U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0465

CHRISTOPHER FRANCIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: June 21, 2018
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James McCurdy and Elana L. Charles (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Compensation and Benefits (2014-LHC-00813) of Administrative Law Judge Richard M. Clark 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a casual longshore worker, sustained an ACL injury to his right knee while working as a lasher for employer on February 28, 2011. Claimant continued to seek and obtain casual longshore work until June 10, 2011, when he underwent surgery on his

right knee. Claimant experienced ongoing knee complaints and subsequently underwent additional knee surgeries on May 16, 2012, December 31, 2013, and October 19, 2015. He has not returned to longshore work since his initial knee surgery. In September 2012, claimant allegedly injured both of his shoulders while performing wall squats which, he testified, had been prescribed by his physical therapist for treatment for his work-related knee condition. Claimant underwent distal clavicle excisions on his left shoulder on April 8, 2013, and his right shoulder on July 24, 2013.

In his Decision and Order, the administrative law judge found that employer does not dispute the compensability of claimant's February 28, 2011, knee injury and the treatment therefor. Decision and Order at 33-36. He determined that claimant failed to present substantial evidence that his shoulder injuries were the natural or unavoidable result of, or related to, his work-related knee injury and treatment, however. Consequently, he found that employer is not liable for medical benefits for the shoulder conditions. *Id.* at 36-38.

The administrative law judge found: claimant's knee condition initially reached maximum medical improvement on January 30, 2013; the nature of his condition changed following each subsequent surgery; claimant has an eight percent impairment to his right lower extremity; claimant cannot return to longshore work; and employer established the availability of suitable alternate employment as of January 7, 2015. Decision and Order at 42-49. He calculated claimant's average weekly wage as $94.84. *Id.* at 38-41. The administrative law judge awarded claimant temporary total disability benefits from June 11, 2011 through January 29, 2013, permanent total disability benefits from January 30, 2013 through January 6, 2015, permanent partial disability benefits for an eight percent impairment to his right lower extremity as of January 7, 2015, temporary total disability benefits from October 19, 2015 through February 22, 2016, and the resumption of permanent partial disability benefits from February 23, 2016, based on claimant's prior impairment rating. *Id.* at 51; *see* 33 U.S.C. §908(a), (b), (c)(2).

On appeal, claimant challenges the administrative law judge's findings that his shoulder conditions are not related to the work injury, the calculation of his average weekly wage, the degree of his right knee impairment, and the disability benefits awarded. Employer, in response, urges affirmance of the administrative law judge's decision in its entirety. Claimant filed a reply brief.

Impairment Rating – Right Lower Extremity

The administrative law judge credited the opinion of Dr. Yodlowski to determine that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for an eight percent impairment to his right lower extremity. Claimant challenges this finding, asserting that the administrative law judge

erred in summarily crediting Dr. Yodlowski's evaluation of claimant's condition which, he avers, does not take into account claimant's underlying knee arthritis.

Dr. Yodlowski, a Board-certified orthopedic surgeon, examined claimant on January 15, 2015, and reviewed reports from claimant's other providers as well as claimant's January 4, 2013 FCE. *See* Decision and Order at 17-19. In a 37-page report dated January 15, 2015, Dr. Yodlowski set forth the medical records she reviewed, as well as her personal evaluation of claimant, and opined that claimant sustained an eight percent impairment of his right lower extremity under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, (6th ed.). EX 44 at 235-272. In a report dated April 8, 2015, Dr. Yodlowski reviewed additional medical records and concluded that her opinions remained unchanged. *Id*. at 273-276. After noting that Dr. Yodlowkski's opinion is the only rating of record, the administrative law judge credited her evaluation of claimant, finding that she is well-qualified to render an opinion because she reviewed the majority of claimant's medical records through January 14, 2015, and her rating of an eight percent impairment under the AMA *Guides* is explained thoroughly. Decision and Order at 48.

In this case, the administrative law judge fully discussed the relevant evidence and provided a rational basis for finding the opinion of Dr. Yodlowski determinative of the degree of impairment to claimant's right lower extremity. *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990). As the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with law, we affirm his finding that claimant sustained an eight percent permanent impairment to his right lower extremity.[1] *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Suitable Alternate Employment

Where, as in this case, claimant has established his inability to return to his usual work due to his 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

[1] Claimant requests that the Board "remand this issue to the ALJ for another closing examination of the right leg." *See* Cl's Br. at 23-24. We decline to do so. Dr. Yodlowski's testimony constitutes the only evidence of record with regard to claimant's knee impairment, and her opinion supports the administrative law judge's award of permanent partial disability for an eight percent impairment to claimant's right lower extremity. Thus, on the record before us, claimant has not established entitlement to a different impairment rating. Should claimant acquire additional evidence documenting a change in his medical condition, he may file a petition for modification. 33 U.S.C. §922.

1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish that suitable work is realistically and regularly available to claimant in his community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

In his decision, the administrative law judge found that Ms. Cohen's January 7, 2015 report establishes the availability of five suitable positions claimant is capable of performing.[2] Decision and Order at 45-46. The administrative law judge credited the deposition testimony of Mr. Park, an occupational therapist, who opined that claimant is capable of medium work, and of Dr. Yodlowski, who placed restrictions on claimant but opined that claimant is capable of performing the jobs identified in Ms. Cohen's labor market survey. *Id.* at 31, 45; CX 50 at 253; EX 44 at 270.

In challenging the administrative law judge's finding that employer established the availability of suitable alternate employment, claimant contends the administrative law judge failed to address all relevant medical evidence, including claimant's testimony regarding his inability to stand for extended periods and his lack of computer skills. Alternatively, claimant asserts the administrative law judge erred in finding suitable alternate employment established on January 7, 2015, rather than on January 15, 2015, when Dr. Yodlowski examined claimant.

We reject claimant's contentions. In finding that claimant is capable of frequent standing, the administrative law judge relied on claimant's January 4, 2013 FCE, the fact that Drs. Bell and Vallier did not place any restrictions on claimant, and Dr. Yodlowski's restrictions which also are silent on claimant's ability to stand. Decision and Order at 45. The administrative law judge rationally found that claimant's testimony is "not entitled to significant weight," *id.* at 29, and claimant does not cite any medical evidence supportive of his subjective opinion regarding his inability to stand for prolonged periods. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). With regard to claimant's computer keyboarding skills, the administrative law judge relied on claimant's statements to his vocational expert, Ms. Foster, that he uses a computer at home as evidence that he has basic computer skills. Decision and Order at 29, 45. Lastly, claimant's assertion that it is undisputed that he "should not lift over 20 pounds," Cl. Br. at 18, is belied by the January 4, 2013 FCE which indicates greater lifting abilities. CX 50 at 253-255.

Substantial evidence supports the administrative law judge's finding that claimant is capable of performing the available jobs identified in Ms. Cohen's January 7, 2015, labor

[2] These positions are: cashier with 7-11; receptionist with Cardinal Employment Services; customer service representative with Mill Casino; customer service representative with U-Hall; worker position with Taco Bell; and host position at Bandon Dunes. EX 47.

market survey. Dr. Yodlowski specifically approved the jobs identified by employer's vocational expert as being within claimant's physical restrictions following the FCE, and the administrative law judge rationally concluded that claimant has the necessary vocational skills to perform the jobs. Moreover, we reject claimant's contention that suitable alternate employment was not established until January 15, 2015, the date on which Dr. Yodlowski approved the identified jobs, as the January 7, 2015 labor market survey identified specific jobs that were within claimant's capabilities on this date. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). We therefore affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as of January 7, 2015, based on the vocational and medical opinions of record.[3] *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Temporary Partial Disability Compensation

Claimant challenges the administrative law judge's denial of temporary partial disability benefits from February 29 through June 10, 2011. The administrative law judge found "no compelling evidence that Claimant was entitled to TPD for the period of February 29, 2011 to June 10, 2011." Decision and Order at 49. In support of this finding, the administrative law judge found that claimant was not under any work restrictions during this period and that, although claimant may have self-restricted his post-injury work, he appeared to be working his normal duties. *Id.*

An award for temporary partial disability is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; the party contending that the employee's actual earnings are not representative of his wage-earning capacity bears the burden of establishing an alternate reasonable wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant has not alleged any specific error committed by the administrative law judge in addressing his claim for compensation during this period nor cited any specific evidence that his actual post-injury earnings were not representative of his actual post-

[3] As claimant does not challenge the administrative law judge's finding that he did not diligently seek suitable employment, that finding is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

injury wage-earning capacity. *See* Cl. Br. at 17. Consequently, as claimant has not established error in the administrative law judge findings, the administrative law judge's denial of disability compensation from February 29 through June 10, 2011, is affirmed.

Average Weekly Wage

Claimant next challenges the administrative law judge's determination of his average weekly wage at the time of injury. Claimant contends the administrative law judge erred in rejecting all of the testimony and evidence supporting his contention that he earned income by performing yard and auto-detailing work. Claimant also contends the administrative law judge failed to consider claimant's tax filings with regard to this purported income.

The object of Section 10(c) of the Act, 33 U.S.C. §910(c), is to arrive at a sum that reasonably represents the claimant's annual earnings at the time of his injury.[4] *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Section 10(c) of the Act states, in relevant part, that:

> a claimant's average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, . . . including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The wages a claimant was earning in all jobs held at the time of injury are includible in the average weekly wage calculation where, as here, claimant's ability to earn the wages in both the job in which he was injured and any other jobs are affected by his work-related injury. *See Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir. 1956); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Harper v. Office Movers/E.E. Kane, Inc.*, 19 BRBS 128 (1986); *see also SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS(CRT) (5th Cir. 1996).

Claimant testified he received income pre-injury for yardwork and auto-detailing services that he performed for various relatives. Claimant's wife and aunt, who allegedly hired and paid claimant for work performed on for her and her church, testified in support of claimant's purported pre-injury work. Tr. at 36-37, 98-104. Claimant's wife additionally presented three years of receipts, which she admittedly constructed after

[4] It is uncontested that neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), is applicable in this case.

claimant's work injury, and claimant submitted into evidence federal and state tax returns which he filed belatedly in June 2012 declaring the income he allegedly received for yard and auto-detailing work in 2009, 2010, and 2011. *See* EX 5.[5]

The administrative law judge found claimant's evidence of pre-injury non-longshore earnings to be "too inconsistent, not credible, and not reliable in the manner sufficiently necessary for an average weekly wage calculation." Decision and Order at 41. Rather, he found the sums claimant received from his relatives to be more akin to an allowance and based on their generosity, rather than self-employment wages.[6] *Id.* Consequently, after finding that the only credible pay information was that derived from claimant's longshore work between November 16, 2010 and June 10, 2011, the administrative law judge calculated claimant's average weekly wage based solely on those wages.[7] *See id.* at 38-41.

We agree with claimant that the administrative law judge's average weekly wage calculation cannot be affirmed. While the administrative law judge acknowledged the existence and history of claimant's belated tax filings, he did not address the accuracy or credibility of these documents. As the administrative law judge did not address all of the relevant evidence regarding claimant's alleged pre-injury earnings, and claimant's federal and state tax returns would, if credited, support claimant's position that he earned income pre-injury performing yard and auto-detailing jobs, we must vacate the administrative law judge's average weekly wage calculation and remand the case for the administrative law judge to address this evidence and recalculate claimant's average weekly wage if necessary. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the Administrative Procedure Act requires the fact-finder to address all relevant evidence on material issues of fact); *see also Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

[5] Claimant declared $7,335 in business income in 2009, $7,335 in business income in 2010, and $625 in business income in 2011. In addition to paying tax on this income, claimant paid a penalty for his late filing.

[6] Claimant allegedly performed work for his grandparents, his wife's grandparents, and his aunt and her church.

[7] The administrative law judge calculated claimant's average weekly wage as $94.84 by dividing claimant's total longshore earnings from November 16, 2010, through the date of his first knee surgery, June 10, 2011, by the number of weeks claimant worked during this period of time, 29.57.

Causation – Shoulder Conditions

Claimant challenges the administrative law judge's finding that his shoulder conditions are not related to his knee injury.[8] Claimant asserts that in September 2012 he was performing wall squats at home, which had been prescribed as treatment for his work-related knee injury, when he fell, injuring both shoulders. Claimant subsequently underwent distal clavicle excisions on both shoulders.

The administrative law judge found that claimant's shoulder conditions constituted "secondary" injuries, and pursuant to *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), claimant bore the burden of persuasion and was required to present substantial evidence that his shoulder conditions naturally or unavoidably resulted from his work-related knee injury without the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption. Decision and Order at 36. The administrative law judge found neither claimant nor his wife to be credible with regard to how claimant allegedly injured his shoulders. He also found that claimant did not inform his treating physician, Dr. Bell, about his shoulder complaints or mention symptoms or pain during his January 2013 FCE. Thus, the administrative law judge determined that claimant failed to present substantial evidence that his shoulder conditions are related to his work-related knee injury or treatment therefor. *Id.* at 38. Assuming, *arguendo*, that Section 20(a) is applicable to this issue, the administrative law judge found that the unequivocal opinion of Dr. Yodlowski, that claimant's shoulder conditions are not work-related, is sufficient to rebut the Section 20(a) presumption. *Id.* at 36 n.12.

Claimant asserted that his shoulder conditions resulted from the physical exercises prescribed for treatment of his work-related knee injury. Pursuant to Section 2(2), 33 U.S.C. §902(2), the term "injury" includes secondary injuries if they "naturally or unavoidably" result from the work-related injury. Thus, an injury sustained during the course of medical treatment for a work-related injury is compensable under the Act. *See Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987). Although the administrative law judge did not agree with claimant's contention that he should analyze this issue in light of the Section 20(a) presumption, *see Amerada Hess Corp.*, 543 F.3d 755, 42 BRBS 41(CRT), he nevertheless found that if the presumption were to be applied

[8] Claimant concedes he does not seek either disability benefits for his shoulder conditions, because any disability for those conditions overlapped his total disability benefits awarded for claimant's right knee injury, or medical benefits, because the state of Oregon has paid his medical expenses. *See* Cl. Br. at 21; Cl. Reply Br. at 10. Rather, claimant states that he seeks only the reimbursement of transportation costs associated with the medical care related to his shoulder conditions. *Id.*; *see* 20 C.F.R. §702.401(a).

to claimant's claim it would have been rebutted by the opinion of Dr. Yodlowski.[9] *See generally Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). If the Section 20(a) presumption is rebutted, it drops from the case, and the administrative law judge must then weigh the relevant evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of proving that his shoulder conditions are the natural or unavoidable result of the work injury. *See Stephenson*, 846 F.3d 680, 50 BRBS 81(CRT); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant does not challenge the administrative law judge's alternate finding that Dr. Yodlowski's opinion is sufficient to rebut the Section 20(a) presumption, thus placing on claimant the burden of proving that his shoulder conditions are work-related. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). With regard to the etiology of claimant's shoulder conditions, the administrative law judge discussed at length the opinions of Drs. Vallier and Yodlowski. Decision and Order at 12-13, 31-32, 37-38 (Dr. Vallier); Decision and Order at 17-21, 31, 37-38 (Dr. Yodlowski). The administrative law judge found Dr. Yodlowski's opinion to be more credible with regard to claimant's shoulder conditions. Dr. Yodlowski opined that claimant's report of injuring his shoulders was inconsistent with his described pain, *see* Tr. at 236-237, and stated that claimant's medical records do not support a finding of a shoulder fracture and that, therefore, the surgeries performed on claimant's shoulders were likely secondary to impingement due to age-related degenerative changes.[10] *See* EX 44 at 268. Specifically, the administrative law judge stated that Dr. Yodlowski

> was unequivocal in her opinion that [claimant's] x-ray did not show a healed fracture . . . I found Dr. Yodlowski to have the more reasoned and well-

[9] The Board has declined to follow *Amerada Hess* and *Ins. Co. of the State of Pennsylvania v. Director, OWCP* [*Vickers*], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013), outside of the jurisdiction of the United States Court of Appeals for the Fifth Circuit. *See Stephenson v. Metro Machine Corp.*, BRB No. 14-0425 (Aug. 17, 2015), *aff'd sub nom. Metro Machine Corp. v. Director, OWCP* [*Stephenson*], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017).

[10] Dr. Vallier opined that claimant's left shoulder exhibited moderately severe posttraumatic arthritis and secondary impingement syndrome, while claimant's right shoulder exhibited mild impingement syndrome, *see* CX 53 at 263, and that it was conceivable that claimant's shoulder conditions were caused by his reported fall while performing wall squats. *See* CX 57.

> explained opinion regarding the shoulders. She fully examined the reports, saw the contradictions, and explained that the way Claimant later described the injuries related to the wrong side of his body and would not have caused the type of injury he alleged . . . I found her report to be more thoughtful and well-considered than the reports and opinions of Dr. Vallier related to the shoulders.
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> After careful evaluation of the evidence, I find that Claimant has failed to present substantial evidence that the right and left shoulder injuries were [sic] "naturally or unavoidably" resulted from the first covered injury or that they are related at all to the original knee injury or treatment. Therefore, the treatment and surgeries performed by Dr. Vallier on both shoulders were neither reasonable nor necessary under the Act for a work-related injury.

Decision and Order at 38.

It is well established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT); *Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Cordero*, 580 F.2d 1331, 8 BRBS 744. In this case, the administrative law judge fully discussed the medical evidence regarding the cause of claimant's shoulder conditions and provided a rational basis for crediting the opinion of Dr. Yodlowski over that of Dr. Vallier. As the administrative law judge's decision is rational and supported by substantial evidence, we affirm his determination that claimant did not meet his burden of establishing that his shoulder conditions are related to the treatment for his work-related knee injury. *See generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Compensation and Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge