BRB No. 04-0555 BLA

AGNES E. SCHUTT (Widow of BENEDICT S. SCHUTT) Claimant-Respondent v. KNIFE RIVER COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/29/2005 DECISION and ORDER

Appeal of the Decision and Order Awarding Miner's and Survivor's Benefits and Supplemental Decision and Order Awarding Representative's Fee of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

David C. Thompson (David C. Thompson, PC), Grand Forks, North Dakota, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Awarding Miner's and Survivor's Benefits (01-BLA-1010) of Administrative Law Judge Thomas M. Burke rendered on claims 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] In addition, employer appeals the administrative law judge's Supplemental Decision and Order Awarding Representative's Fee awarding fees to claimant's counsel. In a decision dated March 9, 2004, the administrative law judge credited claimant with twenty-eight years of coal mine employment,[2] as stipulated by the parties, and found that claimant established that the miner suffered from mild, simple coal workers' pneumoconiosis, arising out of coal mine employment, as well as a mild to moderate level of emphysema caused, at least in part, by his coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(2), (4), that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv), 718.204(c),[3] and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits on both the miner's and survivor's claims. Following the award of benefits, in a Supplemental Decision and Order Awarding Representative's Fee dated June 18, 2004, the administrative law judge granted claimant's counsel's petition for attorney's fees, approving the hourly rate in full, but reducing the number of hours requested. Supplemental Decision and Order Awarding Representative's Fee, issued June 18, 2004.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence in both the miner's and survivor's claims in finding the existence of coal workers' pneumoconiosis, in finding the existence of emphysema due to coal dust exposure, in finding that the miner was totally disabled due to pneumoconiosis, and in finding that his death was due to pneumoconiosis. Claimant[4]

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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 record indicates that the miner's coal mine employment occurred in North Dakota. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge's decision contains citations to the prior version of the regulations, 20 C.F.R. §718.204(c)(1)-(4).

[4] Claimant is the widow of the miner, Benedict S. Schutt. Director's Exhibit 72. The miner filed his claim for benefits on February 17, 1992. Director's Exhibit 1.

responds, urging affirmance of both the award of miner's and survivor's benefits and the award of attorney's fees. Employer filed a brief in reply to claimant's response. The Director responded to one argument raised by employer,[5] but expressed no opinion as to ultimate outcome of the case.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson*

Following the issuance of a July 27, 1992 proposed denial by the district director, on August 6, 1992 the miner requested a hearing. Director's Exhibits 13, 14. On December 28, 1992, however, the miner submitted additional evidence and requested modification. Director's Exhibit 17. On July 6, 1993 the district director issued a proposed decision awarding benefits, Director's Exhibit 31, and on October 26, 1993, the claim was referred to the Office of Administrative Law Judges (OALJ) for adjudication. Director's Exhibit 34. Before a hearing could be held, however, on June 2, 1997 the miner suddenly died. Director's Exhibits 42, 77. On March 9, 1998 claimant filed for survivor's benefits. Director's Exhibit 72. Following the district director's March 12, 2001, proposed decision denying survivor's benefits, on May 11, 2001, claimant requested a hearing. Director's Exhibit 86. The miner's and survivor's claims were consolidated and on July 2, 2001, both claims were forwarded to the OALJ for adjudication. Director's Exhibits 64, 91.

[5] The Director asserted that, contrary to employer's argument, the administrative law judge permissibly relied in part on the Dictionary of Occupational Titles to find that the position of "dragline operator" involved "medium work."

[6] The administrative law judge's findings that claimant established that the miner had twenty-eight years of coal mine employment, that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(1) or (3), and that total disability was not established at 20 C.F.R. 718.204(b)(2)(i) or (iii), but was established at 20 C.F.R. §718.204(b)(2)(ii), are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In reviewing the autopsy reports and medical opinions relevant to the existence of coal workers' pneumoconiosis in both the miner's and survivor's claims pursuant to 20 C.F.R. §718.202(a)(2), (4), the administrative law judge properly accorded greater weight to the autopsy evidence as being the most reliable evidence of the existence of coal workers' pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). The administrative law judge then accorded greatest weight to opinion of Dr. Dikman, a Board-certified pathologist whom he identified as the autopsy prosector, as supported by the opinions of Dr. Kleinerman and Dr. Dolan, and found that the evidence established the existence of pneumoconiosis. Decision and Order at 38-39.

Employer initially asserts that the administrative law judge erred in identifying Dr. Dikman as the autopsy prosector, and in according him greater weight on that basis. Employer's Brief at 27-28. We reject employer's argument. A review of the record reveals that a complete autopsy was not performed in this case. Rather, at claimant's request, on June 3, 1997 Dr. Dwight J. Hertz harvested the miner's lungs and forwarded them to claimant's counsel, who in turn forwarded them to Dr. Dikman for macroscopic and microscopic examination.[7] Director's Exhibit 77. While employer is correct that the administrative law judge mistakenly identified Dr. Dikman as the autopsy prosector, as the administrative law judge specifically indicated that he was not according him greater weight due to his status as autopsy prosector, but rather accorded him greatest weight because he performed the most thorough examination, any error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 39.

Employer further asserts that the administrative law judge erred in according greater weight to Dr. Dikman on the grounds that he performed a digestion study, as that test is not generally used to determine the existence of coal workers' pneumoconiosis. Employer's Brief at 29. Contrary to employer's argument, the administrative law judge specifically acknowledged the conflicting medical evidence of record and then noted that no pathologist had discredited the study as improper. Accordingly, the administrative law judge permissibly concluded that Dr. Dikman's use of this medically acceptable technique along with other techniques to analyze the miner's lungs was appropriate and lent further support to the probative value of his opinion.[8] *Hall v. Director, OWCP*, 8

[7] Subsequently, Dr. Kleinerman also received the miner's lungs for macroscopic and microscopic examination.

[8] In addition, the administrative law judge found that Dr. Dikman was also the only physician who reported performing electron microscopy, energy dispersive

BLR 1-196 (1985); Decision and Order at 39. Thus, we reject employer's argument and affirm the administrative law judge's crediting of Dr. Dikman's report as based on the most thorough examination and testing. *Hall*, 8 BLR at 1-196.

Employer also asserts that the administrative law judge erred in finding Dr. Kleinerman's opinion supportive of Dr. Dikman's, as the physicians offered differing opinions on several issues. Employer also contends that the administrative law judge should have accorded the greatest weight to the opinion of Dr. Kleinerman as his qualifications are equal to Dr. Dikman's and his report is the best reasoned and documented. Employer's Brief at 31. Contrary to employer's arguments, as Dr. Kleinerman also diagnosed the existence of mild simple pneumoconiosis, the administrative law judge properly found his opinion supportive of Dr. Dikman's on this issue. Claimant's Exhibit 3A. In addition, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Dikman than to the opinion of Dr. Kleinerman on the ground that Dr. Dikman's report is based on the most through examination and testing. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (19890(en banc); *Hall*, 8 BLR at 1-196.

Employer's further argument, that the administrative law judge did not explain his weighing of the remaining physician's reports of record, is without merit. Employer's Brief at 29. As discussed above, the administrative law judge clearly stated his basis for according greater weight to Dr. Dikman. Thus, we affirm the administrative law judge's finding that claimant established the existence of coal workers' pneumoconiosis through autopsy and supporting medical opinion evidence at 20 C.F.R. §718.202(a)(2), (4).

Despite our affirmance of the administrative law judge's finding of coal workers' pneumoconiosis, we must also address employer's contention that the administrative law judge erred in further finding the existence of emphysema arising out of coal mine employment, as this finding ultimately affects the administrative law judge's consideration of the medical opinion evidence on the issues of the cause of the miner's disability and death at 20 C.F.R. §§718.204(c) and 718.205(c), respectively. After noting that all of the pathologists of record diagnosed the presence of emphysema,[9] the

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spectroscopy, electron diffraction analysis, or cytocentrifuge light microscopy. Decision and Order at 39.

[9] The administrative law judge based this finding in part on the report of Dr. Graham, a professor of pathology. Decision and Order at 26, 39. Employer asserts that the administrative law judge erred in considering Dr. Graham's opinion, as it was never formally entered into the record. Employer's Brief at 51-52. Employer's argument has merit. While Dr. Graham's opinion was attached to the deposition of Dr. Dolan,

administrative law judge addressed the cause of the miner's diagnosed emphysema, finding, in pertinent part:

> …none of the pathologists, including Dr. Naeye, found evidence of bronchiolitis in the miner's lungs. Dr. Spagnolo explained that it is widely known that a finding of bronchiolitis is required before a diagnosis of centrilobular emphysema is made. In the absence of bronchiolitis, the miner would have suffered from focal emphysema, which is most likely caused by coal dust exposure.
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> In sum, given the absence of bronchiolitis, it is more likely that the miner suffered from coal-dust-induced focal emphysema. However, even if it was determined that he suffered from centrilobular emphysema, Dr. Naeye's opinion supports a finding that coal dust exposure, along with smoking, would have contributed to this condition.
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> Thus, the miner suffered from mild simple coal workers' pneumoconiosis as well as a mild to moderate level of emphysema caused, at least in part, by his coal dust exposure.

Decision and Order at 40.

Employer specifically asserts that in finding that the miner's emphysema arose in part from coal dust exposure, the administrative law judge mischaracterized the opinions of Drs. Spagnolo and Naeye. Employer's Brief at 34-38. We agree.

In his medical report and deposition, Dr. Spagnolo opined that the miner had centrilobular emphysema due to smoking, that there was no evidence of any chronic coal-mine induced lung disease, that coal mine dust did not aggravate the miner's lung condition, and that coal mine dust played no role in the miner's impairment or in his death. Employer's Exhibit 5, Spagnolo Deposition at 30-33. When asked whether coal dust could cause emphysema, Dr. Spagnolo replied that coal dust causes focal emphysema, which is a distinct entity from centrilobular emphysema which is caused by smoking. Spagnolo Deposition at 78-82. When asked about the significance of the absence of bronchiolitis in the miner's lung tissue, Dr. Spagnolo specifically explained that while bronchiolitis is always present with centrilobular emphysema when people are actively smoking, once they quit smoking, as the miner did approximately thirty-five years prior to his death, the emphysema will remain but the bronchiolitis may

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Claimant's Exhibit 15A, there is no evidence in the record that Dr. Graham's opinion was offered into evidence or admitted into the record. Thus, on remand, the administrative law judge must determine whether the opinion of Dr. Graham is properly of record.

disappear.[10] Spagnolo Deposition at 84-90. Thus, the administrative law judge erred in relying on Dr. Spagnolo's opinion regarding the absence of bronchiolitis to support a finding of focal emphysema causally related to coal dust exposure. In addition, we note that there is no other support in the record for the administrative law judge's conclusion that "given the absence of bronchiolitis, it is more likely that the miner suffered from coal-dust-induced focal emphysema."[11] Although the weighing of evidence is within the discretion of the administrative law judge, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Therefore, as the administrative law judge improperly substituted his own conclusions for those of Dr. Spagnolo, we vacate the administrative law judge's finding that the miner suffered from focal emphysema due to coal dust exposure. On remand, in determining whether the miner suffered from any other chronic disease or impairment arising out of coal mine employment, in addition to coal workers' pneumoconiosis, the administrative law judge must reconsider Dr. Spagnolo's opinion in light of our holding.

We further vacate the administrative law judge's reliance on the opinion of Dr. Naeye to find that even if the miner had centrilobular, and not focal, emphysema, it was also due in part to coal dust exposure. During his deposition, Dr. Naeye acknowledged that he diagnosed centrilobular emphysema in the miner and in response to an inquiry as to its cause, stated, in pertinent part:

> It has complex origins. Let me describe it as follows: In coal workers the issue was always if it's present did coal mine dust have a role, and in order to assess that, you have to look at smoking histories also, there is a lot of literature on this subject, and overall I would summarize it by saying that from people who have smoked, the smoking has about three times the role of mine dust exposure in terms of causing centrilobular emphysema. Its just been very well documented in a number of studies in bituminous miners in the United States.

Employer's Exhibit 10, Dr. Naeye's Deposition, at 23.

We agree with employer's argument that Dr. Naeye's statement, "that from people who have smoked, the smoking has about three times the role of mine dust exposure in terms of causing centrilobular emphysema," is merely a summary of the medical literature in general, and was mischaracterized by the administrative law judge as a

[10] For a period of approximately twenty years, the miner's smoking habit ranged from one to four packs a day. The miner quit smoking by 1963.

[11] None of the pathologists of record diagnosed "focal" emphysema. Drs. Naeye, Kleinerman, Caffrey and Hutchins diagnosed centrilobular emphysema, and Dr. Dikman diagnosed "pulmonary emphysema."

medical opinion that coal dust played a role in the development of this specific miner's centrilobular emphysema. *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Goode v. Eastern Associated Coal Co.*, 6 BLR 1-1064 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); Employer's Brief at 36; Decision and Order at 40. Therefore, as Dr. Naeye's statement does not constitute affirmative evidence of a causal relationship between the miner's diagnosed centrilobular emphysema and his coal mine employment, sufficient to support claimant's burden to establish entitlement, *see White v. Director, OWCP*, 6 BLR 1-368 (1983), we vacate the administrative law judge's alternative finding that the miner suffered from centrilobular emphysema arising, at least in part, out of coal dust exposure. On remand, in considering whether the miner suffered from any other chronic disease or impairment arising out of coal mine employment, in addition to coal workers' pneumoconiosis, the administrative law judge must also reconsider Dr. Naeye's opinion in light of our holding.

Employer next asserts that the administrative law judge erred in finding the miner totally disabled from performing his usual coal mine work at 20 C.F.R. §§718.204(b)(2)(iv). Employer's Brief at 50-51. We agree. In determining pursuant to 20 C.F.R. §718.204(b)(2)(iv), that "all of the physicians of record conclude that the miner was totally disabled," the administrative law judge erred in failing to differentiate between those physicians diagnosing cardiac disability and those diagnosing respiratory disability, as only those physicians who conclude that that a miner's *respiratory or pulmonary condition* prevents or prevented the miner from engaging in employment can support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), aff'g 16 BLR 1-11 (1991); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); Decision and Order at 48. Thus, we vacate the administrative law judge's finding that the evidence establishes the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must reconsider the medical opinion evidence and determine whether it is sufficient to establish that the miner was totally disabled solely from a respiratory or pulmonary impairment. In addition, if, on remand, the administrative law judge again finds it necessary to take judicial notice of facts outside of the record, he must do so in accordance with the Administrative Procedure Act. *See* 5 U.S.C. § 556(e); 29 C.F.R. §18.45; 20 C.F.R. §725.464; Fed. R. Evid. 201; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1990)

Employer next challenges the administrative law judge's determinations pursuant to 20 C.F.R. §§718.204(c) and 718.205(c), that the medical evidence of record is sufficient to establish that the miner's totally disabling respiratory impairment and death were both due to pneumoconiosis. In weighing the medical opinion evidence at 20

C.F.R. §§718.204(c) and 718.205(c), the administrative law judge accorded less weight to those physicians who, contrary to his own findings, did not diagnose both coal workers' pneumoconiosis and emphysema arising out of coal mine employment. Decision and Order at 49, 52. Because we have vacated the administrative law judge's finding that, in addition to coal workers' pneumoconiosis, the miner also suffered from emphysema arising out of coal dust exposure, we also vacate his findings regarding disability causation and death due to pneumoconiosis at 20 C.F.R. §§718.204(c) and 718.205(c), respectively, and instruct him to reweigh the medical opinions after he has reassessed whether the miner also suffered from any other chronic disease or impairment arising out of coal mine employment.

Finally, we address employer's arguments regarding the administrative law judge's award of attorney's fees to claimant's counsel. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a complete, itemized fee petition to the administrative law judge, requesting $41,000.00 for 205 hours of services at $200.00 per hour, plus $9,341.67 in expenses. Employer filed objections to the requested hourly rate and to several time and expense entries. Upon consideration of the fee petition and employer's objections thereto, the administrative law judge found that $200.00 an hour was a reasonable rate. Supplemental Decision and Order at 2. Additionally, the administrative law judge disallowed 92.8 hours of time and disallowed all requested expenses on the grounds they were either overhead, or unsupported by invoices or statements. *Id*. at 2-3. The administrative law judge awarded a fee of $22,440.00, and allowed counsel the opportunity to resubmit the requested expenses with supporting documentation. *Id*. at 3.

Employer argues that the administrative law judge abused his discretion in finding counsel's requested hourly rate of $200.00 to be reasonable, asserting that he impermissibly took judicial notice of the 2002 *Survey of Law Firm Economics*. Employer further renews his earlier objection to the fee petition, asserting that counsel did not offer sufficient proof that his customary hourly rate is $200.00. Employer's Brief at 4-6. The record reflects that in counsel's fee petition, he represented that $200.00 an hour has been his customary billing rate in cases which involve pulmonary-related occupational diseases. Fee Petition at 4, 5. Counsel further asserted that he had specialized in representing claimants and plaintiffs in cases involving pulmonary-related occupational disease claims, in both judicial and administrative proceedings, state and federal, for approximately twenty years. Fee Petition at 4, 5, and "Affidavit of David C. Thompson." The administrative law judge noted employer's objection to the requested fee as unsupported, considered the factors required by Section 725.366(b), and noted that

the requested hourly fee of $200.00 fell within the range of fees from $155.00 to $225.00 per hour set forth in the 2002 *Survey of Law Firm Economics*, Altman & Weil Publications, Inc., for attorney's in the West North Central region of the country where petitioner practices. Supplemental Decision and Order at 2. The administrative law judge then concluded that $200.00 an hour was reasonable "considering the extent of Petitioner's experience in this area of the law and the complexity of this matter." Supplemental Decision and Order at 2; 20 C.F.R. §725.366(b).

We detect no abuse of discretion in the administrative law judge's finding that $200.00 was a reasonable hourly rate. *See Jones*, 21 BLR at 1-108. While employer is correct that the administrative law judge erred in taking judicial notice of the Survey of Law Firm Economics without informing the parties of his intent to use this source or allowing employer an opportunity for rebuttal, *see* 5 U.S.C. §556(e); 29 C.F.R. §18.45; 20 C.F.R. §725.464; Fed. R. Evid. 201; *see Maddaleni*, 14 BLR at 1-135, *aff'd*, 961 F.2d at 1524, 16 BLR at 2-68; *Onderko v. Director, OWCP*, 14 BLR at 1-2; *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986), in the instant case this error is harmless in light of the fact that the administrative law judge merely referenced, but did not rely on, the *Survey of Law Firm Economics* to determine an appropriate hourly rate, but, rather, properly considered the factors set forth in 20 C.F.R. §725.366(b). *Larioni*, 6 BLR at 1-1276. Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of a fee, we affirm the fee award. *See Jones*, 21 BLR at 1-108. A fee award is not enforceable, however, until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order Awarding Miner's and Survivor's Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Representative's Fee is affirmed.

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