BRB Nos. 04-0463 BLA
and 04-0463 BLA-A

WILLIE WRIGHT, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 03/16/2005
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Willie Wright, Jr., Bishop, Virginia, *pro se.*

Douglas A. Smoot and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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] without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order Denying Benefits (03-BLA-5061) of Administrative Law Judge Alice M. Craft in a miner's subsequent claim 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). The administrative law judge credited the miner with "at least" twenty-one years of coal mine employment pursuant to the parties' stipulation, 2003 Hearing Transcript at 6-7. Decision and Order at 4. Initially, the administrative law judge found claimant's subsequent claim to be timely filed in accordance with 20 C.F.R. §725.308. *Id.* Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 13-17. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, asserting that the administrative law judge erred in determining that claimant's second claim was timely filed pursuant to Section 725.308. Employer's Brief in Support of Cross-Petition for Review at 6-10. Additionally, employer contends that the administrative law judge erred in finding the opinions of Drs. Forehand and Robinette to be reasoned and documented. *Id.* at 11-13. Claimant has filed a response to employer's cross-appeal and reply to employer's response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, addressing only the timeliness issue.[2]

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[1]Claimant is Willie Wright, Jr., the miner, who filed his second claim for benefits on May 14, 2001. Director's Exhibit 3. Claimant's first claim for benefits was filed on July 6, 1994. Director's Exhibit 1. Administrative Law Judge Jeffrey Tureck denied claimant's first claim for benefits on May 30, 1996, and claimant appealed. *Id.* On March 26, 1997, the Board affirmed Judge Tureck's finding that claimant failed to establish the existence of pneumoconiosis and, therefore, the Board affirmed his denial of benefits. *Id.* Thereafter, claimant filed a timely request for modification, which the district director denied on February 9, 1998. *Id.* Claimant took no further action on his first claim.

[2]We affirm the administrative law judge's finding of "at least" twenty-one years of coal mine employment because this finding is not adverse to claimant and is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address whether the administrative law judge properly determined that this claim was timely filed. In its cross-appeal, employer asserts that the administrative law judge erred in applying *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990),[3] to find that claimant's second claim was timely filed and asserts that the administrative law judge should have applied *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001),[4] to this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[5] Employer's Brief in Support of Cross-Petition for Review at 6-10. Employer contends that under

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[3]In *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), the Board held that "the statute of limitations at 20 C.F.R. §725.308 applies only to the first claim filed."

[4]The Sixth Circuit in *Kirk* held that:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis . . . . Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Tennessee Consol. Coal Co. v. Kirk, 264 F.3d 602, 608, 22 BLR 2-288, 2-298 (6th Cir. 2001).

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia, Director's Exhibit 4. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Kirk, claimant's subsequent claim, filed on May 14, 2001, does not meet the three-year statute of limitations for filing a claim provided at Section 725.308 because it was filed more than three years after claimant received his first medical determination of total disability due to pneumoconiosis in 1995.[6] *Id.* at 8-10. The Director requests that the Board reject employer's assertion that the administrative law judge should have applied *Kirk* to this case arising within the jurisdiction of the Fourth Circuit. Director's Letter at 1 n.1. Additionally, the Director asserts that *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*) "merely applies *Kirk* to a claim arising in the Sixth Circuit" and does not "affect the precedential force of *Andryka* in circuits . . . that have not addressed the statute of limitations issue." *Id.*

The administrative law judge, applying *Andryka*, stated that "[t]here is not a statute of limitations or time limit for filing a subsequent claim." Decision and Order at 4. Accordingly, the administrative law judge determined that because claimant's first claim was timely filed, his second claim is also timely. *Id.* In *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A (June 28, 2004)(*en banc*)(published), the Board declined to apply the holding in *Kirk* regarding the statute of limitations outside of the Sixth Circuit. Therefore, we reject employer's request to apply *Kirk* to this Fourth Circuit case and affirm the administrative law judge's application of *Andryka* and his subsequent Section 725.308 finding.[7]

To be entitled to benefits under the Act, claimant must demonstrate 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[6]Employer asserts that claimant was informed by Drs. Boutris and Rasmussen in 1995 that he was totally disabled due to pneumoconiosis. Employer's Brief in Support of Cross-Petition for Review at 9.

[7]We reject employer's assertion that the administrative law judge's decision is inconsistent with applicable law because in *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*), the Board overruled its decision in *Andryka*. Employer's Brief in Support of Cross-Petition for Review at 8. Contrary to employer's assertion, the Board in *Furgerson* did not overrule its decision in *Andryka* but applied *Kirk* to that case which arose within the jurisdiction of the Sixth Circuit. *Furgerson*, 22 BLR at 1-223.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, as in the instant case, the subsequent claim must also be denied unless the administrative law judge determines that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In claimant's first claim, the Board affirmed Administrative Law Judge Jeffrey Tureck's denial of benefits based on his finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. As the prior denial was based on a finding that claimant did not suffer from pneumoconiosis, the administrative law judge considered the new evidence to determine if claimant has established the existence of pneumoconiosis.

Before discussing the administrative law judge's weighing of the evidence at Section 718.202(a), we will first consider the propriety of the administrative law judge's decision to overrule the objections of the Director and claimant to admit the entire report of Dr. Bush.

At the hearing, the Director and claimant asserted that the administrative law judge should admit only the portion of Dr. Bush's report, Employer's Exhibit 5, which addresses the biopsy slides.[8] 2003 Hearing Transcript at 34-36. The Director argued that part of Dr. Bush's report should not be admitted because in it Dr. Bush reviewed medical documents pertaining to claimant that have been excluded from the record. *Id.* at 34-35. The administrative law judge admitted Dr. Bush's entire report, stating that she did not believe that she could "separate [a portion of Dr. Bush's report] out." *Id.* at 35. In his February 13, 2003 report, Dr. Bush reviewed histologic slides, as well as admitted evidence from both claimant's present claim and previous claim. Employer's Exhibit 5. Pursuant to Section 725.309(d)(1), any evidence that was admitted in a prior claim shall be a part of the record in the subsequent claim. Therefore, because Dr. Bush's opinion was not based on any "excluded" evidence, the administrative law judge did not err in admitting it. Accordingly, we hold that the administrative law judge, within her discretion, permissibly admitted Dr. Bush's medical opinion in its entirety. *See Dempsey*,

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[8]In his response brief, claimant asserts that the administrative law judge erred in admitting Dr. Bush's entire report. Claimant's Consolidated *Pro se* Response Statement to Employer's Cross-Appeal and Response to Claimant's Appeal at 13. The Director did not address the administrative law judge's admission of Dr. Bush's report in his letter to the Board.

slip op. at 9-11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*)(an administrative law judge is given broad discretion to handle procedural matters).

In reviewing the new x-ray evidence, the administrative law judge considered the interpretations of each of the six x-rays separately to determine whether the x-ray establishes the presence of simple or complicated pneumoconiosis. Decision and Order at 14-15. With regard to the August 22, 2001 x-ray, the administrative law judge noted that this x-ray was read as positive for simple and complicated pneumoconiosis by Dr. Forehand, a B reader,[9] and negative by Dr. Spitz, a B reader and Board-certified radiologist. Based on Dr. Spitz' superior radiological qualifications, the administrative law judge properly found the August 22, 2001 x-ray to be negative for the existence of pneumoconiosis. *Id.* at 14; *Trent*, 11 BLR at 1-27-28; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge noted that there was only one reading of the January 16, 2002 x-ray, which was rendered by Dr. Castle, a B reader, who found that there was no evidence of pneumoconiosis. *Id.* at 15. The administrative law judge stated that the February 18, 2002 x-ray was read as positive for simple and complicated pneumoconiosis by Dr. DePonte, a B reader and Board-certified radiologist, and negative for pneumoconiosis by Dr. Scott, who is also dually qualified. Therefore, the administrative law judge permissibly found the readings of the February 18, 2002 x-ray to be in equipoise. *Id.*; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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). Because the September 9, 2002 x-ray was read as negative by Dr. DePonte, a B reader and Board-certified radiologist, and by Dr. McSharry, the administrative law judge found it to be negative for the existence of pneumoconiosis. *Id.* The administrative law judge noted that the March 4, 2003 x-ray was read as positive for simple and complicated pneumoconiosis by Dr. Robinette, a B reader, and negative by Dr. Scott, a B reader and Board-certified radiologist. *Id.* Based on Dr. Scott's superior radiological qualifications, the administrative law judge permissibly found the March 4, 2003 x-ray to be negative for the existence of pneumoconiosis. *Id.*; *Trent*, 11 BLR at 1-27-28; *Roberts*, 8 BLR at 1-213; *Dixon*, 8 BLR at 1-345. The administrative law judge noted that the March 20, 2003 x-ray read by Dr. Antoun, that is contained in claimant's

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[9]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

hospital records, was "neither positive nor negative" because it "is silent as to the presence of pneumoconiosis." *Id.*; *see* 20 C.F.R. §§718.102(b), 718.202(a)(1); *Handy v. Director, OWCP,* 16 BLR 1-73 (1990).

In conclusion, the administrative law judge rationally found that none of the seven newly submitted x-rays is sufficient to show the existence of simple or complicated pneumoconiosis. Therefore, we affirm the administrative law judge's finding that claimant failed to establish that he has simple or complicated pneumoconiosis because the administrative law judge permissibly weighed the new x-ray evidence and her finding is supported by substantial evidence. *See* discussion, *supra*; 20 C.F.R. §§718.202(a)(1), 718.304(a); *Doss v. Director, OWCP,* 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Gollie v. Elkay Mining Co.*, 22 BLR 1-306 (2003); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Regarding the biopsy evidence, Dr. Bush found that the biopsy tissue did not show changes suggestive of coal workers' pneumoconiosis nor did he identify any massive lung lesions. Employer's Exhibit 5. Therefore, the administrative law judge permissibly found that claimant failed to establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2), 718.304(b). Decision and Order at 14; *see Doss v. Director, OWCP*, 53 F.3d at 659, 19 BLR at 2-191; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-248-49 (2003). Moreover, since the instant case involves a living miner's claim filed after January 1, 1982, the administrative law judge correctly determined that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §§718.305(e), 718.306. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Sections 718.202(a)(2), 718.304(b), 718.305(e), and 718.306.

Next, the administrative law judge considered the newly submitted medical opinion evidence. Dr. Forehand found the existence of simple and complicated pneumoconiosis based on his interpretation of the August 22, 2001 x-ray and diagnosed chronic bronchitis due to coal dust exposure and smoking. Director's Exhibit 11. Dr. Robinette found the existence of complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Bush concluded "based on the [radiological] findings, clinical evaluations and the minimal pathologic findings[,] that [claimant] does not suffer from coal workers' pneumoconiosis." Employer's Exhibit 5. Dr. Castle stated that the evidence is insufficient to establish simple or complicated pneumoconiosis. Employer's Exhibits 2, 9 at 26-27. Dr. McSharry found the evidence insufficient to establish simple pneumoconiosis and that it is "unlikely" that the mass in claimant's left upper lung lobe represents progressive massive fibrosis associated with changes of pneumoconiosis. Employer's Exhibits 3, 10 at 34-35. The record also contains treatment records from a hospital visit by claimant in March of 2003. Claimant's Exhibit 2. As the administrative

law judge noted, these records are of "little assistance" to claimant in proving the existence of pneumoconiosis because the records contain no diagnoses of pneumoconiosis. Decision and Order at 13, 16.

The administrative law judge initially stated that all of the physicians' opinions are "based on adequate underlying documentation" and provide "at least some rationale in support of their conclusions." *Id.* at 16. However, the administrative law judge found:

> that the documentation relied upon by Drs. Robinette and Forehand, and the conclusions reached by them were not as convincing, given their reliance upon their own findings of complicated and simple pneumoconiosis by radiographic evidence, when the more highly qualified physicians found that evidence to be negative.

Id. The administrative law judge also noted that neither Dr. Forehand nor Dr. Robinette reviewed the other physicians' reports and objective testing prior to rendering their own opinions. *Id.* at 16-17. Regarding the opinions of Drs. Castle and McSharry, the administrative law judge found these physicians' opinion to be more well-reasoned and well-documented regarding the etiology of claimant's lung mass than the opinions of Drs. Robinette and Forehand.[10] *Id.* at 17. Moreover, the administrative law judge stated that "Drs. Castle and McSharry possess excellent credentials in the field of pulmonary disease[11] [and that] both had the opportunity to examine the Claimant as well as review other medical evidence in the record." *Id.* Therefore, the administrative law judge "accorded greater probative weight to the opinions of Drs. Castle and McSharry," which she found to be supported by the "detailed and reasoned" report of Dr. Bush. *Id.*

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[10]Specifically, the administrative law judge found the "reasoning and explanation [Drs. Castle and McSharry provided] in support of their conclusions [to be] more complete and thorough than that provided by [Drs. Forehand and Robinette, and that] Drs. Castle and McSharry better explained how all of the evidence they developed and reviewed supported their conclusions." Decision and Order at 17.

[11]The record reveals that Dr. Forehand is a B reader, Dr. Castle is a B reader and is Board-certified in internal medicine and pulmonary disease, and Dr. McSharry is Board-certified in internal medicine, pulmonary disease, and critical care medicine. Director's Exhibit 11, Employer's Exhibits 2, 3. Dr. Bush is Board-certified in Anatomic and Clinical Pathology and Medical Microbiology. Employer's Exhibit 5. As the administrative law judge noted, Dr. Robinette's qualifications are not in the record. Decision and Order at 10-11 n.4.

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), and the Board is neither empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws her own inferences); *Anderson*, 12 BLR 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to establish the existence of simple or complicated pneumoconiosis based on the new medical opinion evidence. 20 C.F.R. §§718.202(a)(4), 718.304(c); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

While the administrative law judge cited *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), she did not specifically weigh all of the relevant evidence together to determine whether claimant established the existence of simple pneumoconiosis pursuant to Section 718.202(a). However, because the administrative law judge properly found that claimant failed to establish the existence of simple pneumoconiosis pursuant to each of the subsections found at Section 718.202(a)(1)-(a)(4), *see* discussion, *supra*, it was unnecessary for the administrative law judge to undertake a *Compton* weighing. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of simple pneumoconiosis based on the newly submitted evidence. *See* 20 C.F.R. §718.202(a).

Similarly, in considering whether claimant established the existence of complicated pneumoconiosis, the administrative law judge did not weigh all the relevant evidence together pursuant to Section 718.304. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). However, because the administrative law judge found the evidence insufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a), (b), and (c), it was unnecessary for the administrative law judge to further weigh all the relevant evidence together regarding complicated pneumoconiosis. *Larioni*, 6 BLR at 1-1278. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis based on the newly submitted evidence. *See* 20 C.F.R. §§718.202(a)(3), 718.304.

Finally, because the administrative law judge properly found that claimant failed to establish the existence of simple or complicated pneumoconiosis, *see* discussion, *supra*, we affirm her finding that claimant's subsequent claim must be denied on the basis of the denial of his prior claim. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3; *see Lisa*

Lee Mines v. Director, OWCP [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). Because we affirm the administrative law judge's denial of benefits, it is unnecessary for us to address employer's assertions, raised on cross-appeal, regarding the opinions of Drs. Forehand and Robinette.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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