, claimant must prove pneumoconiosis is a “substantially contributing cause” of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599-601 (6th Cir. 2014). Because claimant established clinical pneumoconiosis but not legal pneumoconiosis, the relevant inquiry before the administrative law judge was whether claimant’s clinical pneumoconiosis was a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

Dr. Forehand opined claimant was totally disabled due to a mixed obstructive and restrictive lung disease caused by smoking and coal dust exposure. Director’s Exhibit 14. Similarly, Dr. Sikder check-marked a box indicating claimant was totally disabled by a moderate respiratory impairment due to smoking and coal mine dust exposure. Claimant’s Exhibit 9. Contrary to claimant’s arguments, the administrative law judge permissibly discredited Drs. Forehand’s and Sikder’s opinions on the cause of claimant’s disabling respiratory impairment for the same reasons he found their opinions unreasoned in determining whether claimant had legal pneumoconiosis. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; Decision and Order at 47. Moreover, as neither physician specifically addressed or opined claimant’s clinical pneumoconiosis is a substantially contributing cause of his total disability, claimant cannot satisfy his burden of proof. *See Groves*, 761 F.3d at 599-601. We therefore affirm the administrative law judge’s finding

claimant failed to establish disability causation. 20 C.F.R. §718.204(c). Decision and Order at 48.

### **Complete Pulmonary Evaluation**

Claimant asserts that because Dr. Forehand examined him as part of the Department of Labor examination, but the administrative law judge found that Dr. Forehand did not address the impact of claimant's heart disease on his impairment, the Director did not fulfill her obligation to provide him with a complete pulmonary evaluation. Claimant's Brief at 27-28. The Director and employer respond, asserting Dr. Forehand's report fulfilled the Director's obligation to provide claimant with a complete pulmonary evaluation. Director's Brief at 1-2; Employer's Brief 17-18. We agree.

Pursuant to Section 413(b) of the Act, "[e]ach miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The Director is not required, however, to provide an evaluation sufficient to meet claimant's burden of proof. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 642 (6th Cir. 2009). Because Dr. Forehand performed all of the required tests and provided an opinion addressing each element of entitlement, we conclude claimant received a complete pulmonary evaluation sufficient to satisfy the requirements of the Act. *Id.*

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge