BRB No. 02-0839 BLA

JANE E. McCANDLESS (Widow of ELWOOD H. McCANDLESS)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 09/30/2003
PEABODY COAL COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Jack N. Vanstone (Vanstone & Kornblum), Evansville, Indiana, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-2197) of Administrative Law Judge Rudolf L. Jansen denying benefits on a miner's claim, but awarding benefits 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).[1] This case is before the Board for the fourth time. In the original Decision and Order dated October 22, 1993, the administrative law judge credited the miner with twenty-five years of coal mine employment and adjudicated both the miner's duplicate claim[2] and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish a material change in conditions in the miner's claim pursuant to 20 C.F.R. §725.309 (2000).[3] Further, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000)[4] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[5] With regard to the survivor's claim, the administrative law judge found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits in both claims.

In response to employer's first appeal, the Board affirmed the administrative law

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The miner's first claim was filed on January 5, 1987. Director's Exhibit 14. This claim was denied by the Department of Labor on April 22, 1987 because the miner failed to establish the existence of pneumoconiosis and total disability. *Id*. The denial became final because the miner did not pursue this claim any further. The miner's most recent claim was filed on July 17, 1990. *Id*.

[3]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

[4]The administrative law judge found that total disability was not established at 20 C.F.R. §718.204(c)(1)-(3) (2000).

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000),[6] but vacated the administrative law judge's findings at 20 C.F.R. §§718.204(c)(4) (2000)[7] and 718.204(b) (2000). Consequently, the Board vacated the administrative law judge's award of benefits in the miner's claim, and remanded the case for further consideration. With respect to the survivor's claim, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.205(c) (2000). Therefore, the Board affirmed the administrative law judge's award of benefits in the survivor's claim. *McCandless v. Peabody Coal Co.*, BRB Nos. 94-0385 BLA/A (Aug. 22, 1995)(unpub.). On the first remand, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge again awarded benefits in the miner's claim.[8]

In disposing of employer's second appeal, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.204(c) (2000) and 718.204(b) (2000), and remanded the case for further consideration of the evidence. The Board also noted that it was not persuaded by employer's contentions that there were errors in the Board's prior affirmance of the administrative law judge's finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(2) (2000). Moreover, the Board held that a material change in conditions was established at 20 C.F.R. §725.309 (2000) because claimant established the existence of pneumoconiosis. *McCandless v. Peabody Coal Co.*, BRB No. 96-1738 BLA (Sept. 23, 1997)(unpub.). On the second remand, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000).[9] The administrative

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[6]In its 1995 Decision and Order, the Board stated that its affirmance of the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000) obviated the need for it to address employer's contentions with regard to the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000).

[7]In its 1995 Decision and Order, the Board also affirmed the administrative law judge's unchallenged finding that total disability was not established at 20 C.F.R. §718.204(c)(1)-(3) (2000).

[8]In the August 28, 1996 decision, the administrative law judge noted that the United States Court of Appeals for Seventh Circuit was holding in abeyance employer's appeal of the award of benefits in the survivor's claim and the award of attorney's fees pending resolution of the miner's claim. 1996 Decision and Order on Remand at 2.

[9]In addressing the status of the survivor's claim in the June 16, 1998 decision, the administrative law judge stated:

law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge again awarded benefits in the miner's claim.

With regard to employer's third appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §§718.204(c) (2000) and 718.204(b) (2000).[10] The Board also affirmed the administrative law judge's award of an attorney's fee of $900.00 for 4.5 hours of services at an hourly rate of $200.00. *McCandless v. Peabody Coal Co.*, BRB No. 98-1318 BLA (Feb. 10, 2000)(unpub.). However, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, vacated the Board's affirmance of the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2) (2000) and 718.204(b) (2000). The court also vacated the Board's affirmance of the administrative law judge's finding that claimant's counsel's hourly rate of $200.00 was reasonable. Hence, the court remanded the case for further consideration of the evidence. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). The Board remanded the case to the administrative law judge for further proceedings consistent with the Seventh Circuit's decision. *McCandless v. Peabody Coal Co.*, BRB Nos. 94-0385 BLA, 94-0385 BLA-A, 96-1738 BLA and 98-1318 BLA (Feb. 13, 2002)(Order)(unpub.). On the most recent remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2) and 718.203(b).[11] Further, the administrative law judge found the evidence sufficient to establish

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> In its most recent Petition for Review before the Board, the employer noted that the Seventh Circuit is holding in abeyance the employer's appeal of my decision awarding benefits to [claimant] and attorney's fees, pending resolution of this miner's claim. Thus, only the issues surrounding the miner's claim will be addressed in this second remand.

1998 Decision and Order on Remand at 3 n.1.

[10]In its 2002 Decision and Order, the Board declined to address employer's contentions at 20 C.F.R. §718.202(a)(1) (2000) since it previously affirmed the administrative law judge's finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(2) (2000). In addition, the Board rejected employer's contentions at 20 C.F.R. §718.202(a)(2) (2000) since its previous holding stands as the law of the case on that issue and no exception to that doctrine was demonstrated by employer.

[11]In addressing the Seventh Circuit's decision to remand the case, the administrative law judge stated:

total disability at 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[12] With respect to the survivor's claim, the administrative law judge found the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).[13] Accordingly, the administrative law judge denied benefits in the miner's claim but awarded benefits in the survivor's claim.[14]

> This case represents a consolidated miner's claim and survivor's claim. As noted, the award of survivor's benefits to [claimant] has been affirmed by the BRB. The Seventh Circuit opinion makes no mention of the consolidated nature of these cases. Pursuant to the Seventh Circuit's remand order, any finding with respect to the presence of pneumoconiosis will necessarily affect both the survivor's and miner's claims. Any finding with respect to total disability will affect only the miner's claim.

2002 Decision and Order on Remand at 3.

[12]In considering the medical opinion evidence, the administrative law judge stated:

> In weighing these opinions together, I find that [the miner] was totally disabled by his cardiac condition. Therefore, [the miner's] pneumoconiosis was not a necessary component of his total disability, regardless of its severity. Pursuant to [*Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994)], the effect pneumoconiosis had on his total disability is, therefore, irrelevant to the question of entitlement to benefits.
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> …
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> Assuming *arguendo* that [the miner] was not totally disabled due to his cardiac condition, I continue to find that [the miner's] pneumoconiosis would have, in and of itself, totally disabled the miner from performing his previous coal mine employment.

2002 Decision and Order on Remand at 11.

[13]The Seventh Circuit's June 29, 2001 decision referenced Case Nos. 95-3291, 00-1449 and 00-2788. The court assigned Case No. 95-3291 to the appeal of the survivor's claim, which was held in abeyance in 1995.

[14]Claimant did not file an appeal of the administrative law judge's denial of benefits in the miner's claim.

On appeal, employer contends that the case should be reassigned to another administrative law judge because of the administrative law judge's intransigence. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant[15] responds, urging affirmance of the administrative law judge's award of survivor's benefits.[16] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the case should be reassigned to another administrative law judge because of the administrative law judge's intransigence. Employer's contention is based upon the premise that the administrative law judge's disdain for the decision of the Seventh Circuit has caused the instant case to reach a stalemated posture that denies it the right to due process. The record does not reflect that the administrative law judge is unfair or partial to claimant, or that he has demonstrated a bias against employer. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we reject employer's contention that the case should be reassigned to another administrative law judge because of the administrative law judge's intransigence.[17]

Next, employer contends that the administrative law judge erred in finding the

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[15]Claimant is the widow of the miner, Elwood H. McCandless, who died on January 15, 1991. Director's Exhibits 1, 3. Claimant's survivor's claim was filed on February 14, 1991. Director's Exhibit 1.

[16]Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[17]The instant case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. An inferior tribunal has no power or authority to deviate from the mandate issued by an appellate court. *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). Since the administrative law judge, in the case at hand, is bound by the case law of the Seventh Circuit, he does not have authority to consider the validity of the decision of the Seventh Circuit in *McCandless*.

evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) in the survivor's claim. The administrative law judge considered the relevant opinions of Drs. Bockelman, Crouch, Kleinerman and Naeye.[18] The administrative law judge stated that "Drs. Bockelman and Kleinerman, while arriving at different conclusions, both made findings of clinical and/or legal pneumoconiosis within a reasonable degree of medical certainty, entitling their opinions to full weight."[19] 2002 Decision and Order on Remand at 7. In contrast, the administrative law judge stated that "Drs. Crouch and Naeye were not confident enough in their opinions to definitively find the absence of silicotic nodules

[18]In considering the conflicting opinions at 20 C.F.R. §718.202(a)(2), the administrative law judge stated:

> In weighing these opinions together, the [Seventh Circuit] apparently no longer permits me to weigh such "arbitrary" considerations as the credentials of these physicians….I am also no longer permitted to consider the "arbitrary" firsthand knowledge of a physician performing an autopsy and reviewing the gross anatomy of the miner, over a physician looking at slides of lung sections chosen and made by the prosector.

2002 Decision and Order on Remand at 6 (citations omitted). Contrary to the administrative law judge's finding, the Seventh Circuit's decision in *McCandless* does not prohibit an administrative law judge from considering a physician's credentials or status as an autopsy prosector in weighing conflicting evidence. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). Rather, the Seventh Circuit held that an administrative law judge must provide a medical reason for relying on a physician's opinion, and cannot mechanistically accord greater weight to a physician's opinion based upon his credentials or status as the autopsy prosector. *Id*.

[19]The administrative law judge stated that "Dr. Bockelman noted coal dust, lesions, and silica, and concluded that [the miner] suffered from pneumoconiosis." 2002 Decision and Order on Remand at 6. The administrative law judge additionally stated that "Dr. Kleinerman opined that the miner did not have pneumoconiosis, but suffered from lesions caused by simple nodular silicosis, and that his silicosis exposure likely occurred in the coal mines. (EX 13, pp. 24-28)." *Id.*

sufficient to qualify as pneumoconiosis."[20] *Id*. at 6-7. Hence, based upon the administrative law judge's reliance on the opinions of Drs. Bockelman and Kleinerman, the administrative law judge found that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(2).

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Naeye and Crouch because they did not satisfy the "reasonable degree of medical certainty" standard. In considering the opinions of Drs. Naeye and Crouch, the administrative law judge stated, "[b]ased upon their uncertainty, I decline to find full confidence in their reports, and accord these opinions less weight." 2002 Decision and Order on Remand at 7. Although the administrative law judge referred to the doctors' opinions in terms of whether they were given within a "reasonable degree of medical certainty," his bases for discrediting the opinions of Drs. Naeye and Crouch were that they expressed uncertainty and a lack of confidence in their opinions.[21]

With regard to Dr. Naeye's opinion, the administrative law judge stated that "Dr. Naeye expresses uncertainty as to the presence of silicotic nodules, and declined to express his opinion within a reasonable degree of medical certainty." 2002 Decision and Order on Remand at 7. At the February 22, 1993 deposition, Dr. Naeye stated:

> But there was only this one tiny nodule. So – I don't see any difference in the report that Dr. Crouch and I gave, except that he thought this one nodule might be silicotic in origin and I'm not so sure.

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[20]In a report dated January 15, 1992, Dr. Naeye opined that coal workers' pneumoconiosis was absent. Employer's Exhibit 4. At a subsequent deposition dated February 22, 1993, Dr. Naeye opined that the black deposits reviewed on the pathology slides did not meet the minimal criteria for the diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 11 at 19. Dr. Crouch, in a report dated April 11, 1991, opined that the miner did not suffer from pneumoconiosis. Director's Exhibit 10. Further, at a subsequent deposition dated March 23, 1993, Dr. Crouch opined that, within a "reasonable degree of medical certainty," the miner did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 6 at 26.

[21]The Board does not require that a medical opinion be given within a "reasonable degree of medical certainty." *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983). Rather, it is sufficient that a doctor's opinion constitutes a reasoned medical judgment. *Id*.

Employer's Exhibit 11 at 14. Dr. Naeye further stated, "I'm not saying it is not. But I'm not certain." *Id*. When asked if all of his answers had been given within a reasonable degree of medical certainty, Dr. Naeye responded:

> Yes, except for my answer about the solitary nodule that may or may not have been silicosis. I still don't know for sure.

Employer's Exhibit 11 at 20. Because of Dr. Naeye's uncertainty as to the presence or absence of a silicotic nodule, the administrative law judge permissibly discredited the opinion of Dr. Naeye because it is equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Naeye's opinion.

With regard to Dr. Crouch's opinion, the administrative law judge found:

> Taking his report as a whole, Dr. Crouch's opinions regarding pneumoconiosis are less certain than those expressed by a physician opining within a reasonable degree of medical certainty. Given his hesitancy to definitively opine to the presence or absence of silicotic nodules, and his apparent conflict in the degree of certainty in which he makes his findings, I accord his opinions less weight.

2002 Decision and Order on Remand at 6. Contrary to the administrative law judge's finding, Dr. Crouch did not express uncertainty or a lack of confidence in his opinion that the miner did not suffer from pneumoconiosis. Employer's Exhibit 6 at 13, 14. Dr. Crouch, throughout his report and deposition testimony, never wavered from his opinion that the miner did not suffer from silicosis, coal dust nodules and coal workers' pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 6. Since the administrative law judge mischaracterized Dr. Crouch's opinion, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and remand the case for further consideration of the evidence. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must weigh all the relevant evidence of record in accordance with the Seventh Circuit's decision in *McCandless*.

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge stated, "as it was not vacated on appeal, I continue to find that [the miner's] death was hastened by his pneumoconiosis as discussed in my earlier opinion." 2002 Decision and Order on Remand at 11. In the October 22, 1993 decision, the administrative law judge noted that "[o]pinions addressing [the issue of death

due to pneumoconiosis] come from Drs. Bockelman, Long Crouch, Tuteur, Naeye, Kleinerman, and Houser." 1993 Decision and Order at 17. In an autopsy report dated January 15, 1991, Dr. Bockelman opined that "[t]he severe pulmonary disease as characterized by the prominent anthracotic pigment deposition and reactive fibrosis would fit under the category of a type III lesion regarded as presumptive evidence of coal workers[']pneumoconiosis." Director's Exhibit 5. Dr. Bockelman also opined that "[t]he extent of pulmonary disease and cardiac compromise due to atherosclerotic vascular disease are of sufficient degree to have resulted in death." *Id*. Similarly, Drs. Houser and Long opined that coal workers' pneumoconiosis contributed to the miner's death. Director's Exhibit 6; Claimant's Exhibit 1. In contrast, Drs. Crouch, Kleinerman, Naeye and Tuteur opined that pneumoconiosis did not contribute to the miner's death. Director's Exhibit 10; Employer's Exhibits 2, 4, 6 at 14, 9, 11 at 19-20, 12 at 25, 26, 13 at 24, 26. In his 1993 decision, the administrative law judge stated:

> Once again, I place greater weight on Dr. Bockelman's opinion. He is a [B]oard certified pathologist who performed the autopsy, which allowed him to observe, firsthand, both grossly and microscopically, [the miner's] lung tissue. His report is greatly detailed and evinces a thorough examination. Moreover, Dr. Bockelman's findings conform with the Regulatory definition of pneumoconiosis. His opinion is well-reasoned, particularly considering that for almost half of the [m]iner's life, he worked in underground coal mines. Finally, Dr. Bockelman's opinion is bolstered by those of Drs. Haser (sic) and Long.

1993 Decision and Order at 18.

In its 1995 Decision and Order, the Board rejected employer's contention that the administrative law judge erred in automatically crediting the opinion of the physician who performed the autopsy without reason, and without properly considering the contrary opinions. *McCandless v. Peabody Coal Co.*, BRB Nos. 94-0385 BLA/A, slip op. at 4 (Aug. 22, 1995)(unpub.). The Board stated that the administrative law judge provided a valid rationale for according dispositive weight to the opinion of the autopsy prosector. *Id*. The Board specifically noted that "[i]n the instant case, the administrative law judge credited the prosector based upon a finding that the prosector performed the actual autopsy." *Id*. However, the Seventh Circuit vacated the Board's affirmance of the administrative law judge's finding that pneumoconiosis was established at 20 C.F.R. §718.202(a)(2) because the administrative law judge erroneously weighed the conflicting autopsy evidence. The court held that the administrative law judge erred in failing to provide a valid basis for preferring Dr. Bockelman's opinion over the contrary opinions. The court stated:

> [*Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992)] is directly on point; it holds that the ALJ may not

> automatically credit the conclusions of an autopsy prosector but must supply a valid rationale for adopting them. Here the only rationale was – that [Dr.] Bockelman was the prosector. That's just a restatement of the rule that *Railey* disapproved.

McCandless, 255 F.3d at 469, 22 BLR at 2-318. Thus, in addressing the administrative law judge's weighing of the autopsy evidence, the court held that the administrative law judge must supply a medical basis for preferring the autopsy prosector's opinion over the pathologist's opinion. Since, on remand, the administrative law judge did not provide a valid basis for according greater weight to the opinion of Dr. Bockelman than to the contrary opinions of record, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case for consideration of all of the relevant evidence thereunder. *Railey*, 972 F.2d at 183, 16 BLR at 2-128.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the survivor's claim is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge