**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0384 BLA
and 18-0385 BLA

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| NELLIE FLETCHER<br>(Widow of and o/b/o BRUCE FLETCHER) | ) | |
| v. | ) | |
| COLLINS CREEK SERVICES, INCORPORATED | ) | DATE ISSUED: 08/28/2019 |
| and | ) | |
| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | |
| 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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul Jones and Denise Hall Scarberry (Jones and Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05666, 2016-BLA-05667) of Administrative Law Judge Peter B. Silvain, Jr., pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on May 11, 2012, and a survivor's claim filed on January 9, 2014.[1]

Based on his finding that the miner had 13.656 years of coal mine employment, the administrative law judge concluded claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). He also found no evidence of complicated pneumoconiosis, precluding invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether, in the miner's claim, the claimant could establish entitlement without the presumptions, the administrative law judge found claimant established the miner was totally disabled and, thus, established a change in an applicable condition of entitlement. He further found claimant established the miner had legal pneumoconiosis and that the total disability was due to legal pneumoconiosis. He therefore awarded benefits. Based

[1] The miner's initial claim, filed on March 25, 2005, was denied by the district director on January 10, 2006, because he did not establish any element of entitlement. Director's Exhibit 1. The miner did not take any further actions before filing the current claim. Director's Exhibit 3. The miner died on November 29, 2013 while his current claim was pending before the administrative law judge; claimant, his widow, is pursuing his subsequent claim and independently filed a survivor's claim. Director's Exhibits 47, 51-52. The miner's and survivor's claims were consolidated and referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 64-66. Both claims have the same exhibits.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. 921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

on the award in the miner's claim, he found claimant is automatically entitled to benefits in her survivor's claim pursuant to Section 422(*l*) of the Act.[3] 30 U.S.C. §932(*l*) (2012).

On appeal, employer asserts the administrative law judge erred in finding claimant established the existence of legal pneumoconiosis and that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Based on the errors alleged in the miner's claim, employer argues the award of benefits in the survivor's claim should also be vacated. Claimant responds in support of the awards.[4] The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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

**The Miner's Claim**

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R.

[3] Under Section 422(*l*) of the Act, the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[4] Claimant filed cross-appeals in both claims, which were dismissed at her request on September 18, 2018. *Fletcher v. Collins Creek Services, Inc.*, BRB Nos. 18-0384 BLA, 18-0384 BLA-A, 18-0385 BLA, 18-0385 BLA-A (Sept. 18, 2018) (unpub.).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence, and evidence as a whole, established the existence of a totally disabling respiratory impairment and thus demonstrated a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Because the miner's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer contends the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis.[7] *See* 20 C.F.R. §718.202(a)(4); Employer's Brief at 6-10 (unpaginated). In order to establish that the miner had legal pneumoconiosis, claimant must prove that he had "a chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge considered the opinions of Drs. Rasmussen, Cohen, Dahhan, and Rosenberg.[8] Director's Exhibits 14, 16; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 7-9. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, due to coal mine dust exposure and smoking. Director's Exhibit 14 at 48. He noted the miner also had "possible occupational asthma," due to welding fumes and smoking, which contributed minimally to his impairment. *Id*. Dr. Cohen similarly diagnosed legal pneumoconiosis in the form of COPD due to coal mine dust exposure and smoking. Claimant's Exhibit 1 at 6-10, 15-17, 19, 25-26. In contrast, Drs. Dahhan and Rosenberg opined that the miner did not have legal pneumoconiosis, but had an obstructive impairment due to causes other than coal mine dust. Director's Exhibit 16; Employer's Exhibits 1; 3; 7; 8 at 4-5; 9 at 1-2, 6.

The administrative law judge credited Drs. Rasmussen and Cohen over Drs. Dahhan and Rosenberg because he found their opinions better reasoned and more consistent with scientific studies found credible by the Department of Labor (DOL) in the preamble to the revised regulations. The administrative law judge therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

[7] The administrative law judge found claimant failed to establish clinical pneumoconiosis through any of the available methods at 20 C.F.R. §§718.107, 718.202(a)(1)-(4). Decision and Order at 46-54.

