

BRB No. 13-0545 BLA

KENNETH A. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PBS COALS INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE	)	DATE ISSUED: 08/26/2014
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-6166) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim on April 19, 2010.<sup>1</sup> Director's Exhibit 3.

In his Decision and Order, issued August 5, 2013, the administrative law judge first found that claimant established the existence of clinical pneumoconiosis based on the new x-ray evidence, pursuant to 20 C.F.R. §718.202(a)(1). Next, applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>2</sup> the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment,<sup>3</sup> and found that new medical opinion evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4).

The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Specifically, the administrative law judge found that, because the

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<sup>1</sup> Claimant's prior claim, filed on April 21, 2004, was finally denied by the district director on November 12, 2004, for failure to establish any element of entitlement. Director's Exhibit 1.

<sup>2</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). Qualifying coal mine employment is employment in underground coal mines, or in conditions "substantially similar to conditions in an underground mine." *Id.* The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

<sup>3</sup> Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

x-ray evidence established the existence of clinical pneumoconiosis, employer did not disprove the existence of pneumoconiosis. Further, the administrative law judge found that employer failed to establish that claimant's total disability did not arise, in whole or in part, out of dust exposure in claimant's coal mine employment, because employer did not rule out coal dust as a cause of claimant's totally disabling impairment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred by failing to consider a negative x-ray interpretation when he determined that the x-ray evidence established the existence of clinical pneumoconiosis. Employer further contends that the administrative law judge erred in finding that employer failed to rule out coal mine employment as a cause of claimant's total disability, and therefore erred in finding that employer failed to rebut the Section 411(c)(4) presumption.<sup>4</sup> Claimant has filed a response, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, arguing that the administrative law judge erred in finding that employer failed to rebut the presumption because it could not prove that coal dust exposure played no part in claimant's totally disabling impairment.

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. 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).

Upon claimant's invocation of the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Under the implementing regulation, employer may rebut the presumption by establishing that claimant has neither clinical nor legal pneumoconiosis,<sup>5</sup> 20 C.F.R.

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had at least fifteen years of qualifying coal mine employment, that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), that he invoked the Section 411(c)(4) presumption, and that he established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-18.

<sup>5</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic

§718.305(d)(1)(i), or by establishing that “no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.” 20 C.F.R. §718.305(d)(1)(ii).

With respect to the administrative law judge’s finding that it failed to disprove the existence of pneumoconiosis, employer argues that the administrative law judge erred in not considering Dr. Wolfe’s July 6, 2011, negative interpretation of an x-ray taken on July 19, 2010. Employer’s Brief at 5; Employer’s Exhibit 1. The administrative law judge admitted that x-ray interpretation into the record, but did not consider it when he weighed the x-ray evidence because employer “failed to submit the prerequisite Black Lung Evidence Summary Form which designates the use of such a reading in the adjudicatory scheme. . . .”<sup>6</sup> Decision and Order at 8; Hearing Transcript at 10-12. Employer contends that this was error, because the administrative law judge admitted the interpretation at the hearing. Employer’s Brief at 5. This argument lacks merit, because the administrative law judge considered another negative interpretation by Dr. Wolfe, dated August 2, 2010, of the same x-ray. Decision and Order at 8-9; Employer’s Exhibit 1; Director’s Exhibit 12. Employer has not shown that the administrative law judge abused his discretion by considering only the August 2, 2010, interpretation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Furthermore, because employer cannot show it was prejudiced by the administrative law judge’s failure to consider the July 6, 2011, x-ray interpretation, any error was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Employer raises no other arguments regarding the administrative law judge’s determination that the x-ray evidence established the existence of clinical pneumoconiosis. Therefore, we affirm the administrative law judge’s finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 9. Because we have affirmed the administrative law judge’s finding of clinical pneumoconiosis, we also affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of

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reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1). “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>6</sup> The administrative law judge noted at the hearing that he did not have employer’s evidence summary form. Hearing Transcript at 7. Employer’s counsel said he would submit it subsequently, *id.*, but there is no indication in the record that he did.

pneumoconiosis. See 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 18.

