BRB No. 12-0475 BLA

ROBERT E. CORNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 05/02/2013
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Richard A. Seid (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (10-BLA-5228) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

This case involves a subsequent claim filed on January 28, 2009.[1]

Initially, the administrative law judge determined that claimant's work for employer constituted the work of a miner under the Act, that employer was the last coal mine operator to employ claimant, and that employer was, therefore, the properly designated responsible operator. In addition, the administrative law judge credited claimant with twenty-five years of coal mine employment.[2]

Addressing the merits of entitlement, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[3] The administrative law judge also found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant's employment as a warehouse worker with employer constituted coal mine employment, as defined by the Act and, therefore, erred in finding that employer was properly designated as the responsible operator. Employer also argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that it is not the responsible operator. In a reply brief, employer reiterates its previous 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,

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[1] Claimant's previous claim, filed on October 2, 2001, was finally denied on February 25, 2003, because claimant failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board 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).

[3] The administrative law judge did not make a finding pursuant to 20 C.F.R. §725.309(d). On appeal, employer does not challenge this aspect of the administrative law judge's decision.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Definition of a Miner/Responsible Operator

Initially, employer contends that the administrative law judge erred in finding that claimant's work for employer satisfied the situs and function prongs of the test required to show that claimant was a "miner" under the Act. Employer contends, therefore, that the administrative law judge erred in finding it liable for the payment of benefits. The Director responds, urging affirmance of the administrative law judge's determination that claimant's employment with employer constituted qualifying coal mine employment.

The regulations set forth two definitions of a miner. Pursuant to 20 C.F.R. §725.101(a)(19), a miner is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 20 C.F.R. §725.101(a)(19). Under 20 C.F.R. §725.202(a), a miner is "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a).

The United States Court of Appeals for the Sixth Circuit has adopted a situs-function test in determining whether an individual is a "miner" under the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The situs portion of the test requires that a person's work occurred in or around a coal mine or coal preparation facility. *Id*. An individual meets the function requirement if his or her work was necessary and integral to the extraction or preparation of coal. *Id*.

In this case, the administrative law judge considered claimant's testimony that, during his last eighteen years of employment with employer, he worked as a "supply man" at a warehouse, delivering equipment to different job sites. Decision and Order at 3; Hearing Transcript at 23. Claimant testified that the warehouse where he worked was located on the same property as a preparation plant and a strip mine. Hearing Transcript

at 24. Claimant further testified that he delivered parts to multiple mine sites each day, at one time delivering parts to twelve to thirteen deep mines, and four to five strip mines. *Id.* at 26.

The administrative law judge found that claimant's testimony, that he worked from a warehouse on the site of a preparation plant and a strip mine, and delivered parts to mine sites daily, satisfied the situs prong of the test. Decision and Order at 4. Further, the administrative law judge noted that the parts that claimant delivered were "generally (if not exclusively) destined for pieces of equipment utilized in coal extraction," and found that the machinery that was employed in the extraction of coal would eventually become inoperable without the delivery of the replacement parts. *Id.* at 5. The administrative law judge, therefore, found that claimant's work was integral to the extraction of coal, and, therefore, satisfied the function test. *Id.*

The issue of whether a worker is a miner is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). In this case, the administrative law judge considered claimant's testimony regarding his job duties while employed for employer, and rationally determined that these duties met the test for determining that claimant was a "miner," based on her finding that the job of delivering necessary equipment parts to active mining operations was integral to the extraction of coal. Under the facts of this case, we affirm the administrative law judge's determination that claimant's work satisfied the situs and function prongs of the test required to establish that claimant was a "miner." *See* 20 C.F.R. §725.202(a); *Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42; *Pinkham v. Director, OWCP*, 7 BLR 1-55 (1984). Further, as the administrative law judge found that employer was the last coal mine operator to employ claimant in coal mine employment for at least one year, we affirm the administrative law judge's responsible operator finding. 20 C.F.R. §725.495.

Complicated Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that claimant established that he suffers from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Section 718.304(a)

Employer contends that the administrative law judge erred in her consideration of the x-ray evidence at 20 C.F.R. §718.304(a). The administrative law judge considered nine interpretations of four x-rays taken on July 16, 2008, January 14, 2009, March 27, 2009, and July 13, 2009, and considered the readers' radiological qualifications. Dr. Miller, a B reader and Board-certified radiologist, interpreted the July 16, 2008 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 23. Although Dr. Scott, an equally-qualified physician, noted a possible 2 cm. mass in the left apex, he interpreted the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 26. Dr. Scott suggested a CT scan to rule out cancer. *Id.*

The administrative law judge found that Dr. Scott provided contradictory statements regarding whether the opacities on the July 16, 2008 x-ray were consistent with pneumoconiosis. Decision and Order at 10. The administrative law judge, therefore, found that Dr. Scott's interpretation of the July 16, 2008 x-ray was entitled to less weight than that of Dr. Miller, and found that this x-ray supported a finding of complicated pneumoconiosis. *Id.*

Dr. Alexander, a B reader and Board-certified radiologist, interpreted the January 14, 2009 and March 27, 2009 x-rays as positive for complicated pneumoconiosis. Director's Exhibits 23, 25. Dr. Baker, a B reader, also interpreted the March 27, 2009 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 18. However, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted the January 14, 2009 and March 27, 2009 x-rays as negative for complicated pneumoconiosis. Director's Exhibits 22, 29.

In weighing the conflicting interpretations of the January 14, 2009 x-ray, the administrative law judge found that Dr. Wheeler's interpretation was equivocal. Decision and Order at 10. The administrative law judge, therefore, found that Dr. Alexander's positive x-ray interpretation was entitled to greater weight than Dr. Wheeler's negative x-ray interpretation. Consequently, the administrative law judge

found that the January 14, 2009 x-ray supported a finding of complicated pneumoconiosis. *Id.*

In regard to the March 27, 2009 x-ray, the administrative law judge initially found that the interpretations of Drs. Alexander and Wheeler were entitled to greater weight than that of Dr. Baker, based upon their superior radiological qualifications. Decision and Order at 10. Despite her acknowledgment that Dr. Baker was not as qualified as Drs. Alexander and Wheeler, the administrative law judge found that "the combination of Drs. Baker's and Alexander's opinions outweigh[ed] Dr. Wheeler's opinion." *Id.* at 11. The administrative law judge also found that Dr. Wheeler's x-ray interpretation was equivocal, in part. *Id.* The administrative law judge, therefore found that the March 27, 2009 x-ray supported a finding of complicated pneumoconiosis. *Id.*

Finally, while Dr. Miller interpreted the July 13, 2009 x-ray as positive for complicated pneumoconiosis, Dr. Wheeler interpreted the x-ray as negative for the disease. Director's Exhibits 27, 31. Because the July 13, 2009 x-ray was interpreted by equally qualified physicians as both positive and negative for complicated pneumoconiosis, the administrative law judge found that this x-ray was "in equipoise" regarding the existence of complicated pneumoconiosis. Decision and Order at 11. Based on the above findings, (three x-rays supportive of a finding of complicated pneumoconiosis and one x-ray in equipoise), the administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Employer argues that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Employer initially contends that the administrative law judge erred in finding that Dr. Scott's interpretation of the July 16, 2008 x-ray was contradictory. On his x-ray report, Dr. Scott initially checked a box indicating that the x-ray revealed small opacities consistent with pneumoconiosis. Director's Exhibit 26. In the "Comments" section of the ILO report, Dr. Scott explained that the asymmetrical shape of the small opacities was "not typical" for silicosis/coal workers' pneumoconiosis. *Id.* Dr. Scott suggested that other diagnoses, such as sarcoidosis, tuberculosis, and histoplasmosis, should be considered. We agree with employer that the administrative law judge failed to explain how Dr. Scott's comments regarding the etiology of the small opacities undermined his opinion that the x-ray did not reveal any large opacities consistent with pneumoconiosis. *Gray*, 176 F.2d at 389, 21 BLR at 2-615. Consequently, we vacate the administrative law judge's finding that the July 16, 2008 x-ray supports a finding of complicated pneumoconiosis.

Employer also argues that the administrative law judge erred in crediting Dr. Alexander's positive interpretations of the January 14, 2009 and March 27, 2009 x-rays

over Dr. Wheeler's negative interpretations. The administrative law judge found that Dr. Wheeler's interpretations of the January 14, 2009 and March 27, 2009 x-rays were equivocal, and, therefore, entitled to less weight, because the doctor commented that the small opacities on the x-ray "could be pneumoconiosis." Decision and Order at 10. Although Dr. Wheeler acknowledged that some of the "small nodules" on the x-rays could be coal workers' pneumoconiosis, he explained that the asymmetrical pattern involving the pleura and apices was more consistent with granulomatous disease. *Id.* Moreover, Dr. Wheeler interpreted both the January 14, 2009 and March 27, 2009 x-rays as negative for complicated pneumoconiosis, opining that the large masses on these x-rays were compatible with a conglomerate granulomatous disease, with mycobacterium avium complex (MAC) or histoplasmosis being a more likely diagnosis than tuberculosis. *Id.* Dr. Wheeler further explained that the large masses in the lungs were not large opacities of coal workers' pneumoconiosis because they involved the pleura, and because the profusion of the background nodules was low. *Id.* Substantial evidence does not support the administrative law judge's finding that Dr. Wheeler's reading was equivocal, given that the doctor definitively stated that the x-rays were negative for large opacities of complicated pneumoconiosis.[4] We, therefore, vacate the administrative law judge's findings that the January 14, 2009 and March 27, 2009 x-rays support a finding of complicated pneumoconiosis.[5] In light of the above-referenced errors, we vacate the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remand the case for further consideration.

[4] Employer also contends that the administrative law judge, in evaluating the interpretations of the March 27, 2009 x-ray, provided "conflicting findings" in regard to Dr. Baker's positive interpretation. Employer's Brief at 26. We agree. In weighing the interpretations of the March 27, 2009 x-ray, the administrative law judge noted that, while Drs. Alexander and Wheeler are dually qualified as B readers and Board-certified radiologists, Dr. Baker is only a B reader. The administrative law judge, therefore, found that Dr. Baker's x-ray interpretation was entitled to "less weight" than the x-ray interpretations rendered by Drs. Alexander and Wheeler. Decision and Order at 10. However, the administrative law judge subsequently found that Dr. Alexander's positive x-ray interpretation, when combined with Dr. Baker's positive x-ray interpretation, outweighed Dr. Wheeler's negative x-ray interpretation. *Id.* at 11. The administrative law judge failed to explain why she combined Dr. Baker's x-ray interpretation with that of Dr. Alexander, given her previous determination that Dr. Baker's interpretation was entitled to "less weight." *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995).

[5] Because it is not challenged on appeal, we affirm the administrative law judge's finding that the July 23, 2009 x-ray is "in equipoise" in regard to the existence of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 718.304(c)

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[6] In considering whether the medical opinion evidence established the existence of complicated pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Baker and Vuskovich. While Dr. Baker diagnosed complicated pneumoconiosis, Director's Exhibit 18, Dr. Vuskovich opined that claimant does not suffer from the disease. Employer's Exhibit 2. Dr. Vuskovich opined that claimant suffers from reactivation tuberculosis. *Id.*

In weighing the medical opinion evidence, the administrative law judge found that Dr. Baker's diagnosis of complicated pneumoconiosis was supported by the x-ray evidence of record. Decision and Order at 13. Conversely, the administrative law judge found that Dr. Vuskovich's opinion conflicted with the x-ray evidence. *Id.* at 14. The administrative law judge also found that Dr. Vuskovich's opinion was not well-reasoned. The administrative law judge specifically found that Dr. Vuskovich's diagnosis of reactivation tuberculosis was not supported by the evidence of record. *Id.* The administrative law judge, therefore, accorded greater weight to Dr. Baker's opinion, and found that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

Employer argues that the administrative law judge erred in her consideration of the medical opinion evidence. We agree. In evaluating the medical opinion evidence, the administrative law judge credited Dr. Baker's diagnosis of complicated pneumoconiosis because it was supported by the x-ray evidence of record. Decision and Order at 13. However, in light of our decision to vacate the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis, the basis for the administrative law judge's finding cannot stand. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), and remand the case for further consideration.

Employer also argues that the administrative law judge erred in her consideration of Dr. Vuskovich's opinion. Employer specifically argues that the administrative law judge erred in finding that Dr. Vuskovich's diagnosis of tuberculosis was not well-reasoned. We disagree. Based upon his review of the medical evidence, Dr. Vuskovich opined that claimant suffered from tuberculosis, rather than complicated pneumoconiosis

[6] The record contains no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

(progressive massive fibrosis). In diagnosing tuberculosis, Dr. Vuskovich relied on claimant's background:

> [Claimant's] mother had tuberculosis. It was likely that he contracted the disease as a child or young adult. His immune system contained and controlled the infection in latent state. Though his skin test result for tuberculosis (TB) infection was positive there was no evidence that before 1999 he had active tuberculosis and there was no evidence that before 1999 he had received prophylactic treatment for latent TB to prevent reactivation TB.

Employer's Exhibit 2 at 23.

Dr. Vuskovich noted that claimant's medical records revealed that, in the late 1990s, claimant was injected "with a cumulative massive dose of long acting cortisone" for the treatment of musculoskeletal pain. Employer's Exhibit 2 at 24. Dr. Vuskovich opined that "immunosuppression from cortisone therapy reactivated [claimant's] latent tuberculosis." *Id.* at 24-25. In support of his opinion, Dr. Vuskovich noted that claimant's treating physician "diagnosed reactivation tuberculosis and treated him for months." *Id.* at 25. Dr. Vuskovich, therefore, opined that claimant suffered from tuberculosis that was reactivated by his cortisone therapy. *Id.* at 28.

The administrative law judge found that Dr. Vuskovich's diagnosis of tuberculosis was not supported by the record:

> In his report, Dr. Vuskovich asserted that the Claimant suffered from tuberculosis and was treated accordingly. It is this tuberculosis that Dr. Vuskovich stated accounted for the radiological changes found in the x-ray evidence. While the Claimant may have been treated preventively for tuberculosis, nowhere in the record does it support a finding that the Claimant was diagnosed definitively with tuberculosis. In fact, the Claimant testified at the hearing that he had never been told that he had tuberculosis. T. at 28-30. I also note, that Dr. Vuskovich stated health workers "treated" the Claimant for tuberculosis, yet Dr. Vuskovich does not go as far to say the Claimant was diagnosed.

Decision and Order at 14.

The administrative law judge accurately found that, contrary to Dr. Vuskovich's understanding, claimant's treatment records do not document a definitive diagnosis of tuberculosis. Dr. Newswanger, claimant's treating physician, noted, on May 10, 1999,

that claimant had "been under *treatment for suspected* reactivation of TB."[7] Director's Exhibit 1 (198) (emphasis added). Dr. Newswanger, in fact, questioned whether claimant suffered from tuberculosis, noting that he was "suspicious that the (nodule in claimant's lung) may be granulomatous disease related to COPD rather than true TB." *Id.* Although Dr. Newswanger subsequently indicated that claimant was undergoing "tuberculosis prophylaxis, as per the Health Department," Dr. Newswanger never diagnosed claimant with tuberculosis. *Id.* Because the administrative law judge accurately found that Dr. Vuskovich's diagnosis of reactivation tuberculosis was not supported by the record,[8] substantial evidence supports the administrative law judge's determination that Dr. Vuskovich's opinion was not well-reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Employer's allegation of error on that issue is therefore rejected.

On remand, in considering whether the evidence establishes the existence of complicated pneumoconiosis, the administrative law judge must consider all relevant evidence. *Gray*, 176 F.2d at 389, 21 BLR at 2-615. Should the administrative law judge determine that claimant is not entitled to the irrebuttable presumption set forth at 20 C.F.R. §718.304, she must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

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[7] Claimant had an x-ray taken on March 29, 1999. Dr. Karsh interpreted the x-ray as revealing a "somewhat increased density in the right upper lobe. Director's Exhibit 1 (200). Dr. Karsh opined that the density could "represent reactivation of tuberculosis or other old disease or could represent a new pathologic process." *Id.*

[8] Employer argues that the administrative law judge, in weighing the credibility of Dr. Vuskovich's opinion, erred in failing to address the significance of claimant's positive purified protein derivative (PPD) skin test. Employer's contention has no merit. Dr. Vuskovich noted that claimant's positive PPD skin test demonstrated that he "was infected with the tuberculosis bacterium." Employer's Exhibit 2 at 5 n.2. However, Dr. Vuskovich recognized that a positive PPD test does not indicate that a patient suffers from active tuberculosis. In fact, Dr. Vuskovich explained that the "rationale of treating latent TB (the state of being tuberculin skin test positive but no other manifestations of the disease) is to prevent reactivation TB." *Id.* at 23.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration 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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BETTY JEAN HALL
Administrative Appeals Judge