[8] The administrative law judge also considered Dr. Hussain's 2005 opinion, diagnosing a mild respiratory impairment due entirely to smoking. Director's Exhibit 1. We affirm, as unchallenged, the administrative law judge's finding that Dr. Hussain's opinion is not entitled to "significant probative weight" because it is conclusory and he did not have the benefit of considering the new evidence. Decision and Order at 49; *Skrack*, 6 BLR at 1-711.

We reject employer's assertion that the administrative law judge erred in crediting Dr. Rasmussen's opinion because he did not consider that, as a coal truck driver and shop mechanic, the miner had limited exposure to coal mine dust. Employer's Brief at 7-8. The administrative law judge permissibly found Dr. Rasmussen relied on a "substantially accurate" understanding of the miner's coal mine employment history.[9] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 19, 49. Further, contrary to employer's argument, Dr. Rasmussen considered that the miner's x-rays are negative for clinical pneumoconiosis and explained why that did not alter his diagnosis of legal pneumoconiosis.[10] Employer's Brief at 8; *see* Director's Exhibit 14 at 110-111.

Nor is there merit to employer's contention that Dr. Rasmussen's opinion is not sufficient to establish legal pneumoconiosis because he was unable to determine the "ultimate causation" of the miner's respiratory impairment. Employer's Brief at 6-8. Dr. Rasmussen unequivocally stated that coal mine dust exposure caused, in part, the miner's COPD/emphysema.[11] Decision and Order at 23; Director's Exhibit 14 at 53, 93. While

[9] Dr. Rasmussen initially relied on a twenty-two year coal mine employment history but subsequently revised his opinion based on a thirteen year confirmed history, of which two years were spent underground and the remainder were spent "primarily [as] a mechanic" but also as a truck driver "on a strip job." Decision and Order at 19; Director's Exhibit 14 at 1, 45, 51. Dr. Rasmussen acknowledged the miner's surface coal mine employment probably involved less dust exposure than underground employment but opined it was still sufficient to cause pneumoconiosis. Director's Exhibit 14 at 81-83.

[10] Moreover, as employer concedes, a physician can credibly diagnose pneumoconiosis "notwithstanding a negative x-ray" and legal pneumoconiosis, in the form of a clinically significant obstructive impairment, can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

[11] Dr. Rasmussen stated:

> Likely all of these factors [including cigarette smoke, coal mine dust, and welding fumes and smoke] play a role. Certainly his coal mine dust and cigarette smoke are important. It is unlikely his asthma would significantly contribute to his impairment in oxygen transfer during exercise . . . . While all three are risk factors, both his smoking and his mine dust are major factors including his coal mine dust exposure.

Dr. Rasmussen acknowledged that if the miner had only thirteen years of coal mine dust exposure it was likely less significant than the other factors contributing to his disease, such as cigarette smoking and asthma, he concluded it was still a substantial contributing factor. Decision and Order at 23; Director's Exhibit 14 at 93.

In crediting Dr. Rasmussen's opinion, the administrative law judge permissibly found it well-reasoned and well-documented and consistent with scientific studies found credible by the DOL, concluding that the effects of coal mine dust exposure and cigarette smoking can be additive. *See* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 35-36. Moreover, contrary to employer's contention, the administrative law judge properly found Dr. Rasmussen's attribution of the miner's obstructive impairment to the combination of coal mine dust exposure, smoking, and asthma, and his specific opinion that coal mine dust was a "material" and "substantial" contributing factor, is sufficient to support a finding that claimant has legal pneumoconiosis.[12] *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486-87 (6th Cir. 2012); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 50; Director's Exhibit 14 at 82-83, 93.

We next reject employer's assertion that the administrative law judge erred in relying on Dr. Cohen's diagnosis of legal pneumoconiosis because he did not examine the

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Director's Exhibit 14 at 53. Dr. Rasmussen also stated he was not able to rule out the miner's recurrent bouts of pneumonia as a contributing cause of his respiratory impairment. *Id.* at 80-81.