As for the second method of rebuttal, employer and the Director both argue that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). To attempt to rebut the presumption using this method, employer relied on the opinions of Drs. Kaplan and Fino. Dr. Kaplan opined that claimant is not totally disabled, but that coal mine dust exposure contributed approximately ten percent to claimant's chronic obstructive pulmonary disease, emphysema, and chronic bronchitis. Employer's Exhibit 3 at 16-20. Dr. Fino concluded that claimant is totally disabled, and opined that "smoking is the clinically significant factor in his impairment and that coal mine dust . . . may be contributing a numerical reduction in FEV1, [but] it's not clinically significant." Employer's Exhibit 2 at 22. Although he believed that claimant would be as disabled if he had never performed coal mine employment, Dr. Fino agreed that coal mine dust exposure made "some contribution" to claimant's disabling pulmonary impairment. *Id.* at 22, 26.

The administrative law judge concluded that the opinions of Drs. Kaplan and Fino were insufficient to rebut the presumption:

Unfortunately for Employer, however, 20 C.F.R. §718.305(d) provides that for the [Section 411(c)(4) presumption] to be rebutted, the cause of total pulmonary/respiratory disability cannot be due . . . in whole *or in part* to coal dust exposure from the miner's coal mine employment. As neither physician can state that coal dust exposure is not responsible for at least a part of Claimant's pulmonary/respiratory impairment, the presumption . . . is not rebutted.

Decision and Order at 19 (citation omitted) (emphasis in original).

Employer contends that the administrative law judge "misinterpreted" 20 C.F.R. §718.305(d) by requiring employer to prove that claimant's disabling respiratory impairment is not due, even in part, to coal mine dust exposure. Employer's Brief at 4-5. Employer argues that the administrative law judge's interpretation of the regulation "would basically preclude any type of defense" because "[n]o physician is going to indicate that coal mine dust employment [sic] bore no relationship to a respiratory impairment, even in cases of a significant smoking history." *Id.* at 5. Therefore, employer contends that the administrative law judge should have found that the opinions

of Drs. Kaplan and Fino established that claimant's total disability did not arise in whole or in part from coal mine dust exposure. *Id.* This argument lacks merit.

In laying out employer's burden to rebut the Section 411(c)(4) presumption by establishing that the cause of claimant's total disability "did not arise in whole or in part out of dust exposure in [claimant's] coal mine employment," the administrative law judge cited the previous version of the relevant regulation. *See* 20 C.F.R. §718.305(d) (2013); Decision and Order at 18. The Department of Labor (DOL) subsequently issued revised regulations that took effect on October 25, 2013, *see* 78 Fed. Reg. 59,102 (Sept. 25, 2013), and set forth employer's burden on rebuttal to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). As shown below, however, the rebuttal standard under the revised regulation is effectively the same as it was before.

When it proposed 20 C.F.R. §718.305(d)(1)(ii), the DOL announced that the revised regulation would require an employer to prove that "there is no connection between the miner's totally disabling respiratory or pulmonary impairment and his or her dust exposure in coal mine employment." 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012). The DOL made clear that this standard was consistent with the "rule-out" standard developed through case law interpreting both the rebuttal standard under the previous version of 20 C.F.R. §718.305(d), and the standard under 20 C.F.R. §727.203(b)(3) for rebutting the interim presumption at 20 C.F.R. §727.203(a). *Id.*; *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Kline v. Director, OWCP*, 877 F.2d 1175, 1179, 12 BLR 2-346, 2-354 (3d Cir. 1989); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 78, 6 BLR 2-15, 2-21-22 (3d Cir. 1984); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Defore v. Ala. By-Prods. Corp.*, 12 BLR 1-27 (1988). The DOL noted that, under the "rule-out" standard, an employer "must rule out the miner's coal mine employment as a contributing cause of the totally disabling respiratory or pulmonary impairment." 77 Fed. Reg. at 19,463. The DOL concluded that "[t]here is no reason to depart from this consistent and longstanding precedent when interpreting the standard for rebuttal under amended Section 411(c)(4)." *Id.* The DOL maintained that position when it announced the final rule adopting 20 C.F.R. §718.305(d)(1)(ii), explaining that the "no part" standard of the revised regulation was not a departure, but was "intended to simplify and clarify the 'in whole or in part['] standard" under the prior version of 20 C.F.R. §718.305(d). 78 Fed. Reg. 59,102, 59,107 (Sept. 25, 2013).

