BRB No. 03-0744 BLA

WALTER W. YADLOSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
	)	DATE ISSUED: 07/14/2004
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (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:

Claimant[1] appeals the Decision and Order Denying Benefits (02-BLA-0442) of Administrative Law Judge Ralph A. Romano on modification in a miner's claim filed

[1]Claimant is Walter W. Yadlosky, the miner, who filed his claim for benefits on June 25, 1998. Director's Exhibit 1. Administrative Law Judge Ralph A. Romano (hereinafter, the administrative law judge) denied claimant's claim for benefits on March 1, 2000. Director's Exhibit 59. Claimant appealed to the Benefits Review Board, and the Board dismissed claimant's appeal as untimely on April 27, 2000. Director's Exhibits

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).[2] The administrative law judge previously credited the miner with ten years of coal mine employment. Director's Exhibit 102 at 3. Initially, the administrative law judge found that the record reveals no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 8-9. Therefore, the administrative law judge found that claimant failed to establish a change in conditions pursuant to Section 725.310 (2000). Decision and Order at 4, 9. Accordingly, benefits were denied on modification.

On appeal, claimant asserts that the administrative law judge "ignored the standard of review" for a mistake in fact and a change in conditions enunciated in *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991). Claimant's Brief at 3. Claimant additionally contends that the administrative law judge erred in failing to find total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (b)(2)(iv). *Id.* at 3-18. Lastly, claimant requests that this case be reassigned to a different administrative law judge, if it

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60, 62. Claimant requested modification and submitted new evidence on November 30, 2000. Director's Exhibits 63. The administrative law judge again denied claimant's claim for benefits on February 1, 2002. Director's Exhibit 102. Claimant appealed to the Board and, thereafter, on April 30, 2002, filed a Motion to Remand to pursue modification. Director's Exhibit 106. In response to claimant's request, the Board issued an order dismissing claimant's appeal and remanding this case to the district director for modification proceedings. Director's Exhibit 107. The district director denied claimant's second request for modification, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 113, 114.

[2]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.

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

is remanded to the Office of Administrative Law Judges.[4] *Id.* at 19-20. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief. In his response brief, the Director urges the Board to affirm the administrative law judge's findings that claimant failed to establish a mistake in fact pursuant to Section 725.310 (2000) and failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i). Director's Brief at 5-8. However, the Director asserts that the Board should remand the case for the administrative law judge to reconsider Dr. Raymond Kraynak's opinion pursuant to Section 718.204(b)(2)(iv). *Id.* at 8-9. Claimant has filed a reply brief, reiterating the arguments set forth in his Petition for Review and brief.[5]

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).

Claimant first asserts that the administrative law judge ignored the standard set forth in *Nataloni* when considering whether claimant demonstrated a mistake in fact or a change in conditions at Section 725.310 (2000). Claimant's Brief at 3. The Board has held that in considering whether a claimant has established a change in conditions pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the old evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni*, 17 BLR at 1-84; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). With regard to a mistake in fact, the Board stated:

> [u]nlike a change in condition[s], the administrative law judge is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a determination of a mistake in fact upon modification.

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[4]Claimant has not sought reinstatement of his prior appeal, BRB No. 02-0389 BLA, which was dismissed by the Board pursuant to claimant's request. *See* n.1, *supra*.

[5]We affirm the administrative law judge's findings that, based on the new evidence, total respiratory disability was not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Nataloni, 17 BLR at 1-84.

In this case, the administrative law judge cited to the standard for modification enunciated in *Nataloni* and *Keating*. Decision and Order at 3-4. The administrative law judge reviewed his previous decision, in which he discussed all the previously submitted evidence, and found no mistake in a determination of fact, noting that claimant has not alleged "a specific mistake."[6] *Id.* at 4. Therefore, the administrative law judge stated that the issue in this case is whether there has been a change in conditions. *Id.* The administrative law judge noted that in his prior decision he had denied claimant's claim for benefits because claimant failed to establish total respiratory disability. Director's Exhibit 102. Consequently, the administrative law judge found the issue properly before him was whether the newly submitted evidence was sufficient to establish total respiratory disability. Because the administrative law judge applied the correct legal standard in determining whether claimant had established a mistake in fact or a change in conditions, we reject claimant's assertion that the administrative law judge ignored the legal standard in determining whether claimant established modification in this case. *See Keating*, 71 F.3d at 1123, 20 BLR at 2-61-63; *Nataloni*, 17 BLR at 1-84. Apart from alleging that the administrative law judge ignored the standard for modification, claimant does not allege any further error in the administrative law judge's finding of no mistake in fact. Therefore, we affirm the administrative law judge's finding that there was no mistake in fact in his prior denial pursuant to Section 725.310 (2000). *Id.*

Regarding total respiratory disability, the administrative law judge first considered whether claimant could demonstrate total respiratory disability based on the new pulmonary function study evidence. Pursuant to Section 718.204(b)(2)(i),[7] claimant asserts that the administrative law judge erred in adjusting the height on the October 22, 2002 pulmonary function study to 71.3 inches, rather than 71.4 inches.[8] Claimant's Brief

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[6]Claimant was represented by counsel when this case was before the Office of Administrative Law Judges.

[7]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

[8]The Director, Office of Workers' Compensation Programs (the Director), states in his response brief that because claimant's average height for the pulmonary function studies is 71.33, which falls between the heights listed in Appendix B of 20 C.F.R. Part 718, it is the Director's position that the next higher height listed, 71.7, should have been used. Director's Brief at 3 n.1. However, the Director asserts that this error is harmless

at 4. It is unclear why claimant makes this assertion in his brief. Because two different heights were recorded on claimant's three pulmonary function studies, the administrative law judge "resolv[ed] the height discrepancy" by averaging the two heights recorded.[9] Decision and Order at 8. Therefore, the administrative law judge permissibly "used the height of 71.3 inches in assessing the pulmonary function tests." *Id.*; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In order to be eligible to qualify[10] under the regulations at a height of 71.3 inches and an age of 68, as recorded on the October 22, 2002 pulmonary function study, claimant's FEV1 value must be equal to or less than 2.02.[11] Appendix B to 20 C.F.R. Part 718, App. B. At a height of 71.7 inches and an age of 68, claimant's FEV1 value must be equal to or less than 2.05. *Id.* The FEV1 value on the October 22, 2002 test is 2.07. Claimant's Exhibit 4. Because the October 22, 2002 pulmonary function study would not have produced a qualifying FEV1 value if the administrative law judge had determined claimant's height to be 71.4 inches rather than 71.3 inches, any error the administrative law judge may have made in using the 71.3 height is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next asserts that the administrative law judge failed to provide an adequate rationale for determining that the June 12, 2002 pulmonary function study was invalid. Claimant's Brief at 4-6. The administrative law judge noted that the record contains three newly submitted pulmonary function studies. Decision and Order at 8. The administrative law judge further noted that the June 12, 2002 and November 5, 2002 studies produced qualifying values under the regulations whereas the October 22, 2002

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because the qualifying/non-qualifying nature of the October 22, 2002 and November 5, 2002 tests does not change under the values for either height. *Id.* at 3, 8 nn.1-2.

[9]Dr. Raymond Kraynak recorded claimant's height as seventy-one inches on the June 12, 2002 pulmonary function study he administered and seventy-two inches on the October 22, 2002 pulmonary function study he administered. Director's Exhibit 109; Claimant's Exhibit 4. Dr. Green recorded a height of seventy-one inches on the pulmonary function study he administered. Director's Exhibit 118.

[10]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values in Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[11]20 C.F.R. §718.204(b)(2)(i) provides that in order to demonstrate total disability at this subsection, a miner's pulmonary function study must initially show FEV1 "values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual's age, sex, and height."

test produced non-qualifying values. *Id.* With regard to the June 12, 2002 qualifying study, the administrative law judge stated that Dr. Michos opined that it was invalid and Dr. Raymond Kraynak, Dr. Matthew Kraynak, and Dr. Prince found this test to be valid. *Id.* Claimant contends that the administrative law judge failed to provide a rationale for preferring the opinion of a consulting physician, Dr. Michos, over that of the administering physician, Dr. R. Kraynak. Claimant's Brief at 5. Claimant additionally contends that the administrative law judge failed to provide an adequate reason for rejecting the opinion of Dr. Prince, who has qualifications equal to those of Dr. Michos. *Id.* at 5-6. The administrative law judge found Dr. Michos' invalidation opinion to be entitled to greater weight than the opinions of Dr. R. Kraynak and Dr. M. Kraynak because of Dr. Michos' superior qualifications.[12] Therefore, contrary to claimant's contention, the administrative law judge provided a rationale, Dr. Michos' superior qualifications, for crediting the opinion of Dr. Michos, the consulting physician, over the opinion of Dr. R. Kraynak, the administering physician, in considering the validity of the June 12, 2002 pulmonary function study. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1opinion with Brown, J., dissenting); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767 (1984); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Moreover, in considering the remaining invalidation opinions of the June 12, 2002 pulmonary function study, the administrative law judge stated that "Dr. Prince, like Dr. Michos, is a pulmonary specialist." Decision and Order at 8. However, the administrative law judge found Dr. Prince's report to be "not well-documented and reasoned" and accorded it "little weight" because this physician "gave no explanation as to how or why he reached the conclusion that the 12 June 2002 PFT is valid." *Id.* Dr. Michos invalidated the June 12, 2002 study in his July 1, 2002 report because he found that there was less than optimal effort, cooperation, and comprehension and there was a greater than five percent variation in the two best FEV1 and FVC values. Director's Exhibit 110. On August 20, 2002, Dr. Prince found the June 12, 2002 test to be valid, but did not provide any explanation as to why he found it to be valid after Dr. Michos found this test to be invalid. Claimant's Exhibit 3. Therefore, contrary to claimant's contention, the administrative law judge provided an adequate reason for according greater weight to Dr. Michos' opinion over Dr. Prince's opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

[12]The record reveals that Dr. Michos is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 111. Dr. Raymond Kraynak is Board-eligible in family medicine and Dr. Matthew Kraynak is Board-certified in family medicine. Director's Exhibit 46; Claimant's Exhibit 11. Dr. Prince is a B-reader and is Board-certified in internal medicine, pulmonary disease, and critical care. Claimant's Exhibit 3.

Lastly, claimant asserts that the administrative law judge impermissibly relied on numerical superiority to find that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i). Claimant's Brief at 6-7. The administrative law judge stated that no physician has offered an opinion questioning the validity of the remaining pulmonary function studies dated October 22, 2002 and November 5, 2002. Decision and Order at 8. Accordingly, the administrative law judge found the non-qualifying October 22, 2002 study and the qualifying November 5, 2002 test to be valid. *Id.* Because the administrative law judge found "[t]he results of these two tests, one qualifying and one non-qualifying . . . cancel each other out," he concluded "that the weight of the PFT evidence does not support a finding" of total respiratory disability pursuant to Section 718.204(b)(2)(i). *Id.* In doing so, the administrative law judge did not rely on numerical superiority, but rather permissibly found that claimant failed to carry his burden of proving total disability by this evenly balanced and contradictory evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability or a change in conditions by the new pulmonary function study evidence.

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in considering the new medical opinion evidence. Claimant's Brief at 7-19. The administrative law judge reviewed the new medical opinions of Dr. R. Kraynak and Dr. M. Kraynak, finding claimant to be totally disabled, and the opinion of Dr. Green, finding claimant retains the ability to perform his last coal mine employment without limitation. Director's Exhibit 117; Claimant's Exhibits 10, 14. The administrative law judge accorded "greatest weight" to Dr. Green's report because he is a pulmonary specialist whereas Drs. R. Kraynak and M. Kraynak are not. Decision and Order at 9. Additionally, the administrative law judge considered Dr. R. Kraynak's status as claimant's treating physician. *Id.* The administrative law judge found that although Dr. R. Kraynak is claimant's treating physician, his opinion and deposition testimony are unreasoned and undocumented. *Id.* Similarly, the administrative law judge found Dr. M. Kraynak's opinion to be deficient. *Id.* The administrative law judge stated that neither the opinion of Dr. R. Kraynak nor Dr. M. Kraynak was based on "credible medical evidence of record" because both of these physicians relied on the invalid June 12, 2002 pulmonary function study. *Id.* The administrative law judge added that neither Dr. R. Kraynak nor Dr. M. Kraynak "had the benefits of blood gas testing, and their medical reports fail to adequately support their conclusions." *Id.*

Claimant contends that the administrative law judge erred in discrediting the opinions of Drs. R. Kraynak and M. Kraynak because both physicians relied on the June 12, 2002 pulmonary function study, which was invalidated by a pulmonary specialist, and

neither physician had the benefit of blood gas testing. Claimant's Brief at 8-15. The Director asserts that the administrative law judge failed to consider whether the pulmonary function studies dated November 5, 2002 and October 22, 2002 "provide sufficient documentation to support" Dr. R. Kraynak's opinion regarding disability. Director's Brief at 9. The contentions of claimant and the Director have merit.

As claimant points out in his brief, Drs. R. Kraynak and M. Kraynak did not rely solely on the qualifying June 12, 2002 pulmonary function study to find claimant is totally disabled. At his deposition, Dr. R. Kraynak testified that in finding claimant to be disabled by coal workers' pneumoconiosis, he took into account claimant's length of coal mine employment, complaints, medical and social histories, physical examinations, various diagnostic tests, and medical records. Claimant's Exhibit 9 at 9. Additionally, both Drs. R. Kraynak and M. Kraynak[13] reviewed Dr. Green's report and testing, including the qualifying pulmonary function study and non-qualifying blood gas study performed by Dr. Green. Claimant's Exhibits 10, 14. In his deposition testimony, Dr. R. Kraynak testified that the values obtained on the October 22, 2002 pulmonary function study he administered and the November 5, 2002 study Dr. Green administered support the presence of a disabling lung disease. Claimant's Exhibit 9 at 7. Dr. R. Kraynak further testified that the blood gas study performed by Dr. Green showed hypoxemia at rest and stated that he did not find it unusual for a claimant, who is totally disabled due to pneumoconiosis, to have a non-qualifying blood gas study. *Id.* at 8-9. Moreover, Dr. R. Kraynak stated that his opinion regarding claimant's disability would be the same if he relied solely on Dr. Green's pulmonary function study or did not rely on any pulmonary function study evidence. *Id.* at 10. In light of the foregoing, we vacate the administrative law judge's finding that claimant failed to demonstrate total respiratory disability and a change in conditions based on the new medical opinion evidence inasmuch as the administrative law judge failed to provide a valid reason for discrediting the opinions of Drs. R. Kraynak and M. Kraynak. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Claimant additionally asserts that the administrative law judge failed to consider the opinion of Dr. Prince pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 7-8. In his report, Dr. Prince stated that he reviewed the November 5, 2002 pulmonary function study and opined that the "study conforms to the applicable quality standards of the Department of Labor." Claimant's Exhibit 13. Dr. Prince further opined that this pulmonary function study shows "inadequate lung function to support [claimant's] last coal mine employment as an underground miner. He is unable to carry timber, drill, fire, push and shovel coal, and lift weights up to 100 pounds." *Id.* Because the administrative

[13]Claimant testified at the hearing that both Dr. R. Kraynak and Dr. M. Kraynak were his treating physicians. January 22, 2003 Hearing Transcript at 9-10.

law judge failed to consider Dr. Prince's opinion pursuant to Section 718.204(b)(2)(iv), we instruct the administrative law judge to do so on remand. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Moreover, claimant contends that "Dr. Green's opinion is incompetent as a matter of law on the issue of total disability because [this physician] did not exhibit any knowledge as to the physical requirements of the Claimant's last coal mine employment" and because Dr. Green did not "reconcile his own qualifying pulmonary function study with his failure to find a disabling impairment present."[14] Claimant's Brief at 18. Dr. Green opined that claimant is "able to perform last coal mine job in B1a without limitation." Director's Exhibit 117. Under Part "B1a" in his report, Dr. Green noted that claimant "mined coal" and "worked in deep mines." *Id.* Notwithstanding Dr. Green's notation regarding claimant's coal mine employment, we instruct the administrative law judge on remand to determine if Dr. Green was sufficiently aware of the exertional requirements of claimant's last coal mine employment when considering this physician's report pursuant to Section 718.204(b)(2)(iv). *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986); *see Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000)(physician must demonstrate awareness of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work).

After reconsidering the new medical opinion evidence regarding total respiratory disability on remand, as outlined above, if the administrative law judge finds the newly submitted evidence sufficient to demonstrate a change in conditions pursuant to Section 725.310 (2000), he must then consider the entire evidentiary record to determine if claimant has established entitlement on the merits of his case. *Nataloni*, 17 BLR at 1-84.

Finally, claimant requests that the Board require that this case be reassigned to a new administrative law judge on remand because the administrative law judge assigned to this case has demonstrated a bias against claimant. Claimant's Brief at 19, 20. Specifically, claimant asserts that the administrative law judge has exhibited a "disdain"

[14]Contrary to claimant's contention, Dr. Green was not obligated to find total respiratory disability because the pulmonary function study he performed yielded qualifying values. Rather, because the interpretation of the objective medical evidence is for the experts, Dr. Green could have found claimant able to perform his previous coal mine employment even though the pulmonary function study he performed was qualifying. *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984)(interpretation of the medical evidence is for the experts).

for claimant because he continues to pursue his claim for benefits. *Id.* at 19. We decline to order that this case be reassigned to another administrative law judge on remand inasmuch as claimant has failed to provide adequate factual support for such a request. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984)(Board rejected claimant's suggestion of administrative law judge's bias as lacking factual support).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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