BRB Nos. 08-0839
and 08-0839A

N.S.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: 08/11/2009
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Attorney Fee Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and the Attorney Fee Order (2006-LHC-0980) of Administrative Law Judge Russell D. Pulver rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.,*

16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On August 9, 2005, claimant was injured while working as a casual longshore worker for employer when he tripped on a cable and fell forward, hitting his head, chest and right shoulder. As a result of this accident, claimant sought disability and medical benefits under the Act for injuries to his right shoulder and cervical spine.[1] Claimant also sought benefits for a traumatic hearing loss in the left ear caused when he struck his head in the August 9, 2005 accident, as well as for cumulative hearing loss related to noise exposure sustained in the course of his employment with employer. On September 7, 2006, employer voluntarily paid claimant a lump sum of $5,025.44, representing 56 weeks of temporary total disability benefits, and began paying temporary total disability benefits which continued through November 14, 2006. On November 7, 2006, employer offered to settle the claim by paying claimant $15,000, for outstanding temporary total disability benefits and permanent partial disability benefits; employer additionally indicated that it would consider an additional payment to settle claimant's medical expenses or that medical benefits could be left open pursuant to the provisions of the Act. Claimant's attorney rejected employer's settlement offer, and the claim proceeded to a hearing before the administrative law judge.

In his Decision and Order, the administrative law judge found that claimant's right shoulder and cervical spine conditions and his traumatic hearing loss are causally related to his August 9, 2005 work injury and that his cumulative binaural hearing loss is related to noise exposure sustained during his employment with employer. The administrative law judge further found that claimant reached maximum medical improvement on December 21, 2005. The administrative law judge determined that claimant is unable to perform his usual employment duties as a casual longshore worker and that employer established the availability of suitable alternate employment. The administrative law judge next determined that claimant's post-injury wage-earning capacity of $356 per week exceeds his stipulated average weekly wage of $89.74. Pursuant to these findings, the administrative law judge awarded claimant temporary total disability benefits from August 9, 2005 to May 22, 2006, and a *de minimis* award of $1 per week from May 23, 2006, and continuing. 33 U.S.C.§908(b), (c)(21). Lastly, the administrative law judge awarded claimant compensation for a 29.06 percent binaural hearing loss, *see* 33 U.S.C.§908(c)(13), and medical benefits. 33 U.S.C. §907.

[1] Prior to his August 9, 2005 work-related accident, claimant had undergone surgery to repair a torn rotator cuff in his left shoulder, a cervical laminectomy and diskectomy at C6-7, and a cervical diskectomy and fusion at C4-5 and C5-6. EX 1 at 29, 41, 99.

Claimant's attorney subsequently filed a fee petition seeking a fee for work performed before the administrative law judge.[2] In his Attorney Fee Order, the administrative law judge, after considering employer's objections and claimant's reply thereto, reduced the requested hourly rates for attorney services to $275 and for legal assistant services to $110, reduced the overall fee on the basis of claimant's counsel's degree of success, and awarded claimant's counsel $27,937.12 in fees and costs payable by employer.[3]

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance. BRB No. 08-0839. Employer, in its cross-appeal, challenges the administrative law judge's finding that it is liable for an attorney's fee payable to claimant's counsel. Claimant has not responded to employer's appeal. BRB No. 08-0839A. In a supplemental appeal, claimant challenges the administrative law judge's reduction in the hourly rates requested for the services performed by his attorney and legal assistant. Employer responds, urging affirmance of the administrative law judge's hourly rate determinations.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). In order to meet this burden, employer must establish that job opportunities are realistically and regularly available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, background, and physical restrictions, and which he could reasonably secure if he diligently tried. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS

[2] In his initial fee petition, claimant's counsel requested a fee of $33,806.25, representing 87.75 hours of attorney services at an hourly rate of $375, and 7.5 hours of legal assistant services at an hourly rate of $120, plus an additional $3,169.93 in costs. Employer responded, making various objections to the fee request. Claimant's attorney replied to employer's response, and requested an additional fee of $2,437.50 for 6.5 hours spent by counsel preparing the reply; employer responded to the arguments made in claimant's reply and objected to the supplemental fee request.

[3] The administrative law judge applied a five percent reduction to the fee requested in claimant's counsel's initial fee petition and approved only 3.7 of the 6.5 hours requested in the supplemental fee petition to account for claimant's counsel's degree of success.

13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). In determining whether an employment position constitutes suitable alternate employment, the administrative law judge is required to compare the job's requirements with the totality of claimant's condition, including claimant's medical restrictions. *See Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984).

In this case, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based on the March 26, 2007 report and hearing testimony of employer's vocational expert, Mr. Katzen. Specifically, the administrative law judge found that six of the specific employment opportunities identified in Mr. Katzen's labor market survey constitute suitable alternate employment.[4] Decision and Order at 2-30; EX 12. In challenging the administrative law judge's reliance on the vocational opinion of Mr. Katzen, claimant avers that Mr. Katzen improperly determined that claimant was physically capable of performing light to medium work without having considered the opinion of Dr. Hobson, the Board-certified orthopedic surgeon who treated claimant's right shoulder condition, that claimant is restricted to sedentary work.

The Board may not interfere with the administrative law judge's weighing of the evidence or credibility determinations. *See, e.g., Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993). However, the Board is not bound to accept an administrative law judge's ultimate finding or inference if the decision discloses that it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988), and a decision which is not supported by substantial evidence cannot be affirmed. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). For the reasons that follow, we agree with claimant that the administrative law judge's determination that employer established the availability of suitable alternate employment cannot be affirmed.

In a report dated March 26, 2007, employer's vocational expert, Mr. Katzen, provided the following summary of claimant' physical capabilities:

[4] These six jobs include security guard positions with Mills Casino and Cardinal Services, a cashier position with Cardinal Services, gas station attendant positions with Cardinal Services and Hire Calling, and a sandwich board carrier job with Hire Calling. EX 12 at 655-660. Mr. Katzen indicated that security guard and cashier jobs are classified as light work and that the service station attendant job is classified as medium work; no classification was provided for the sandwich board carrier position. *Id.* at 649.

> In summary, relative to physical capacities, this counselor assumed that Mr. Selthon could work in a light to medium physical demand range, with lifting up to 35 lbs on an occasional basis and 20 lbs more frequently. This is based on the information proved by Dr. Hobson, Dr. Bert, and Mr. Selthon. Major limitations relate to reaching with this right (dominant) arm, as he has limited range of motion and ability to bear weight.

EX 12 at 640-641 (emphasis in original). As claimant asserts, however, Mr. Katzen's assumption regarding claimant's physical capacities rests on an inaccurate understanding of Dr. Hobson's opinion regarding claimant's physical restrictions.[5] In his written report, Mr. Katzen made no mention of Dr. Hobson's December 21, 2005, report in which he declared claimant to be medically stationary and stated that claimant would never be able to return to longshore work and would need a sedentary job. *See* CX 16. Moreover, in his report, Mr. Katzen incorrectly assumed that a physical capacities checklist dated May 17, 2006, was authored by Dr. Hobson, who was treating claimant's shoulder condition,

[5] Claimant first saw Dr. Hobson for treatment of his work-related right shoulder injury on August 25, 2005. CX 10. Dr. Hobson diagnosed a massive rotator cuff tear, and stated that claimant may not have enough space available for the surgical repair of that condition. *Id.* Dr. Hobson took claimant off work and referred him for physical therapy. *Id.* On September 15, 2005, Dr. Hobson reported that claimant's shoulder condition remained very symptomatic and kept him off work. CX 12. Dr. Hobson additionally stated that claimant may also have sustained a cervical injury and referred him to Dr. Bert, another Board-certified orthopedic surgeon in Dr. Hobson's practice, for evaluation of claimant's cervical spine. *Id.*

On December 21, 2005, Dr. Hobson reported that he did not recommend surgical repair of claimant's extensive tear of the rotator cuff in his right shoulder because of inadequate space. CX 16. He further found claimant to be medically stationary and opined that claimant would never be able to return to work as a longshoreman and would need a sedentary job. *Id.* On April 19, 2006, Dr. Hobson reiterated that claimant had been declared stationary because of a rotator cuff tear of the right shoulder that was not amendable to surgical treatment, and referred claimant for pain management. CX 17. He also referred claimant to Dr. Whitney for a second opinion regarding the possibility of surgical intervention, *id.;* Dr. Whitney concurred that surgery was unlikely to result in any significant improvement in claimant's right shoulder condition. CX 19.

when in actuality the checklist was completed by Dr. Bert, who was treating claimant's cervical spine condition and imposed lesser restrictions for that injury.[6] EX 12 at 639; EX 1 at 179. In his hearing testimony, Mr. Katzen initially acknowledged his error in attributing the May 17, 2006, checklist to Dr. Hobson. Tr. at 138. Later in his hearing testimony, however, Mr. Katzen compounded his original error by stating that "Dr. Hobson, early on, limited [claimant] to sedentary work, but then later on he fills out a form that allows him to lift up to 20 pounds, which would be light work;" Mr. Katzen added that this form was dated May 17, 2006. Tr. at 153. Mr. Katzen provided the following explanation of his finding that claimant was able to perform medium level work:

> Well, I combined the information I had from Dr. Bert, who said 35 pounds, with Dr. Hobson, who had said 20 pounds, with the testimony and the interview information from Mr. Selthon, who pushed it up to the 40-50 pound range.

Tr. at 154. This testimony thus supports a conclusion that Mr. Katzen confused the restrictions imposed by Dr. Bert for the cervical spine with those of Dr. Hobson regarding the shoulder. *See* n. 6, *supra.*

Similarly, when addressing Dr. Hobson's reports, the administrative law judge mischaracterized Dr. Hobson's opinion. Although the administrative law judge cited Dr. Hobson's December 21, 2005, report, noting that in this report Dr. Hobson declared claimant's right shoulder condition permanent and stationary and opined that claimant should retire from longshore work, Decision and Order at 5, 23-24, the administrative law judge made no mention of Dr. Hobson's subsequent statement that claimant would need a sedentary job. Similarly, the administrative law judge made the same mistake as Mr.

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[6] In his May 17, 2006, status report, Dr. Bert diagnosed claimant with degenerative joint disease of the cervical spine and declared claimant to be medically stationary. EX 1 at 179. He indicated that claimant could occasionally bend, squat, crawl, twist, reach above shoulders, walk ramps, use stairs and ladders, walk on uneven surfaces, and use his hand for repeated fine manipulations. *Id.* Dr. Bert limited claimant to occasional lifting and carrying of up to 20 pounds, and restricted him from using his arms for repeated pushing, pulling, grasping, lifting, and carrying. *Id.* He further indicated that claimant could sit, stand and walk for four hours per day. *Id.*

In his November 18, 2006, response to employer's inquiry regarding claimant's work restrictions, Dr. Bert indicated that claimant was restricted from performing overhead work, from using heavy equipment and from lifting over 35 pounds. EX 4.

Katzen when he attributed the May 17, 2006,[7] physical capacities checklist to Dr. Hobson rather than to Dr. Bert. Decision and Order at 10, 25-26. Lastly, the administrative law judge did not make a clear finding regarding claimant's specific work restrictions, nor did he clearly specify the evidence upon which he relied in determining those restrictions.[8] *See Hernandez*, 32 BRBS 109. As neither the administrative law judge nor Mr. Katzen addressed Dr. Hobson's opinion that claimant should be limited to sedentary work and as this opinion, if credited by the administrative law judge, may affect his finding that six of the jobs listed in the labor market survey are suitable for claimant,[9] we must vacate the administrative law judge's finding that employer established the availability of suitable alternate employment and remand the case for further consideration of the evidence addressing this issue.[10] *Id.*

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[7] The administrative law judge mistakenly referred to the date of this checklist as May 23, 2006. Decision and Order at 10.

[8] Although the administrative law judge appears to have credited Mr. Katzen's assessment of claimant's physical capabilities, he also made the following statement regarding Mr. Katzen's report:

> Yet in the summary of Claimant's physical capabilities in the labor market survey as well as in [Mr. Katzen's] testimony, the information he listed is not a complete list of Claimant's physical capabilities per Claimant's physicians.

Decision and Order at 26. On remand, therefore, the administrative law judge must determine whether Mr. Katzen possessed an adequate understanding of claimant's medical restrictions, and, if not, whether the labor market survey can nonetheless be considered reliable evidence.

[9] None of the six jobs found suitable by the administrative law judge is classified as sedentary work. EX 12 at 649.

[10] We reject claimant's additional argument that the administrative law judge employed on incorrect *legal* standard when considering whether employer established the availability of suitable alternate employment. Claimant argues in this regard that the administrative law judge erroneously failed to determine whether, in light of the relevant employment market, it was probable that claimant would secure employment deemed to be suitable if he diligently sought such employment. *See* Cl. br. at 12-13. We reject claimant's contention as it lacks support in the law and misconstrues his burden of proof on this issue. It is well-established that once an employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure such

Employer, in its cross-appeal, contends that the administrative law judge erroneously found employer liable for the payment of claimant's counsel's fee pursuant to Section 28(b), 33 U.S.C. §928(b) of the Act.[11] Section 28(b) states in relevant part that if an employer pays or tenders benefits without an award, it is liable for a claimant's attorney's fee only if the claimant obtains greater compensation than the employer paid or tendered. 33 U.S.C. §928(b). The term "tender" is not defined by the Act, but the Board has held that a valid "tender" under the Act requires "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986) (*en banc*). A "tender" pursuant to Section 28(b) must be unconditional. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 39 (2004).

In challenging the administrative law judge's decision to hold it liable for counsel's fee, employer contends that claimant did not obtain greater compensation by virtue of the administrative law judge's Decision and Order than employer tendered in its November 7, 2006, settlement offer.[12] We reject employer's assignment of error, as the administrative law judge rationally determined that his award of *de minimis* benefits to

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employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). If, as claimant alleges, the positions identified as establishing the availability of suitable alternate employment are not truly suitable or available, this fact would be borne out by a diligent, yet unsuccessful, job search. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

[11] No party contends that Section 28(a), 33 U.S.C. §928(a), applies to this case and, thus, the provisions of that subsection need not be addressed.

[12] Employer avers that the $15,000 which it offered to settle the outstanding compensation claims, with medical benefits left open, exceeds the value of the $3,295.15 in additional benefits awarded to claimant after employer was credited for the compensation payments it previously made, and the ongoing award of *de minimis* benefits of $1 per week. *See* Emp. Petition for Review at 2; Emp. Objections to Fee Petition-EXs 3, 4.

claimant supports a finding that employer is liable for the fee under Section 28(b).[13] *See* Attorney Fee Order at 6-7. Employer, relying on the holding of the United States Court of Appeals for the Ninth Circuit in *Richardson*, 336 F.3d at 1106, 37 BRBS at 82(CRT), that where the claimant obtained no actual relief, "the possibility of future relief" does not constitute a "successful prosecution" entitling the claimant to attorney's fees under Section 28(a) of the Act, 33 U.S.C. §928(a), argues that the administrative law judge's award of *de minimis* benefits, subject to future modification under Section 22 of the Act, 33 U.S.C. §922, does not support an award of attorney's fees under Section 28(b). In *Richardson*, the claimant's work-related back injury was found to have resolved and, thus, he was awarded no disability compensation for that injury nor was he compensated for any outstanding medical bills related to that condition. 336 F.3d at 1106, 37 BRBS at 82(CRT). The court's discussion of "the possibility of future relief" referred to the employer's potential liability for medical benefits in the event that the claimant's back injury were to recur in the future. *Id.* In this case, employer's reliance on *Richardson* is misplaced as in that case the claimant was found to have no present disability resulting from his work-related back injury nor any present need for medical treatment of that injury, while in the case at bar claimant was found to have a present permanent partial disability due to his work-related injuries, and the administrative law judge's award of *de minimis* benefits represents a present compensation award for that present disability. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).[14]

If claimant had agreed to the settlement offer proposed by employer, he would have forfeited his entitlement to an award of *de minimis* benefits for his present disability,

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[13] We agree with employer, however, that the administrative law judge erred in additionally finding that the administrative law judge's award of medical benefits supports employer's fee liability under Section 28(b). *See* Attorney Fee Order at 6. Employer's settlement order explicitly stated that medical benefits were not to be discharged and, thus, had claimant accepted the settlement offer, he would have remained entitled to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907—the same benefits that were awarded by the administrative law judge. *See* Decision and Order at 38; Objections to Fee Petition – EX 2. *See Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 439, 32 BRBS 171, 177(CRT) (1st Cir. 1998).

[14] In *Rambo II*, the Supreme Court stated that to effectuate the Act's mandate to account for the future effects of disability, there must be "a cognizable category of disability that is potentially substantial, but presently nominal in character." 521 U.S. at 132, 31 BRBS at 58(CRT). The Court emphasized that "a disability whose substantial effects are only potential is nonetheless a present disability, albeit a presently nominal one." 521 U.S. at 135, 31 BRBS at 60(CRT).

an award which allows for future modification should he sustain a loss of wage-earning capacity in the future. By declining employer's settlement offer and obtaining an award of *de minimis* benefits, claimant obtained an inchoate right to greater compensation than that tendered by employer and, thus, he is entitled to an attorney's fee payable by employer under Section 28(b).[15] *See generally E.P. Paup Co. v. Director, OWCP [McDougall]*, 999 F.2d 1341, 1354, 27 BRBS 41, 57(CRT) (9th Cir. 1993). We therefore affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(b).

Lastly, we consider claimant's argument that the administrative law judge committed legal error by rejecting counsel's evidence of the "market" hourly rates of comparable attorneys in Portland, Oregon, and relying instead on hourly rate determinations made by administrative law judges in other longshore cases. For the reasons stated in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009), we vacate the hourly rate determination for attorney services made by the administrative law judge, and we remand the case for him to determine a reasonable hourly rate consistent with these decisions. *See H.S. v. Dept. of Army/NAF*, ___ BRBS ___, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009). For the same reason, we also vacate the administrative law judge's decision to reduce the requested hourly rate for legal assistant services, which appears to have been based on the same rationale as that underlying his reduction in the hourly rate requested for attorney services. *Id.*

[15] Employer's further assertion that there is no basis in the record for assigning a value to claimant's *de minimis* award is rejected. The administrative law judge rationally determined, on the basis of the evidence in this case, that there is a "real and substantial risk" that claimant will experience a future loss of wage-earning capacity and, thus, would be entitled to an award of disability benefits for that loss. Attorney Fee Order at 7. Noting that the value of claimant's *de minimis* award is that it hedges against that significant risk, the administrative law judge found that the future award of disability benefits could result in payments far in excess of the $15,000 offered by employer. *Id.*

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is vacated, and the case is remanded for further consideration of this issue consistent with this decision. With respect to the fee award of the administrative law judge, his determination that employer is liable for a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), is affirmed, his reduction in the requested hourly rates for attorney and legal assistant services is vacated, and the case is remanded for further consideration of the hourly rates requested by claimant's counsel consistent with this decision.

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