This history demonstrates that the "no part" standard of 20 C.F.R. §718.305(d)(1)(ii) is, in substance, no different than the "rule-out" or the "in whole or in part" standard of 20 C.F.R. §718.305(d) (2013) applied by the administrative law judge. *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1336-37 (10th Cir. 2014) (holding that, to rebut via §718.305(d)(1)(ii), employer must rule out any relationship between

disability and coal mine employment); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that employer's burden on rebuttal is to rule out coal mine employment as a cause of disability, or show that pneumoconiosis played no part in causing disability). Employer is correct that rebuttal via 20 C.F.R. §718.305(d)(1)(ii) is difficult, but as the DOL explained, that is the choice Congress made in reviving the Section 411(c)(4) presumption. *See* 78 Fed. Reg. at 59,106-07 (observing that Congress singled out miners who can invoke the presumption for special treatment, and that "[a]dopting a rigorous rebuttal standard" when employer cannot disprove the existence of pneumoconiosis is consistent with Congress's approach); *see also Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789, 795, 25 BLR 2-285, 2-295 (7th Cir. 2013) (noting that "the 15-year presumption is difficult to rebut"). We therefore reject employer's contention that the administrative law judge misinterpreted the regulation when he required employer to prove that claimant's disabling impairment was not due, even in part, to his coal mine dust exposure.

Unlike employer, the Director recognizes that to rebut the Section 411(c)(4) presumption via 20 C.F.R. §718.305(d)(1)(ii), employer must "rule out" pneumoconiosis as a cause of claimant's total disability by demonstrating that "no part" of claimant's disabling impairment is caused by pneumoconiosis. Director's Brief at 3. The Director, however, argues that the administrative law judge erred by failing to determine "whether Dr. Fino and Dr. Kaplan totally excluded pneumoconiosis as a cause of [claimant's] impairment." *Id.* at 3-4. Because Drs. Kaplan and Fino both concluded that claimant had neither clinical nor legal pneumoconiosis, the Director contends that their opinions "are at least facially sufficient to establish rebuttal under revised section 718.305(d)(1)(ii)." *Id.* at 4; Employer's Exhibits 2, 3. The Director recognizes that Drs. Kaplan and Fino "do not wholly rule out dust exposure as a cause of [claimant's] lung disease," but argues that their opinions can still be used as evidence to rebut the presumption of legal pneumoconiosis, which requires employer to show only that claimant's lung disease is not "significantly related to, or substantially aggravated by, dust exposure in the miner's coal mine employment." Director's Brief at 4 (quoting 20 C.F.R. §718.201(a)(2), (b)). Therefore, the Director urges the Board to remand the case to the administrative law judge for further consideration.<sup>7</sup>

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<sup>7</sup> The Director also argues that, on remand, the administrative law judge should discount the opinions of Drs. Kaplan and Fino as poorly reasoned, because: 1) neither doctor diagnosed clinical pneumoconiosis, contrary to the administrative law judge's finding; 2) Dr. Kaplan opined that claimant is not totally disabled, contrary to the administrative law judge's finding; 3) Dr. Kaplan failed to explain why the ten percent contribution of coal dust exposure to claimant's impairment was not significant; 4) Dr. Fino erroneously relied on x-ray evidence showing no significant coal dust accumulation in claimant's lungs to eliminate legal pneumoconiosis as a cause of claimant's

We disagree with the Director's position, as we understand it.<sup>8</sup> Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). As noted above, employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge essentially focused on the words "no part" in the regulation, and determined that the opinions of Drs. Kaplan and Fino did not meet the "no part" or "rule-out" standard, because neither physician could say that coal mine dust exposure was not responsible for at least some portion of claimant's totally disabling impairment. Decision and Order at 19. In his brief on appeal, however, the Director seems to focus on the word "pneumoconiosis." Because Drs. Kaplan and Fino do not believe that the miner has clinical or legal pneumoconiosis, the Director contends that their opinions, if credited, would establish that no part of the claimant's impairment was caused by pneumoconiosis.