[12] Contrary to employer's contention, Dr. Rasmussen did not "simply state[] that he cannot rule out coal dust exposure." Employer's Brief at 6 (unpaginated). Rather, Dr. Rasmussen consistently explained the miner's smoking and coal dust exposure were substantial contributing causes of his respiratory impairment. Director's Exhibit 14. Nor did Dr. Rasmussen "automatically conclude[] that the miner was exposed to coal dust because the miner was exposed to welding fumes." Employer's Brief at 7. Dr. Rasmussen correctly recognized that coal mine dust is "a mixture of all kinds" of dusts in the mines, *see Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990) (coal mine dust encompasses "the various dusts around a coal mine") and posited that welding fumes could be considered a type of coal mine dust, because they are composed of "fine particles and that would be a dust particle." Director's Exhibit 14 at 78. Even if that were not the case, however, Dr. Rasmussen emphasized that welding fumes were just one component of the miner's coal mine dust exposure and attributed only his "possible occupational asthma" to that exposure, not this COPD/emphysema. Director's Exhibit 14 at 48, 82-84.

miner and failed to adequately consider the miner's employment or medical history in attributing his impairment to coal mine dust exposure. Employer's Brief at 6-9. There is no requirement that a non-examining physician's opinion be given less weight than an examining physician's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Collins v. J&L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999). Rather, the determination of whether a medical opinion is adequately reasoned and documented is reserved for the administrative law judge as the factfinder. *Banks*, 690 F.3d at 489; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge acknowledged that Dr. Cohen did not examine the miner, but based his opinion on a review of the medical record, including the opinions of Drs. Rosenberg, Vuskovich, Dahhan, Rasmussen, and Hussain, together with the miner's treatment records documenting his recurrent pneumonia and narcotic use.[13] Decision and Order at 32-33, 49; Employer's Brief at 7-8; Claimant's Exhibit 1 at 46-50. He also found Dr. Cohen relied on a "substantially accurate" understanding of the miner's smoking and coal mine employment histories in concluding that both smoking and coal dust exposure substantially contributed to the miner's COPD/emphysema.[14] Decision and Order at 32-33, 51. Further, the administrative law judge permissibly found his opinion well-reasoned and well-documented and consistent with the scientific studies found credible by the DOL regarding the effects of cigarette smoking and coal mine dust in the development of obstructive lung disease. *See* 65 Fed. Reg. at 79,940-43; *Adams*, 694 F.3d at 801-02; Decision and Order at 51.

The determination of whether a medical opinion is documented and reasoned is for the administrative law judge. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir. 1985). The administrative law judge considered the reasoning of Drs. Rasmussen and Cohen in light of the objective evidence of record, and explained why he credited their

[13] Contrary to employer's argument, Dr. Cohen discussed the miner's history of pneumonia and narcotic pain medication use at length and explained why neither was a likely cause of his respiratory impairment. Employer's Brief at 8; Claimant's Exhibit 1 at 44-51.

[14] Dr. Cohen considered a thirty-four pack-year smoking history and a thirteen year coal mine employment history. He noted that two of the miner's thirteen years of coal mine employment were spent underground with the remainder spent on the surface and with part of that time spent in the shop as a mechanic. Claimant's Exhibit 1 at 6, 29, 37-39. He acknowledged the miner's surface coal mine employment probably involved less dust exposure than underground employment but explained it was still significant and sufficient to cause pneumoconiosis. Claimant's Exhibit 1 at 38-39.

conclusions that the miner's disabling COPD/emphysema was due, in significant part, to coal mine dust exposure. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Rasmussen and Cohen are sufficiently reasoned to support a finding of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Employer also asserts the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Dahhan and Rosenberg that the miner did not have legal pneumoconiosis. Employer's Brief at 9-10. We disagree. In concluding that coal mine dust was not a contributing factor to the miner's respiratory impairment, Dr. Dahhan relied in part on the partial reversibility of the miner's impairment after the administration of a bronchodilator.[15] Decision and Order at 51-52; Employer's Exhibit 3. As the administrative law judge noted, however, Dr. Dahhan did not consider the most recent pulmonary function study, which had totally disabling values even after bronchodilators. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 52. Further, the administrative law judge permissibly determined Dr. Dahhan did not adequately explain why the miner's response to bronchodilators necessarily eliminated coal mine dust as a substantially aggravating factor of his impairment. *See Barrett*, 478 F.3d at 356; *Banks*, 690 F.3d at 489; Decision and Order at 52. The administrative law judge also was not persuaded by Dr. Dahhan's reliance on statistics and generalizations about the average loss of FEV1 due to coal mine dust versus smoking to exclude coal mine dust as a significant contributing cause of this particular miner's impairment. *See Rowe*, 710 F.2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 51-52.

The administrative law judge further noted that Dr. Rosenberg relied, in part, on his view that the miner's reduced FEV1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 52-54; Employer's Exhibits 1, 9. Consistent with

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[15] Dr. Dahhan stated:

> Coal dust exposure can cause an obstructive ventilatory impairment, however, it does not demonstrate such response to the administration of bronchodilators. This finding indicates that the impairment is not fixed and is an indication that it is not cause by obstructive ventilatory defect resulting from inhalation of coal dust rather from hyperactive airway disease.

Employer's Exhibit 3.

the law of the United States Court of Appeals for the Sixth Circuit, he permissibly discredited this reasoning because it conflicts with the medical science accepted by the DOL that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. *See* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order 52-54.

Because the administrative law judge permissibly credited the opinions of Drs. Rasmussen and Cohen and rejected the opinions of Drs. Dahhan and Rosenberg, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). We also affirm, as supported by substantial evidence, his finding that all of the evidence of record, when weighed together, established that the miner had legal pneumoconiosis at the time of his death. 20 C.F.R. §718.202(a); *see Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-217-18 (6th Cir. 2012); Decision and Order at 54.

**Total Disability Causation**

To establish that the miner was totally disabled due to pneumoconiosis, claimant must prove that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of a miner's total disability if it had "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014); *Banks*, 690 F.3d at 489.

The administrative law judge found the opinions of Drs. Rasmussen and Cohen meet this standard, as they found legal pneumoconiosis "significantly contributed to and substantially aggravated" the miner's totally disabling respiratory impairment. Decision and Order at 56-57; Director's Exhibit 14; Claimant's Exhibit 1.

Employer contends that the administrative law judge erred in his disability causation finding for the same reasons it cited as error in his finding of legal pneumoconiosis. Employer's Brief at 13.[16] Contrary to employer's contention, the administrative law judge

[16] Employer's argument in this regard consists of a single sentence, "For the reasons mentioned above, the [administrative law judge] also erred in concluding that the [miner's]

rationally discredited the opinions of Drs. Dahhan and Rosenberg because they did not diagnose legal pneumoconiosis.[17] *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 55-56. Further, for the reasons noted above, we do not find employer's contentions of error as to the crediting of the opinions of Drs. Rasmussen and Cohen persuasive. Consequently, we affirm the administrative law judge's finding at 20 C.F.R. 718.204(c). We therefore affirm the administrative law judge's award of benefits in the miner's claim.

**The Survivor's Claim**

Having awarded benefits in the miner's claim, the administrative law judge found claimant established each element necessary to demonstrate her entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 57-58. Because we have affirmed the award of benefits in the miner's claim and employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that claimant is entitled to survivor's benefits. 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 57-58.

totally disabling impairment was substantially caused by coal worker's pneumoconiosis." Employer's Brief at 10-11.

[17] The administrative law judge further found neither Dr. Rosenberg nor Dr. Dahhan offered an opinion on disability causation independent of his belief that the miner did not have legal pneumoconiosis. Decision and Order at 56.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge