BRB No. 13-0586 BLA

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<tr><td>HARVEY J. GOWER<br><br>Claimant-Respondent<br><br>v.<br><br>EASTERN ASSOCIATED COAL COMPANY<br><br>and<br><br>PEABODY INVESTMENTS<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest</td><td>DATE ISSUED: 07/29/2014<br><br>DECISION and ORDER</td></tr>
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Appeal of the Decision and Order on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (09-BLA-5811) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012), (the Act). This case, involving a subsequent claim filed on May 8, 2008,[1] is before the Board for the second time.

In the initial decision, Administrative Law Judge Michael P. Lesniak credited claimant with twenty years of underground coal mine employment,[2] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, Judge Lesniak considered claimant's 2008 claim on the merits. Having found that claimant established twenty years of qualifying coal mine employment, and that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), Judge Lesniak determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). Judge Lesniak also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, Judge Lesniak awarded benefits.

Pursuant to employer's appeal, the Board affirmed Judge Lesniak's finding that claimant established twenty years of qualifying coal mine employment. *Gower v. E.*

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[1] Claimant's first claim, filed on June 5, 1986, was denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. *Id.* However, Administrative Law Judge Frank J. Marcellino subsequently dismissed the claim on January 17, 1989. *Id.* Claimant's second claim, filed on June 1, 1993, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 2.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] 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). 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).

*Associated Coal Corp.*, BRB No. 12-0101 BLA, slip op. at 3 n.5 (Dec. 19, 2012) (unpub.). The Board, however, vacated Judge Lesniak's finding that the pulmonary function study evidence established total disability pursuant to Section 718.204(b)(2)(i). *Id.* at 4-5. The Board further instructed Judge Lesniak, on remand, to weigh all of the relevant evidence together, both like and unlike, in determining whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 6. Because the Board vacated Judge Lesniak's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the Board also vacated Judge Lesniak's finding that claimant invoked the Section 411(c)(4) presumption. *Id.*

On remand, due to Judge Lesniak's unavailability, the case was reassigned, without objection, to Administrative Law Judge Richard A. Morgan (the administrative law judge). In a Decision and Order on Remand dated August 28, 2013, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2008 claim on the merits. Because the Board previously affirmed Judge Lesniak's finding that claimant established twenty years of qualifying coal mine employment, and because he found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

## Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[4]

The record contains three pulmonary function studies conducted on June 19, 2008, January 21, 2009, and March 25, 2009. The June 19, 2008 pulmonary function study produced non-qualifying values,[5] both before and after the administration of a bronchodilator. Director's Exhibit 13. The January 21, 2009 pulmonary function study, however, produced qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 12. The March 25, 2009 pulmonary function study produced qualifying values before the administration of a bronchodilator, but non-qualifying values after the administration of a bronchodilator. Director's Exhibit 30.

In addressing the conflicting pulmonary function study evidence, the administrative law judge found that the pulmonary function studies conducted before the administration of a bronchodilator were entitled to the most weight, based on the Department of Labor's (DOL's) recognition that, although the use of a bronchodilator may aid in determining the presence or absence of pneumoconiosis, it "'does not provide an adequate assessment of the miner's disability. . . .'" Decision and Order on Remand at 5, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). Because two of the three pulmonary function studies produced qualifying values before the administration of a bronchodilator, the administrative law judge found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

[4] The administrative law judge noted that Judge Lesniak previously found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 3. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Employer argues that the administrative law judge erred in crediting the pre-bronchodilator results over those obtained after the administration of a bronchodilator. We disagree. Where the record contains both a pre-bronchodilator and post-bronchodilator result and one qualifies while the other does not, the administrative law judge must weigh the values and explain those results he finds more probative. *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). In this case, the administrative law judge explained that he accorded greater weight to the pre-bronchodilator studies based on reasoning approved by the DOL in the preamble to the 1980 regulations, specifically that the use of a bronchodilator "'does not provide an adequate assessment of [a] miner's disability. . . .'" Decision and Order on Remand at 5; *quoting* 45 Fed. Reg. at 13,682. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by DOL, and to consider the preamble to the 1980 regulations in assessing the credibility of the pulmonary function study evidence in this case.[6] *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

Employer next argues that the administrative law judge erred in considering claimant's pre-bronchodilator study conducted on March 25, 2009 to be a qualifying study. Claimant was 74 years of age at the time of the March 25, 2009 pulmonary function study. Pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Under this standard, the administrative law judge properly characterized claimant's pre-bronchodilator July 29, 2010 pulmonary function study as qualifying. Decision and Order on Remand at 4.

However, employer accurately notes that, in the case of older miners, an opposing party may offer medical evidence to prove that a pulmonary function study that yields qualifying values for age 71 is actually normal or otherwise does not represent a totally

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[6] Employer argues that the administrative law judge erred in relying upon the preamble to the 1980 regulations because the Department of Labor's (DOL's) position, regarding the use of a bronchodilator, "does not reflect current medical literature." Employer's Brief at 12. However, employer submitted no evidence invalidating the DOL's position, as set forth in the preamble, that the use of a bronchodilator does not provide an adequate assessment of a miner's disability. Consequently, the administrative law judge permissibly elected to accord greater weight to the pre-bronchodilator studies since to do so was consistent with a view endorsed by the DOL in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013).

disabling pulmonary impairment. *Meade*, 24 BLR at 1-47. Employer contends that Dr. Rosenberg offered such evidence, noting that the doctor explained that, when he extrapolated the values on claimant's pulmonary function study to account for his age, they did not produce qualifying values. Employer's Brief at 14. The administrative law judge found that, while Dr. Rosenberg extrapolated values for a miner over the age of 71, the doctor "made no general statements about the probative value of [claimant's] testing, nor did he explain why [the] results that [the administrative law judge] determined to be qualifying actually show[ed] normal pulmonary function." Decision and Order on Remand at 6. In this case, the administrative law judge permissibly found that employer failed to present any medical evidence that the pre-bronchodilator portion of the March 25, 2009 study was normal or otherwise did not represent a totally disabling pulmonary impairment. *See Meade*, 24 BLR at 1-47. Consequently, the administrative law judge properly characterized claimant's most recent pulmonary function study, conducted on March 25, 2009, as producing qualifying values before the administration of a bronchodilator. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer next argues that the administrative law judge erred in his consideration of the medical opinion evidence. The administrative law judge considered the medical opinions of Drs. Jaworski, Renn, and Rosenberg. Dr. Jaworski diagnosed a severe pulmonary impairment which "could" prevent claimant from performing his last coal mine employment. Director's Exhibit 13. Drs. Renn and Rosenberg, however, opined that, from a pulmonary perspective, claimant was not totally disabled from performing his last coal mine employment. Director's Exhibit 30; Employer's Exhibit 3.

The administrative law judge found that Dr. Jaworski's opinion was entitled to "little weight" based upon its equivocal nature. Decision and Order on Remand at 7. The administrative law judge also discredited the opinions of Drs. Renn and Rosenberg. The administrative law judge found that Dr. Renn's opinion was entitled to little weight because the doctor focused solely upon claimant's post-bronchodilator pulmonary function study results in determining that claimant was able to perform heavy labor, without addressing whether claimant was capable of performing such labor without medication. *Id.* The administrative law judge similarly discredited Dr. Rosenberg's assessment of claimant's pulmonary function because of his reliance upon claimant's post-bronchodilator pulmonary function study results. *Id.* In addition, the administrative law judge found that Dr. Rosenberg failed to reconcile his determination that claimant's impairment was "severe at times" with his opinion that claimant could perform heavy labor. *Id.*

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Renn and Rosenberg. We disagree. The administrative law judge

permissibly discounted Dr. Renn's opinion because the doctor failed to address the significance of claimant's qualifying pre-bronchodilator pulmonary function study results and therefore, failed to address the relevant issue, whether claimant could perform his prior coal mine employment without the use of a bronchodilator. In making disability determinations, the question is whether a miner is able to perform his job, not whether he is able to perform his job after he takes medication. *See* 20 C.F.R. §718.204(b)(1). Thus, the results of a post-bronchodilator pulmonary function study are not necessarily dispositive of the issue of total disability. 45 Fed. Reg. at 13682. The administrative law judge also permissibly discounted Dr. Rosenberg's opinion because he relied upon pulmonary function study results obtained after the administration of a bronchodilator without addressing the significance of claimant's qualifying pre-bronchodilator results. *Id.* Further, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's opinion was not well reasoned, noting that the doctor failed to reconcile his opinion that claimant could perform heavy labor with his characterization of claimant's impairment as "severe at times." Decision and Order on Remand at 8; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Employer's Exhibit 5 at 26. We, therefore, affirm the administrative law judge's findings regarding the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge found that the medical opinion evidence did not undercut the pulmonary function study evidence supporting a finding of a totally disabling respiratory impairment. Decision and Order on Remand at 8. Therefore, the administrative law judge determined that the medical evidence, as a whole, established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* Because this finding is supported by substantial evidence, it is affirmed.[7]

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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[7] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order on Remand at 8 n.18.

**Rebuttal of the Section 411(c)(4) Presumption**

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[8] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order on Remand at 11 n.3. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Jaworski, Saludes, Renn, and Rosenberg. Dr. Jaworski diagnosed legal pneumoconiosis, in the form of obstructive airway disease due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 13. Dr. Saludes also diagnosed obstructive lung disease. Claimant's Exhibit 1. Although Dr. Saludes opined that claimant's obstructive lung disease was likely caused by smoking, he also opined that "coal dust exposure could be a contributing factor." *Id.* Dr. Renn diagnosed chronic bronchitis due entirely to claimant's cigarette smoking and asthma. Director's Exhibit 30. Dr. Rosenberg diagnosed chronic obstructive pulmonary disease due entirely to claimant's cigarette smoking. Employer's Exhibit 3.

The administrative law judge found that the opinions of Drs. Renn and Rosenberg were inconsistent with the regulations. Decision and Order on Remand at 12. Therefore, the administrative law judge determined that their opinions were insufficient to disprove the existence of legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Renn and Rosenberg. We disagree. As summarized by the administrative law judge, Dr. Renn excluded coal mine dust exposure as a cause of claimant's chronic bronchitis because bronchitis associated with coal dust exposure always ceases within six months to a year after cessation of exposure. Employer's

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[8] "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 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).

Exhibit 6 at 16. The administrative law judge permissibly found that this reasoning was inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order on Remand at 12.

The administrative law judge also found that Dr. Rosenberg's opinion, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, is inconsistent with scientific studies approved by the DOL in the preamble to the 2001 amended regulations. Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that each found uncharacteristic of a coal mine dust-induced lung disease.[9] The administrative law judge noted, however, that scientific evidence endorsed by the DOL recognizes that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order on Remand at 12; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (finding that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio). Consequently, the administrative law judge permissibly discounted Dr. Rosenberg's opinion, as to the cause of claimant's disabling obstructive pulmonary impairment, because the doctor relied on an assumption that is contrary to the medical science credited by the DOL. *See Obush*, 24 BLR at 1-125-26; *McCoy*, 373 F.3d at 578, 23 BLR at 2-190. As the administrative law judge's basis for discrediting the opinion of Dr. Rosenberg is rational and supported by substantial evidence, it is affirmed.[10]

Because the administrative law judge permissibly discredited the opinions of Drs. Renn and Rosenberg, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal

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[9] Dr. Rosenberg opined that claimant's coal mine dust exposure was not the cause of his pulmonary impairment because claimant's pulmonary function studies indicated a reduced FEV1/FVC ratio, and not a preserved FEV1/FVC ratio. Employer's Exhibit 3. Although Dr. Rosenberg noted that he agreed with the DOL that "[chronic obstructive pulmonary disease] may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal [coal workers' pneumoconiosis]." *Id.*

[10] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Renn and Rosenberg, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge rationally discounted the opinions of Drs. Renn and Rosenberg, that the miner's disabling pulmonary impairment did not arise out of his coal mine employment, because Drs. Renn and Rosenberg did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that claimant's totally disabling impairment did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); *see Rose* 614 F.2d at 939, 2 BLR at 2-43.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand 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