BRB No. 06-0891 BLA

P.H. (Widow of R.H.)	)	
Claimant-Respondent	)	
	)	DATE ISSUED: 07/24/2007
v.	)	
CONSOLIDATION COAL COMPANY	)	
Employer-Petitioner	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (06-BLA-5087) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on

a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed this claim on February 5, 2002.[1] Director's Exhibit 3. The administrative law judge initially credited the miner with 36.75 years of coal mine employment. The administrative law judge found that claimant established that she was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis by establishing that he had complicated pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b). Thus, the administrative law judge concluded that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 in Administrative Law Judge Jeffrey Tureck's earlier finding that the miner did not have complicated pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the exclusion of the interpretations of a June 28, 2000 x-ray by Drs. Scatarige and Scott. Employer argues further that the administrative law judge erred in shifting the burden to employer to disprove the existence of complicated pneumoconiosis, and in failing to require claimant to prove at 20 C.F.R. §718.304(a) that any large opacities seen on the miner's x-rays arose out of coal dust exposure. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that claimant need not prove that large opacities on the miner's x-rays are due to coal dust exposure, because the miner's complicated pneumoconiosis is presumed to have arisen out of his coal mine employment pursuant to Section 718.203(b), since he was credited with more than ten years of coal mine employment. Employer has filed a reply brief reiterating its contentions.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.414-Evidentiary Limitations

[1] The miner died on January 8, 2002. Director's Exhibit 10. He was awarded disability benefits during his lifetime based on a claim he filed on March 16, 1983. Director's Exhibit 1. Claimant, the widow of the deceased miner, filed her survivor's claim on February 5, 2002. Director's Exhibit 3. Administrative Law Judge Jeffrey Tureck denied benefits on January 18, 2005. Director's Exhibit 56. Subsequently, claimant requested modification on March 23, 2005. Director's Exhibit 57.

Employer first argues that the interpretations by Drs. Scatarige and Scott of the x-ray dated June 28, 2000 were improperly excluded. Specifically, employer argues that the evidentiary limitations at 20 C.F.R. §725.414 are arbitrary and capricious. Employer's Brief at 2 n.2. Contrary to employer's argument, the evidentiary limitations have been upheld by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Board, as neither arbitrary nor capricious. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-1-59 (2004)(*en banc*).

Employer next asserts that the x-ray interpretations by Drs. Scatarige and Scott should have been admitted under the good cause exception at 20 C.F.R. §725.456(b)(1). At the June 24, 2004 hearing, Judge Tureck excluded the interpretations by Drs. Scatarige and Scott of the June 28, 2000 x-ray, based upon employer's concession that they exceeded the evidentiary limitations. Director's Exhibit 55 at 19-20. No hearing was held before Judge Chapman on modification, based on the parties' agreement to have the case decided on the record. However, in its closing brief, employer argued that good cause justified the admission of these two interpretations because they were relevant and probative. Employer's Closing Argument at 2 n.3. The administrative law judge did not address employer's argument or make a good cause finding as to these two x-ray interpretations. Because, as discussed below, we must remand this case to the administrative law judge for further analysis of the medical evidence, and the good cause issue is committed to her discretion, we instruct the administrative law judge to determine whether employer has demonstrated that good cause, pursuant to Section 725.456(b)(1), exists for the admission of the interpretations by Drs. Scatarige and Scott of the June 28, 2000 x-ray.[2] *Cf. Dempsey*, 23 BLR at 1-62 (affirming the administrative law judge's finding that a claim of relevancy was insufficient to establish good cause).

Section 718.304-Complicated Pneumoconiosis

Employer additionally argues that the administrative law judge applied an incorrect legal standard in analyzing the x-ray, CT scan, and medical opinion evidence by shifting the burden to employer to prove that the large opacities seen on the miner's x-rays by some doctors are inconsistent with a diagnosis of complicated pneumoconiosis,

[2] Employer raised an additional good cause argument in its closing argument before Administrative Law Judge Linda S. Chapman, as to the admission of six interpretations of a CT scan dated December 30, 2001. Employer's Closing Argument at 13. Judge Chapman found good cause established for the admission of the six CT scan interpretations. *See* Decision and Order at 5 n.2.

contrary to the holding in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000). Employer's argument has merit.

Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.[3] The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc); Truitt v. North Am. Coal Corp.,* 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.,* 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

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[3] Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:

> (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

In *Scarbro*, the Fourth Circuit held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The court further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. [Citation omitted]. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. *See* Decision and Order at 5-7. The administrative law judge prefaced her consideration of the evidence by stating her interpretation of *Scarbro*:

> I view the Court's decision in *Scarbro* to require that, when the Claimant presents evidence satisfying §718.304 and the Employer also presents relevant x-ray evidence or evidence relevant to prongs (B) or (C), I must determine if the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray.[footnote omitted]. This evidence loses force *only if* evidence is presented that affirmatively shows either that the opacities are not there, or that they are not what they seem to be. If the evidence fails to meet this burden, the Claimant is entitled to the benefit of the §718.304 presumption.

Decision and Order at 7.

Turning to the record evidence, the administrative law judge began her analysis by considering whether claimant had established a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray. Reviewing the x-ray evidence under Prong A, she relied on the two interpretations by Drs. Bassali and Pathak, diagnosing category A and B opacities, respectively, to reach her conclusion that claimant suffered from a condition of the lung of such severity that it would produce

opacities measuring greater than one centimeter on x-ray.[4] Decision and Order at 7-8. The administrative law judge also reviewed the CT scan evidence under Prong C, and determined that the CT scan evidence corroborated the x-ray evidence in showing that the miner had a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray.[5] The administrative law judge stated, "With respect to the CT scan evidence, all six physicians who interpreted [the miner's] December 30, 2001 CT scan identified masses or other conglomerate processes in his lungs." Decision and Order at 8. In evaluating the x-ray and CT scan evidence, the administrative law judge stated that:

> I have evaluated the x-ray and CT scan evidence and find that the Claimant has satisfied her burden of proving that [the miner] suffered from the statutorily defined condition referred to as complicated pneumoconiosis. Thus, the Claimant has established that [the miner] had a condition that shows up on x-ray as a Category A or B opacity. The Employer has failed to provide persuasive x-ray or CT scan evidence affirmatively showing that the opacities [are] not there, or that they are due to a process other than pneumoconiosis.

Decision and Order at 9.

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[4] Dr. Bassali interpreted the September 23, 1983 x-ray as positive for complicated pneumoconiosis, category A, and Dr. Pathak read the January 29, 1991 x-ray as positive for complicated pneumoconiosis, category B. Director's Exhibit 21. The September 23, 2003 and January 29, 1991, x-rays were unavailable for employer to have reread by its experts because the x-rays were destroyed. Director's Exhibit 55 at 13-16; Employer's Closing Argument at 12. Employer did not object to the admission of these two x-ray readings, but argued that the unavailability of the miner's x-rays established good cause to admit CT scans proffered by employer. The administrative law judge found good cause for the admission of six interpretations of the CT scan performed on December 30, 2001, offered by employer, because the September 23, 1983 and January 29, 1991 x-rays were unavailable. Decision and Order at 5 n.2.

[5] Dr. Olson read the December 30, 2001 CT scan for complicated pneumoconiosis. Director's Exhibit 12. Drs. Hippensteel, Scatarige, and Scott attributed the 4-5 centimeter masses that they saw on the December 30, 2001 CT scan to tuberculosis, granulomatous disease, or cancer. Director's Exhibit 47. Dr. Wheeler attributed the masses that he saw on the December 30, 2001 CT scan to healed tuberculosis or histoplasmosis. *Id*. Dr. Repsher did not identify the cause of the masses seen on the December 30, 2001 CT scan. *Id*.

Under Prong C, the administrative law judge discussed and weighed the opinions of Drs. Bush, Caffrey, Hippensteel, and Repsher.[6] With regard to these medical opinions, the administrative law judge stated that:

> I find that the reports of Dr. Hippensteel, Dr. Repsher, Dr. Bush, and Dr. Caffrey are not affirmative evidence that the opacities seen on x-ray are not there or are not what they seem to be. Rather, these physicians speculate and provide conjecture as to what caused the masses in [the miner's] lungs. They do not satisfy the Employer's burden of providing affirmative evidence that the opacities are not there or are not what they seem to be.

Decision and Order at 11.[7]

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[6] Dr. Hippensteel opined in his March 5, 2004 report and June 7, 2004 deposition that the opacities were related to old granulomatous disease. Director's Exhibit 47. Dr. Repsher stated in his March 30, 2004 and June 14, 2004 reports, and at his May 28, 2004 deposition that the miner's chest x-ray and CT scan abnormalities were typical of healed granulomatous disease, either tuberculosis or histoplasmosis. Director's Exhibit 47. Dr. Bush, in his reports dated August 24, 2003 and June 10, 2004 found some degree of pneumoconiosis, but did not diagnose complicated pneumoconiosis. Director's Exhibits 30, 47. Dr. Caffrey, in his reports dated September 22, 2003 and June 11, 2004, found x-ray evidence of simple and complicated pneumoconiosis. Director's Exhibits 31, 47.

[7] After discussing and weighing the opinions of Drs. Bush, Caffrey, Hippensteel, and Repsher, the administrative law judge discussed readings of thirty-four digital x-rays performed on the miner from June 2000 to January 2002. Decision and Order at 11. Claimant's treating doctors, Drs. Ahmed, Aycoth, Chambers, Duremdes, Groten, Olson, Patel, Pathak, and Rahman, read the various digital x-rays as positive for complicated pneumoconiosis. Director's Exhibit 12. Dr. Wheeler reviewed eight of the digital x-ray interpretations, and identified the masses as due to conglomerate tuberculosis more likely than cancer, inflammatory disease, and findings compatible with conglomerate granulomatous disease, tuberculcosis, or histoplasmosis. Director's Exhibit 47. Dr. Scott interpreted the December 12, 2001 digital x-ray as showing inflammatory disease versus cancer. *Id*. Dr. Scatarige interpreted this same x-ray as showing bilateral perihilar masses or infiltrates with lateral pleural reaction. *Id*. The administrative law judge found that the interpretations by Drs. Scatarige, Scott, and Wheeler were not affirmative evidence that the large opacities noted on the digital x-rays are not there, or that they are due to a process other than pneumoconiosis. Decision and Order at 11.

Finally, the administrative law judge indicated that after further reflection on the evidence initially submitted to Judge Tureck, and having exercised her broad discretion to correct mistakes of fact, she found that claimant established by a preponderance of the persuasive medical evidence that the miner suffered from the statutory condition referred to as complicated pneumoconiosis. Decision and Order at 11. Furthermore, the administrative law judge provided the following summation:

> I find that the Claimant is entitled to the irrebuttable presumption that her husband's death was due to pneumoconiosis provided by Section 718.304. The Fourth Circuit's language in *Scarbro* is straightforward. The Court has made it clear that under the statute, a claimant who meets the congressionally defined condition is entitled to the irrebuttable presumption that death was due to pneumoconiosis. The Claimant is not required to establish that [the miner] had the medical condition known as complicated pneumoconiosis. Rather, once the Claimant shows, by a preponderance of the x-ray, autopsy or biopsy, or equivalent objective medical evidence that [the miner] had a condition that shows up on x-ray as a large opacity due to coal dust exposure, she is entitled to benefits unless the *Employer affirmatively shows, by persuasive objective medical evidence*, either that the opacities are not there, or that they are due to a process other than pneumoconiosis. I find that the Claimant has met these requirements, and that the *Employer has not met the burden imposed on it by the Court in Scarbro to affirmatively establish that the opacities are due to a process other than pneumoconiosis*. Thus, the Claimant has established that [the miner] had pneumoconiosis that arose out of his coal mine employment, and that his death was due to pneumoconiosis.[footnote omitted]. The Claimant is therefore entitled to benefits under the Act.

Decision and Order at 11-12 (emphasis added).

We hold that the administrative law judge improperly shifted the burden of proof to employer. Contrary to the administrative law judge's finding, employer does not have the burden to "affirmatively establish" that a large opacity was caused by something other than coal dust exposure. Decision and Order at 12. The particular language cited by the administrative law judge in *Scarbro* was used by the court only in reference to situations where the x-ray evidence "vividly displays opacities exceeding one centimeter." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Moreover, in a recent unpublished case issued by the Fourth Circuit, the court specifically rejected the analysis employed by the administrative law judge, stating that: "*Scarbro* holds only that once the claimant presents legally sufficient evidence (here, x-ray evidence of large opacities classified as category A, B, or C in the ILO system, [citation omitted], he is likely to win unless there is contrary evidence . . . in the record." *Clinchfield Coal Co. v. Lambert*, No.

06-1154 (4th Cir. Nov. 17, 2006)(unpub.), slip op. at 6.[8] Consequently, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304, and remand the case for reconsideration. On remand, the administrative law judge must discuss and weigh all evidence in determining whether claimant established complicated pneumoconiosis at Section 718.304. The administrative law judge must first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33.

In addition, the administrative law judge's inaccurate application of *Scarbro* affected her weighing of the medical opinion evidence that is not premised directly upon x-ray or CT scan interpretations under 20 C.F.R. §718.304(c). Employer argues that the administrative law judge erred by rejecting the opinions of Drs. Bush, Caffrey, Hippensteel, and Repsher, because they diagnosed the miner with granulomatous disease or tuberculosis, and there is no evidence to support these diagnoses. On remand, the administrative law judge should take into account that the miner's medical records date back only to the year 2000, along with Dr. Repsher's deposition testimony that the miner could have had tuberculosis without knowing it.[9] Director's Exhibit 47 at 17-18. Further, although claimant need not establish that the miner had an impairment in order

[8] We recognize that unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). While we agree with its reasoning, our holding is not based exclusively upon the Fourth Circuit's decision in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.). Rather, our holding is based upon a review of this administrative law judge's individual statements in this case. These statements indicate that she improperly shifted the burden of proof to employer in her consideration of the evidence under Section 718.304.

[9] Dr. Caffrey noted Dr. Rasmussen's observation that there were no available medical records of the miner before October 13, 2000. Director's Exhibit 47 (Dr. Caffrey's June 11, 2004 report at 2); Director's Exhibit 50 at 3. Moreover, Dr. Repsher testified by deposition that, "The vast majority of people who have tuberculosis never know that they had it." Director's Exhibit 47 (Dr. Repsher's May 28, 2004 deposition at 17-18).

to establish complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge on remand should address the totality of the rationale offered by Drs. Bush, Caffrey, Hippensteel, and Repsher for ruling out the presence of complicated pneumoconiosis, including their discussion of the extent to which the absence of a significant respiratory or pulmonary impairment supports their opinion that the x-ray evidence is not consistent with a diagnosis of pneumoconiosis. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148, 11 BLR 2-1, 2-8 (1987), *reh'g denied*, 484 U.S. 1047 (1988)(recognizing that evidence regarding the presence of an impairment may shed light on the interpretation of an x-ray); *see also Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Contrary to employer's additional contention, however, Section 718.304 does not require claimant to prove that the large opacities seen radiographically arose out of coal dust exposure. Rather, as the Director accurately responds, if claimant establishes her entitlement to the irrebuttable presumption under Section 718.304 (by establishing the existence of a chronic dust disease of the lung diagnosed in accordance with the requirements of that Section) she need only establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, in order to establish entitlement to benefits under the Act.[10] *See Daniels Co. v. Mitchell*, 479 F.3d 321, 337, --- BLR --- (4th Cir. 2007); *see also* 20 C.F.R. §718.302.

Because we have vacated the administrative law judge's finding that the existence of complicated pneumoconiosis was established, we also vacate her finding that a mistake in a determination of fact was established at Section 725.310, and instruct her to reconsider this issue on remand.[11] *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-29 (4th Cir. 1993). In exercising her discretion on the modification request,

[10] Because the miner was credited with 36.75 years of coal mine employment, the administrative law judge properly applied the presumption at 20 C.F.R. §718.203(b) after finding that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. *See* Decision and Order at 12 n.6. Thus, if the administrative law judge on remand finds claimant entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304, claimant is entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b).

[11] Contrary to employer's contention, since the administrative law judge has the discretion to find that the ultimate fact of entitlement was mistakenly decided, she need not conduct a threshold inquiry into whether Judge Tureck made a specific factual error. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

the administrative law judge on remand must also consider whether reopening this case would render justice under the Act. *Sharpe v. Director, OWCP*, --- F.3d ---, 2007 WL 2034503 (4th Cir. 2007)(discussing factors that may be relevant to whether a modification request should be granted).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge