BRB No. 03-0779

LINDA R. CAMPBELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAVIS-MONTHAN AIR FORCE BASE	)	DATE ISSUED:Aug. 18, 2004
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order: (1) Granting Employer's and Claimant's Motions for Reconsideration, In Part; And (2) Denying Employer's and Claimant's Motions for Reconsideration, In Part, of Gerald Michael Etchingham, Administrative Law Judge, United States Department of Labor.

Kurt A. Gronau, Glenwood Springs, Colorado, for claimant.

Kim M. Hoffman (Air Forces Services Agency-Office of Legal Counsel), San Antonio Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Order: (1) Granting Employer's and Claimant's Motions for Reconsideration, In Part; And (2) Denying Employer's and Claimant's Motions for Reconsideration, In Part (Order on Reconsideration) (2002-LHC-2101) of Administrative Law Judge Gerald Michael Etchingham on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant alleges that she sustained injuries to her right wrist and elbow, as well as an aggravation of her pre-existing psychological condition of depression and anxiety, as a result of her work as a barber for employer. Employer voluntarily paid claimant temporary total disability benefits from April 29, 1998, through May 3, 1998, and from October 18, 2000 through January 8, 2002.

In his decision, the administrative law judge initially concluded, based on the parties' stipulations, that claimant's injuries to her right wrist and elbow are work-related. As for claimant's psychological condition, the administrative law judge found claimant established invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), *i.e.*, that she sustained a work-related aggravation of her pre-existing psychological condition, but that employer established rebuttal thereof. Considering the evidence as a whole, the administrative law judge concluded that claimant's pre-existing psychological condition was not aggravated by her employment, and thus denied benefits with regard to this claim. Decision and Order at 17-18. The administrative law judge next determined that claimant was incapable of returning to her usual employment as a barber as a result of her work-related right wrist and elbow injuries and that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded temporary total disability benefits from October 18, 2000, until December 6, 2001, and permanent partial disability benefits thereafter based on claimant's loss in wage-earning capacity.[1]

On reconsideration, the administrative law judge modified the award of permanent partial disability benefits to reflect that claimant's work-related injuries are to a scheduled member, *i.e.*, her right arm. He thus concluded that claimant's award of permanent partial disability benefits must be made pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), based on a combined 23 percent impairment to her right wrist and elbow. 33 U.S.C. §908(c)(1); Order on Reconsideration at 3. Nevertheless, employing a hybrid method of calculating permanent partial disability compensation, *see* 33 U.S.C. §§908(c)(1), (21), the administrative law judge modified the prior award of permanent partial disability to reflect that claimant is entitled to receive permanent partial disability compensation for 71.76 weeks beginning on September 12, 2001, based this time on two-thirds of her loss in wage-earning capacity. Order on Reconsideration at 3.

[1] The administrative law judge found that claimant reached maximum medical improvement for her right wrist condition on February 12, 2001, and for her right elbow on September 12, 2001.

On appeal, claimant challenges the administrative law judge's findings that claimant did not sustain a work-related aggravation of her psychological condition, that claimant reached maximum medical improvement with regard to her elbow injury, and that employer established the availability of suitable alternate employment, as well as his calculation of claimant's average weekly wage and permanent partial disability award. Employer responds and agrees with claimant's assertions regarding permanent partial disability but in all other respects urges affirmance of the administrative law judge's decisions.

Claimant first asserts that the administrative law judge erred in relying upon the treatment notes and hearing testimony of Dr. Schoenhals to conclude that employer established rebuttal of the Section 20(a) presumption with regard to claimant's psychological condition, arguing that these documents are not relevant to that issue. Claimant additionally contends that the administrative law judge erred in rejecting claimant's testimony as to the work-related nature of her psychological condition and in the rejection of Dr. Day, her treating psychologist, as the record contains no contrary evidence showing that claimant's underlying psychological condition was not aggravated by her work for employer.

A psychological impairment that is work-related is compensable under the Act. *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996); *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989)(decision on remand). Furthermore, the Section 20(a) presumption is applicable in psychological injury cases. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 384 n. 2 (1990); 33 U.S.C. §920(a). It is well established that an employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Thus, claimant's psychological injury need be due only in part to work-related conditions to be compensable under the Act. *See Peterson v. General Dynamics Corp.*, 25 BRBS 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor, OWCP*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

Once, as in this case, the Section 20(a) presumption has been invoked the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Where aggravation of a pre-existing condition is at issue, here claimant's acknowledged

psychological condition, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Cairns v. Matson Terminals*, 21 BRBS 262 (1988). The presumption may be overcome by circumstantial evidence "specific and comprehensive enough" to sever the potential connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.) *cert. denied*, 429 U.S.820 (1976); *see generally Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995). However, the Section 20(a) presumption is not rebutted where employer does not provide concrete evidence but merely suggests alternate ways that claimant's injury might have occurred. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Moreover, in considering the evidence on rebuttal, the administrative law judge may not substitute his judgment for that of the medical professionals, but must instead specifically address the medical conclusions reached or not reached by the physicians. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In the instant case, the administrative law judge concluded that employer established rebuttal of the Section 20(a) presumption based on the treatment notes of Dr. Schoenhals.[2] Decision and Order on Reconsideration at 6. In particular, the administrative law judge found that Dr. Schoenhals' notes indicated no change in the dosage of claimant's anti-depressant medication following her October 2000 work-related injuries or that claimant reported a worsening of her condition subsequent to that date. From this, the administrative law judge concluded that Dr. Schoenhals' notes indicate that claimant's July 2001 depression was not aggravated by her work-related injuries. We cannot affirm this conclusion. The record reflects that while Dr. Schoenhals last prescribed psychotropic medication to claimant in August 2001, which is after the claimed aggravation, he did not see claimant at that time and therefore was not treating her at the time claimant's pre-existing psychological condition allegedly worsened.[3]

[2] Under the Section 20(a) rebuttal portion of this decision, the administrative law judge also discussed his reasons for not crediting claimant or Dr. Day. This analysis, however, is relevant in weighing the evidence on the record as a whole. The issue on rebuttal concerns whether employer met its burden of production, and this burden is not affected by the findings regarding claimant or Dr. Day.

[3] Dr. Day indicated that, as of July 2001, he began counseling claimant for what he diagnosed as "a severe depression." CX-5. Dr. Day specifically stated that "the cause of the depression was from a work-related arm injury and an inability to continue with work." *Id.* He testified that her condition underwent a dramatic change from an adjustment disorder for which he treated her in 1999 to major depression which was related to her inability to work as a barber due to her injury. Tr. at 19-22.

Rather, Dr. Schoenhals testified that he last saw claimant on August 11, 2000, Tr. at 66, at which time he continued her antidepressant medication at the same dosage as when she began treatment in 1996. At that time, claimant was still working; she was laid off in September 2000. He testified his notes reflect that claimant contacted his office and on August 3, 2001, he gave claimant a new prescription with refills; he explained that he was willing to write claimant a prescription at the same dosage because he knew her and was aware that she was seeing Dr. Day for depression. Tr. at 89, 92-94. Given this testimony, claimant's medication history and dosage alone cannot support an inference that claimant's psychological condition had not changed. More significantly, when specifically asked whether claimant's depression at the time he last saw her in August 2000 was related to personal issues or other factors, Dr. Schoenhals testified, "I really don't have any way of knowing that." Tr. at 61. The record further reflects that the administrative law judge would not allow any follow-up questions on the causation issue, as he determined that the question was outside of Dr. Schoenhals' "speciality." Tr. at 62. The administrative law judge did not consider this testimony in addressing Dr. Schoenhals' opinion.

As Dr. Schoenhals testified he had no opinion on causation, and his treatment notes are not contemporaneous with the alleged work-related exacerbation of claimant's pre-existing psychological condition in July 2001, we cannot affirm the finding that Section 20(a) was rebutted by this opinion.[4] *See generally Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Bridier v. Alabama Dry Dock & Shipping Corp.*, 29 BRBS 84 (1995). We must therefore vacate the administrative law judge's finding of rebuttal and remand the case for the administrative law judge to reconsider whether employer rebutted the Section 20(a) presumption. On remand, the administrative law judge must address the relevant evidence of record to determine whether employer met its burden of producing substantial evidence that claimant's psychological condition was not caused or aggravated by claimant's employment. *See O'Kelley*, 34 BRBS 39 (opinion to a reasonable degree of medical certainty is sufficient to rebut). In addressing the evidence

[4]We note that the administrative law judge alternatively concluded that even if claimant's psychological condition changed, any increase was due to other non-work factors, such as the deaths of claimant's friends or the ending of a relationship with her boyfriend. The mere existence of other possible factors cannot support rebuttal. Since, under the aggravation rule, a work injury need not be the sole cause of a condition, the issue in the instant case thus involves whether claimant's work injuries and resulting disability played a role in the deterioration of her pre-existing psychological condition. If the work accident was a factor combining with the other stressors in claimant's life, causation is established. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

on remand, the administrative law judge may again note the status of both Dr. Schoenhals and Dr. Day as claimant's treating physicians, *see Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended,* 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied,* 528 U.S. 809 (1999), and that such a status entitles their opinions to "special" consideration, especially when, as here, there is an absence of contrary evidence.[5] *Id.*

Claimant next contends that the administrative law judge erred in concluding that the tips claimant received while working for employer did not count as income to be included in the calculation of her average weekly wage. Claimant asserts that a majority of claimant's income was in the form of tips and that in excluding these amounts, the administrative law judge did not follow the dictates of Section 10(c) of the Act, 33 U.S.C. §910(c), by calculating an average weekly wage which reasonably represented the actual wages of claimant. Claimant avers that the administrative law judge misapplied the holding in *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999), which she argues mandates that tips should be included in the calculation of average weekly wage.

In determining whether a specific category of payment, such as tips, is included in average weekly wage, the relevant provision is Section 2(13) of the Act, which defines wages as

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is

[5] In view of our holding that this case must be remanded for further consideration of whether employer has established rebuttal of the Section 20(a) presumption, we must necessarily vacate the administrative law judge's finding that the evidence as a whole fails to establish that claimant's psychological condition is work-related. If, on remand, the administrative law judge reaches the issue of whether the evidence as a whole establishes the work-relatedness of claimant's psychological condition, the administrative law judge should reconsider whether Dr. Day's opinion is properly termed "conclusory." Order on Reconsideration at 5. While Dr. Day's single report, CX-5, is brief, claimant did not rely solely on this *ex parte* evidence, but presented Dr. Day as a witness at the hearing. *See generally Richardson v. Perales*, 402 U.S. 389 (1971). Review of the entirety of Dr. Day's opinion shows that the physician testified at the hearing, referred to his medical notes, referred to the treatment and tests given to claimant, and was subject to cross-examination. Tr. at 14-55. Moreover, the fact that Dr. Day was the only physician to opine that claimant was severely depressed must be viewed in the context of his being the only expert psychological opinion presented. Accordingly, the administrative law judge must reconsider the entirety of the physician's medical conclusion, if reached on remand.

> received from the employer and included for purposes of any withholding of tax under substitle C of the Internal Revenue Code of 1954.

33 U.S.C §902(13). In *Story*, the Board held, following a discussion of Section 2(13) of the Act, that the "claimant's tips must be included in her average weekly wage if they were part of the 'money rate' under the contract of hiring." *Story*, 33 BRBS at 116. Finding that the tips in that case met this test, the Board affirmed the administrative law judge's inclusion of them in claimant's wages. *Story*, 33 BRBS at 119. We reject, however, claimant's argument that *Story* supports a similar result here.

In the instant case, the administrative law judge concluded that while the tips received by claimant constituted an "advantage" to claimant, the tips were not part of the "money rate" at which she was to be compensated as claimant failed to provide adequate documentary evidence to ascertain the value of the tips she received. The administrative law judge further found that claimant did not declare the tips she received as taxable income and thus was "judicially estopped from adding these tips to calculate her average weekly wage." Decision and Order at 20; *see Wausau Insurance Companies v. Director, OWCP* [*Guthrie*], 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).[6] Moreover, the administrative law judge found that a percentage of claimant's tips were included in withholding and thus were included in claimant's average weekly wage; only the undeclared tips were at issue. Order on Reconsideration at 6-7. Contrary to claimant's assertion, and as found by the administrative law judge, Mr. Briles' testimony established only that cash tips were to be declared for tax purposes and thus cannot establish error by the administrative law judge in refusing to include undeclared amounts. Tr. at 161-162. Accordingly, we affirm the administrative law judge's determination that claimant's undeclared cash tips were not part of the "money rate" by which claimant was compensated by employer under the contract for hire, and thus affirm his conclusion that they cannot be included in claimant's average weekly wage.[7]

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[6]The Board's decision in *Story* discussed the Ninth Circuit's holding in *Guthrie* that "an advantage," such as the value of room and board is not to be included in the calculation of claimant's average weekly wage if it is not included for purposes of withholding under the Internal Revenue Code, but did not apply that test as the case arose within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. The Board instead applied the decision of the United States Court of Appeals for the Fourth Circuit in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998). As the present cases arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the *Guthrie* case is controlling.

[7] We note that the administrative law judge also relied on the fact that tips were received from a customer and not directly from employer. In *Story*, however, the Board

Claimant further argues that the administrative law judge erred in relying on the opinion of Dr. Hayden over the contrary opinion of Dr. Butler in concluding that claimant reached maximum medical improvement with regard to her right elbow injury on September 12, 2001. Claimant avers that the conclusion of her treating physician, Dr. Butler, on February 12, 2001, that claimant had not reached maximum medical improvement with regard to her right elbow condition, coupled with his continued treatment of claimant's injury into December 2001, and subsequent recommendation that claimant seek further treatment for said injury from Dr. Walter, indicates that maximum medical improvement has not yet been reached.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In finding that claimant reached maximum medical improvement with regard to her right elbow injury, the administrative law judge relied on the September 12, 2001, opinion of Dr. Hayden that claimant was "medically stable and stationary" and was not in need of "any active medical care or physical therapy for conditions causally related" to her right elbow injury. Employer's Exhibit 15. The administrative law judge further found that on October 10, 2001, Dr. Butler issued a statement indicating that he agreed with Dr. Hayden's assessment of claimant's right elbow condition. Employer's Exhibit 13. The administrative law judge further found that Dr. Butler's mere recommendations for alternative treatments to claimant's right elbow did not rise to the level of treatment "reasonably calculated to improve" claimant's condition and thus did not support a finding that claimant had not reached maximum medical improvement. Order on Reconsideration at 7. As the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on September 12, 2001, we affirm that finding. *See Delay*, 31 BRBS 197; *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

Claimant asserts that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Claimant contends that the administrative law judge erroneously relied on the testimony of the vocational consultant, Ms. Wise, and Dr. Schoenhals to find that claimant's anti-depressant medication did not affect her ability to perform any employment, as neither individual was qualified to

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concluded that such income may be imputed to employer where it is considered part of claimant's earnings package. We need not address this issue in greater detail here, as it is not dispositive.

testify as to the effects of anti-depressant medication upon an injured worker. Claimant also argues that the jobs listed as available on Ms. Wise's labor market survey were, in fact, unavailable when claimant received the labor market survey, and further argues that her testimony supports the fact that she is unable to work.

In establishing the availability of suitable alternate employment, the burden rests with employer to demonstrate that specific job opportunities, which claimant can perform considering her age, education, background, work experience, and physical and mental restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). In finding that employer met its burden to establish the availability of suitable alternate employment, the administrative law judge found that the positions listed by Ms. Wise in her labor market survey were consistent with claimant's physical limitations because they all involved light-exertion levels. In addition, the administrative law judge found that Dr. Hayden and Dr. Butler approved three positions as an appointment setter clerk, an optical retail sales clerk and a customer service specialist. Decision and Order at 29. The administrative law judge further found that the evidence of record supports a conclusion that the low-level anti-depressant medication taken by claimant did not interfere with claimant's job prospects, specifically noting claimant's history of work while taking the same dosage. Order on Reconsideration at 8. In particular, the administrative law judge found that claimant's daily activities of driving her car and running errands support the finding that taking such medicine did not interfere with her ability to work or seek employment. Order on Reconsideration at 7. These findings are supported by substantial evidence. However, as this case is remanded for consideration of the work-relatedness of claimant's psychological condition, the issue of whether employer has established the availability of suitable alternate employment must also be reconsidered on remand, should a determination be made that claimant's psychological condition is work-related.[8] *See Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *see generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

Assuming that suitable alternate employment is established, we affirm the administrative law judge's finding that claimant did not establish due diligence in trying to obtain employment similar to the jobs mentioned in the labor market survey. As the administrative law judge recognized, contrary to claimant's contention, the duty to

[8]In reconsidering this issue, the administrative law judge must consider the impact, if any, of Ms. Wise's testimony that she did not take claimant's psychological condition into consideration in finding suitable alternate positions, Tr. at 184.

exercise reasonable diligence is not necessarily linked to the labor market survey, as employer has no duty to inform claimant of identified positions. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Rather, claimant must establish that she diligently tried to obtain employment similar to the jobs employer demonstrated were reasonably available in her community. As the administrative law judge found, claimant has not established that she diligently tried to obtain any employment. This finding is therefore affirmed. *See Berezin*, 34 BRBS 163.

Lastly, we agree with the parties' contentions on appeal that the administrative law judge erred in his calculation of claimant's benefits pursuant to Section 8(c)(1) of the Act as he improperly limited the award to claimant's residual loss in wage-earning capacity. A schedule award runs for the proportionate number of weeks attributable to the loss of use of the body part, at the full compensation rate. 33 U.S.C. §908(c)(19); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986). Therefore, we modify the administrative law judge's award of permanent partial benefits for the injury to claimant's right upper extremity to reflect an award of 66 2/3 of claimant's average weekly wage for 71.76 weeks (23 percent of 312) pursuant to Section 8(c)(1), for a total award of $17,155.66. 33 U.S.C. §908(c)(1), (19); *Boone*, 37 BRBS 1.

Accordingly, claimant's permanent partial disability award for her arm is modified to reflect claimant's entitlement to benefits for 71.76 weeks at two-thirds of her average weekly wage pursuant to Section 8(c)(1), (19). The finding that claimant's psychological condition is not work-related is vacated, and the case is remanded for reconsideration of this and any related issues in accordance with this opinion. In all other respects, the administrative law judge's decisions are 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