The problem with the Director's argument on appeal, in our view, is that it makes 20 C.F.R. §718.305(d)(1)(i) superfluous. *See B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 248-49, 25 BLR 2-13, 2-37 (3d Cir. 2011) (holding that "when interpreting a statute, we strive to give effect to every word which Congress used and to avoid any interpretation which renders an element of the statute superfluous"). Section 718.305(d)(1)(i) allows an employer to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, but there would be no need for it if 20 C.F.R. §718.305(d)(1)(ii) required the administrative law judge to reconsider whether the evidence disproved the existence of pneumoconiosis.

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impairment, when the regulations permit a finding of pneumoconiosis notwithstanding negative x-rays; and 5) Dr. Fino rejected pneumoconiosis as a cause of claimant's impairment in part because claimant's pulmonary function studies showed some reversibility after bronchodilation, but Dr. Fino failed to account for the studies' fixed impairment component. Director's Brief at 4. Therefore, the Director contends that, on remand, the administrative law judge should again find that employer has failed to rebut the Section 411(c)(4) presumption. *Id.*

<sup>8</sup> Although the Director is correct that the standard for disproving the existence of legal pneumoconiosis is different than the standard for "wholly" ruling out coal dust exposure as a cause of claimant's impairment under 20 C.F.R. §718.305(d)(1)(ii), Director's Brief at 4, we do not understand why the Director believes that difference is relevant here, where the issue is whether employer can rebut the Section 411(c)(4) presumption via 20 C.F.R. §718.305(d)(1)(ii), by proving that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis.



The Director's argument is also at odds with the DOL's explanation of the recent regulatory revisions. The DOL stated in the preamble to the revisions that if a claimant establishes total disability and invokes the Section 411(c)(4) presumption, the remaining three elements of entitlement — "disease" (i.e., pneumoconiosis), "disease causation," and "disability causation: that the miner's pneumoconiosis contributes to that disability" — are presumed. 78 Fed. Reg. at 59,106. The DOL explained that an employer may rebut the "disease" and "disease causation" elements via 20 C.F.R. §718.305(d)(1)(i), by proving that the miner has neither clinical nor legal pneumoconiosis, and that an employer may rebut the "disability causation" element via 20 C.F.R. §718.305(d)(1)(ii), by proving that no part of the miner's disability was caused by pneumoconiosis.<sup>9</sup> *Id.* The DOL's explanation of how 20 C.F.R. §718.305(d) is applied suggests that the existence of pneumoconiosis is not an issue the administrative law judge must address at 20 C.F.R. §718.305(d)(1)(ii).

Therefore, we reject the Director's argument that the administrative law judge must reconsider the opinions of Drs. Kaplan and Fino because they concluded that claimant does not have pneumoconiosis and thus, if credited, would establish that no part of claimant's totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Having found that employer failed to disprove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge applied the proper standard for rebuttal under 20 C.F.R. §718.305(d)(1)(ii), and reasonably determined that neither Dr. Kaplan nor Dr. Fino ruled out coal mine dust as a cause of claimant's disabling impairment.<sup>10</sup> Decision and Order at 18-19. Therefore, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption via 20 C.F.R. §718.305(d)(1)(ii). *See Goodin*, 743 F.3d at 1346; *Ogle*, 737 F.3d at 1071; Decision and Order at 19.

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<sup>9</sup> The Director cites the preamble's discussion of the elements of entitlement that are presumed upon invocation of the Section 411(c)(4), but does not cite the subsequent discussion of those elements which may be rebutted via 20 C.F.R. §718.305(d)(1)(i) and (ii). Director's Brief at 3; *see* 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013).

<sup>10</sup> After reviewing the deposition testimony of Drs. Kaplan and Fino, the administrative law judge concluded that "[b]oth physicians, therefore, concede that they cannot rule out coal dust as a cause of at least part of Claimant's pulmonary/respiratory impairment — which Dr. Fino stated was disabling and Dr. Kaplan stated was not." Decision and Order at 19. Employer does not dispute the administrative law judge's characterization of the physicians' opinions.

Because claimant invoked the Section 411(c)(4) presumption that his total disability is due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge