

## **Chapter 26**

### **Motions**

#### **I. Generally**

The regulatory bases for procedural, evidentiary, and discovery motions are commonly located at 20 C.F.R. Part 725 and 29 C.F.R. Part 18. Note, however, that the evidentiary rules at 29 C.F.R. § 18.101 *et seq.*, do not apply to black lung cases. 29 C.F.R. § 18.1101.

#### **A. Ten days to respond**

Generally, parties are afforded a period of ten days to respond to a motion, unless otherwise authorized by an administrative law judge. 29 C.F.R. § 18.6(b). Twenty-nine C.F.R. § 18.40 sets forth the procedures to be applied for the computation of time for filing motions and responsive pleadings.

#### **B. Dismissal of a claim, defense or party**

Twenty C.F.R. § 725.465(c) provides in part that "[i]n any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal shall not be granted and afford all parties a reasonable time to respond to such order." The failure to comply with a lawful order of an administrative law judge may result in the dismissal of the claim, defense, or party. 20 C.F.R. § 725.465 (2000) and (2008).

#### **C. Caption**

Miners' and survivors' claims will have a "BLA" case number. For other case types, the designations will be as follows: (1) "BMO" for medical benefits only claims; (2) "BTD" for medical treatment dispute claims; (3) "BLO" for overpayment claims (and the parties will generally be styled as the Director, OWCP versus Claimant); (4) "BMI" for medical interest claims (none of these claims should be pending before this Office, see Chapter 20); (5) "BCP" for black lung civil money penalty claims; and (6) "BLB" for Black Lung Part B claims (these are non-adversarial proceedings, see Chapter 19).

Only the claimants' initials should be used in the captions and texts of final orders and decisions published to the website by the Office. This policy is designed to protect their Privacy Act rights.

## **II. Remand to the district director**

### **A. District director's obligation to provide complete examination**

#### **1. Generally**

The district director has an obligation to provide the miner with a complete pulmonary examination in an original claim, or in subsequent claims filed under 20 C.F.R. § 725.309 of the regulations. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990)(en banc). See also *Petry v. Director, OWCP*, 14 B.L.R. 1-98 (1990)(en banc); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 B.L.R. 2-25 (8<sup>th</sup> Cir. 1984). The Department-sponsored medical evaluation must address all elements of entitlement. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

For additional discussion of the district director's obligation to provide a complete pulmonary evaluation, see Chapter 1.

#### **2. Report credible on one issue, § 725.406 requirements may be satisfied**

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.), the administrative law judge properly found that Dr. Hussain, who conducted the Department of Labor-sponsored examination of the miner, did not provide a reasoned opinion regarding the presence or absence of clinical pneumoconiosis. Notwithstanding this deficiency, the Board agreed with the Director that the Department's duty to provide a complete, credible pulmonary evaluation under 20 C.F.R. § 725.406 was discharged. In particular, Dr. Hussain also found that Claimant was not totally disabled and the judge relied on this component of Dr. Hussain's opinion, along with other medical evidence of record, to deny benefits.

#### **3. Claimant provided erroneous history, 20 C.F.R. § 725.406 requirements satisfied**

In *Broughton v. C & H Mining, Inc.*, BRB No. 05-0376 BLA (Sept. 23, 2005)(unpub.), the administrative law judge properly discredited the opinion of Dr. Simpao, who conducted the Department of Labor-sponsored examination of Claimant, on grounds that Dr. Simpao's diagnosis was based on 18 years of coal mine employment where the judge found 8.62 years established on the

record. However, the Board denied Claimant's request that the claim be remanded for another pulmonary evaluation under § 725.406. In particular, the Board agreed with the Director that the miner was provided with a pulmonary evaluation in compliance with § 725.406 and "Dr. Simpao's reliance on an incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician."

#### **4. Incomplete or invalid examination, additional examination or testing required**

If, during the pendency of a claim before this Office, it is determined by the administrative law judge that the pulmonary evaluation provided to the miner by the Department of Labor under § 725.406 is incomplete as to any issue that must be adjudicated, or fails to comply with the quality standards, the administrative law judge may, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing. 20 C.F.R. §§ 725.406 and 725.456(e) (2008).

#### **5. Evaluation outweighed but not discredited, § 725.406 requirements satisfied**

In *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-\_\_\_\_, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008), the Board held that, although the Director agreed that the exam conducted under § 725.406 was incomplete on the issue of whether the miner was totally disabled, a remand for an additional opinion by the physician was unnecessary because the judge found the physician's finding of a "severe respiratory impairment" to be outweighed by assessments of other physicians of record. Because any supplemental opinion by the physician would be based on this discredited premise, remand was not needed.

Similarly, in *Lovins v. Arch Mineral Corp.*, BRB No. 05-0201 BLA (Sept. 30, 2005) (unpub.), the Board denied the miner's request that his claim be remanded for another Department-sponsored pulmonary evaluation where the administrative law judge "did not discredit Dr. Hussain's disability opinion entirely," but found only that it was outweighed by a contrary opinion of record.

#### **6. Director, OWCP has standing to contest whether complete evaluation provided**

The Director has standing to contest the issue of whether Claimant was provided a complete pulmonary examination at the Department of Labor's expense. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

## **B. Withdrawal of controversion or agreement to pay benefits**

It is proper to accept the Director's "Motion to Remand for the Payment of Benefits" as a withdrawal of controversion of all issues. *Pendley v. Director, OWCP*, 13 B.L.R. 1-23 (1989)(en banc). On the other hand, Employer's agreement to withdraw its controversion of Claimant's eligibility for medical benefits in return for Claimant's agreement to first submit all future medical expenses to alternative health carriers is illegal. The agreement would deprive Claimant of protection afforded him under the regulations. 20 C.F.R. §§ 725.701-725.707. *Gerzarowski v. Lehigh Valley Anthracite, Inc.*, 12 B.L.R. 1-62 (1988).

## **C. Failure to timely controvert**

### **1. Generally**

If the administrative law judge determines that a designated employer failed to timely controvert the claim, then entitlement is established and the claim may be remanded for the payment of benefits. See 20 C.F.R. § 725.413(b)(3) (2000) and § 725.412(b) (2008). See also Chapter 28.

### **2. Entitled to *de novo* consideration by administrative law judge**

In *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 B.L.R. 2-238 (6<sup>th</sup> Cir. 1989), the Sixth Circuit held that it is within the jurisdiction of the administrative law judge to determine, after *de novo* review of the issue, whether Employer established "good cause" for its failure to timely controvert the claim. The Board adopted this holding in *Krizner v. U.S. Steel Mining Co.*, 17 B.L.R. 1-31 (1992)(en banc) wherein it held that any party dissatisfied with the district director's determination on the issue of filing a timely controversion, or finding "good cause" for an untimely filing, is entitled to have the issued decided *de novo* by an administrative law judge.

If the judge finds that Employer failed to timely controvert the claim, then entitlement is established. 20 C.F.R. § 725.413(b)(3) (2008).

### **3. Employer thought Fund would be liable, no "good cause" established**

In *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6<sup>th</sup> Cir. 1997), the court held that an employer could not be relieved of its liability for failure to timely controvert on grounds that it relied on the claimant's mistaken representation that the Trust Fund would be held liable for benefits. As a result, the court

concluded that the employer failed to demonstrate "good cause" for its failure to timely controvert both the claim and its designation as the responsible operator. The court then upheld an order directing that the employer secure the payment of \$150,000 in benefits pursuant to 20 C.F.R. § 725.606 (2000) and (2008).

**D. Inability to locate the claimant or abandonment of the claim**

If the claimant has died or cannot be located, and it is unclear who has authority to proceed with the claim, or if the widow wishes to file a separate survivor's claim, remand may be appropriate. Within the administrative law judge's discretion, the claim may also be dismissed on the basis of abandonment. 20 C.F.R. §§ 725.409, 725.465, and 725.466 (2008). It must be noted, however, that the regulations require that an order to show cause be issued prior to an order of dismissal.

**E. Consolidation of claims**

A party may file a motion to consolidate claims where the issues to be resolved are identical. 29 C.F.R. § 18.11. Typical motions to consolidate involve a survivor who seeks to consolidate his or her claim with the deceased miner's claim. 20 C.F.R. § 725.460 (2008). Although remand is not required to consolidate claims, for practical reasons, it may often be necessary. When two claims are consolidated, evidence submitted in conjunction with one claim can be considered with relation to the consolidated claim. A single hearing applicable to both claims is held and, if both claims are not currently before this Office, a case may have to be continued or remanded so that they may be consolidated before hearing.

For claims adjudicated under the amended regulations at 20 C.F.R. Parts 718 and 725 (2008), the fact-finder and parties should consider the impact of the evidentiary limitations at 20 C.F.R. § 725.414 (2008) when considering consolidation of the living miner's and survivor's claims. Notably, evidence must be specifically designated in accordance with the limitations set forth at 20 C.F.R. § 725.414 (2008) for any claim filed after January 19, 2001.

**F. Determination of responsible operator (or motion to dismiss as a party)**

**1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

**a. Generally**

The regulations require that the district director make the initial

determination of the proper responsible operator. 20 C.F.R. § 725.412 (2000). A remand of the case may be appropriate where the district director has not properly named the responsible operator. Before a responsible operator is dismissed as a party to a claim, the administrative law judge should issue an order to show cause why that party's motion should not be granted. 20 C.F.R. §§ 725.465 and 725.466 (2000).

Occasionally, the district director transfers a case with more than one putative responsible operator named. A responsible operator should not be dismissed if there are contested issues concerning qualifying coal mine employment or ability to assume liability. If a *de novo* hearing is necessary for these issues, dismissing a potentially responsible operator would be premature.

The district director has the burden to investigate and assess liability against the proper operator. *England v. Island Creek Coal Co.*, 17 B.L.R. 1-141, 1-444 (1993). However, if the operator is financially incapable of assuming liability, the ruling in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4<sup>th</sup> Cir. 1995), *rev'g. in part sub. nom.*, 17 B.L.R. 1-145 (1993), allows the district director to reach back and name earlier operators. However, *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984) mandates that the responsible operator issue be resolved in a preliminary proceeding or that all potential operators be proceeded against at every stage of adjudication. Failure to do so precludes the designation of another responsible operator and exposes the Trust Fund to liability. As a result, the matter should proceed to hearing without dismissing those parties.

#### **b. Remand prior to hearing**

In *Director, OWCP v. Oglebay Norton Co.*, 12 B.L.R. 2-357 (6<sup>th</sup> Cir. 1989), the court upheld remand of a claim to the district director for determination of the responsible operator. Although the claim had been referred to the administrative law judge, a hearing had not been held. The court noted that, once the claim is heard, other potential operators cannot be identified by the district director. However, prior to adjudication, the district director may name potential responsible operators as long as the employer is not unduly prejudiced. See *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1991); *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990).

#### **c. Criteria for remands**

The Board has delineated restrictions on remands for the determination of a responsible operator. In *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984), the Board held that a claim should not be remanded if: (1) the remand would either jeopardize the claimant's case; or (2) the remand would be incompatible with the efficient administration of the Act. The district director must resolve the responsible operator issue, or proceed against all

putative operators at every stage of the claim's adjudication. Otherwise, an employer that should have been designated would be prejudiced by not having notice and an opportunity to be heard at the district director level and before the administrative law judge. *Id.* at 1-357. *See also England v. Island Creek Coal Co.*, 17 B.L.R. 1-141 (1993) (the district director has the burden of naming the appropriate responsible operator); *Shepherd v. Arch of West Virginia*, 15 B.L.R. 3-134 (1991)(presenting a good example of the application of *Crabtree* and the definition of piecemeal litigation). Therefore, motions to remand on the issue of responsible operator are most often granted when it is demonstrated that the correct responsible operator may not have been named.

In *Baughman v. R. Turner Clay Co.*, 15 B.L.R. 3-697 (1991), the administrative law judge allowed a remand for a determination of responsible operator on employer's motion because new issues were presented for consideration. 20 C.F.R. § 725.463 (2008). The new issues were not reasonably ascertainable by Employer's counsel while the claim was before the district director due to counsel's illness and his unfamiliarity with the procedures.

## **2. After applicability of 20 C.F.R. Part 725 (2008)**

Under the amended regulations, a claim is forwarded with only one operator listed as responsible for the payment of any benefits. Subsection 725.418(d) provides the following:

The proposed decision and order shall reflect the district director's final designation of the responsible operator liable for the payment of benefits. No operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410. The district director shall dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407 and that were not previously dismissed pursuant to § 725.410(a)(3).

20 C.F.R. § 725.418(d) (2008). In addition, the provisions at § 725.465(b) have been altered to provide the following:

The administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon motion or written agreement of the Director.

20 C.F.R. § 725.465(b) (2008). Notably, the amended regulations do not include provisions allowing for remand of a claim if the judge determines that

the district director designated the wrong operator; rather, the Black Lung Disability Trust Fund should be held liable for the payment of benefits. For further discussion of this issue, see Chapters 4 and 7.

### **G. Remand for evidentiary development permitted only if record is incomplete**

Before the administrative law judge may order further development of the record, s/he must make a determination that the record is incomplete as to one or more of the contested issues. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

Notably, it was error to remand a claim for further evidentiary development where "the administrative law judge did not find the evidence to be incomplete on any issue before him but rather required the development of cumulative evidence." The Board determined that, "unless mutually consented to by the parties . . ., further development of the evidence by the administrative law judge is precluded." *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

*But see King v. Cannelton Industries, Inc.*, 8 B.L.R. 1-146, 1-148 (1985) (development of additional medical evidence is proper when the judge, questioning the validity of blood gas studies and seeking to learn more about Claimant's condition, permitted Employer the opportunity to obtain a post-hearing blood gas study and permitted Claimant 30 days to respond); *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983) (admission of post-hearing examination of Claimant under 20 C.F.R. § 725.456(e) was proper where the judge wanted to learn more about the effects of Claimant's back injury).

## **III. Transfer of liability to the Black Lung Disability Trust Fund**

The purpose of the transfer of liability to the Trust Fund is to shield the employer from unexpected liability resulting from amendments to the Black Lung Benefits Act. The 1977 Amendments provide for reconsideration of claims previously dismissed. The Fund is deemed liable in such cases so that employers do not suffer liability in claims that they reasonably expected were finally adjudicated. 20 C.F.R. § 727.101 *et seq.*. See Chapter 22 for a discussion of the transfer of liability provisions.

## **IV. Amend controversion form**

### **A. Generally**

Every claim file referred to the Office of Administrative Law Judges for adjudication should contain a Form CM-1025. This form sets forth the issue contested by the party or parties opposing entitlement (*i.e.* employer and/or

Director, OWCP). The hearing is confined to the issues included on the controversion form. 20 C.F.R. § 725.463 (2000) and (2008). Prior to the scheduled hearing, the Director, OWCP or the employer may move to amend the list of contested issues. Such a motion is only granted where the additional issues were raised in writing at the district director's level. 20 C.F.R. § 725.463(a) (2000) and (2008).

When new issues are raised before the administrative law judge, s/he has the discretion under 20 C.F.R. § 725.463(b) (2000) and (2008) to (1) remand the case to the district director, (2) hear and resolve the new issue, or (3) refuse to consider the new issue. See *Callor v. American Coal Co.*, B.L.R. 1-687 (1982), *aff'd sub nom., American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 B.L.R. 2-81 (10<sup>th</sup> Cir. 1984).

An issue not previously considered by the district director may be adjudicated if the parties consent. Such consent may be inferred where the parties develop evidence and are aware of each other's intent to litigate the issue. See *Carpenter v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-784 (1984).

## **B. Limits scope of litigation**

The administrative law judge erred in permitting the Director, without reason, to litigate issues that were easily ascertainable while the case was pending before the district director, but were not checked as contested on referral (the Form CM-1025) by the district director. *Thorton v. Director, OWCP*, 8 B.L.R. 1-277, 1-280 (1985). See 20 C.F.R. § 725.463(b) (2000) and (2008).

## **C. Parties bound by "clerical error" on CM-1025**

In *Chaffins v. Director, OWCP*, 7 B.L.R. 1-431 (1984), the administrative law judge properly declined to consider the issue of length of coal mine employment where the Director merely argued that because of a clerical error, the issue was not "checked" on the CM-1025. The Director further stated that the issue had been raised in writing before the district director on prior occasions. The Board held:

[W]e squarely reject the implication of the Director's position on appeal; that he has no duty with respect to identifying the issues to be heard and that the administrative law judge and claimant must look behind the statement of contested issues in the chance that a clerical error was made in its preparation.

*Id.*

Similarly, in *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983), the judge erred in considering whether Claimant suffered from pneumoconiosis, where

the issue was not listed as contested. *See also Perry v. Director, OWCP*, 5 B.L.R. 1-527 (1982)(pneumoconiosis not listed as contested); *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992) (error to deny benefits on grounds that Claimant failed to establish coal workers' pneumoconiosis where the issue was not listed as contested on the Form CM-1025); *Mullins v. Director, OWCP*, 11 B.L.R. 1-132 (1988)(en banc) (eligibility of survivor conceded if reasonably ascertainable at district director's level, but not raised at that level by the opposing party).

In an unpublished decision, *Linton v. Director, OWCP*, Case No. 85-3547 (3<sup>rd</sup> Cir. June 10, 1986)(unpub.), the Third Circuit held that Claimant could not raise the issue of an employer's failure to timely controvert the claim at the hearing because the issue was reasonably ascertainable while the case was pending before the district director, but not listed on the CM-1025.

#### **D. Amending the CM-1025**

##### **1. Raising a new issue at the hearing, alternative means of handling**

If a new issue is presented at the hearing, the judge has the option of remanding the claim to the district director for consideration of the new issue, or s/he may refuse to consider the issue at the hearing. *Callor v. American Coal Co.*, 4 B.L.R. 1-687 (1982), *aff'd. sub. nom., American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 B.L.R. 2-81 (10<sup>th</sup> Cir. 1984).

##### **2. Waiver of objection to new issue, failure to object**

In *Grant v. Director, OWCP*, 6 B.L.R. 1-619 (1983), Claimant waived his right to challenge litigation of issues not marked as contested because Claimant failed to object when the judge expressly stated the issues as those to be decided at the hearing. *See also Prater v. Director, OWCP*, 87 B.L.R. 1-461 (1986) (Claimant's counsel failed to object to Employer's motion to enlarge issues at the hearing).

In *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784 (1984), the judge properly decided certain medical issues, which were not listed as contested on the CM-1025, because the record supported a finding that both parties (1) developed medical evidence on the issues, and (2) were aware of each other's intent to litigate the issues.

##### **3. Issue "reasonably ascertainable" at district director's level, error to consider**

The regulatory provisions at 20 C.F.R. § 725.463(b) permit new issues to be raised before the administrative law judge if they were not "reasonably

ascertainable" while the claim was pending at the district director's level.

In *Thorton v. Director, OWCP*, 8 B.L.R. 1-277 (1985), the administrative law judge erred in adjudicating issues raised one week before the hearing. The Board determined that the issues were ascertainable while the claim was pending before the district director.

#### **4. Issue not specified or developed, error to consider**

It is error for an administrative law judge to conduct a hearing where the issues were not specified by the district director. Indeed, the Board held that it is proper to remand a claim in accordance with 20 C.F.R. § 725.456(e) to develop the evidence and identify contested issues prior to referral. *Stidham v. Cabot Coal Co.*, 7 B.L.R. 1-97, 1-101 (1984).

#### **5. Parties agree not to litigate issue, error to consider**

Fundamental fairness was violated and resulted in prejudicial error when the administrative law judge considered an issue that the parties agreed not to litigate. Specifically, the Board reversed the judge's decision to consider length of coal mine employment where (1) it was not listed as an issue on the CM-1025, and (2) it was not submitted as an issue in writing to the district director. As a result, the Board concluded that Claimant was denied due process. *Derry v. Director, OWCP*, 6 B.L.R. 1-553, 1-555 (1983) (the parties stipulated to ten years of coal mine employment).

In *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992), the judge erred in determining that Claimant did not suffer from pneumoconiosis arising out of coal mine employment. Neither issue was marked as contested on the CM-1025, or raised in writing before the district director. The Board concluded that the Director conceded the issues of pneumoconiosis related to coal mine employment such that it was error for the judge to adjudicate the issues.

### **V. Motions for discovery and proffers of evidence**

In responding to motions to compel discovery, the primary consideration is to guarantee the right of every party to a full and fair hearing. The regulations at 20 C.F.R. § 725.455 (2000) and (2008) set forth the hearing procedures in general terms and give the administrative law judge the ability to inquire into the facts and evidence. This section also exempts the hearing before the administrative law judge from the common law or the Federal Rules of Evidence, thus giving the administrative law judge greater latitude in determining the facts and merits of a claim.

Prior to a hearing, any party may submit a motion to compel discovery.

29 C.F.R. § 18.6. Motions to compel discovery can be used to request physical examinations, answers to interrogatories, depositions, medical reports, and medical release forms. Twenty C.F.R. § 725.450 (2008) guarantees the right of all parties to a full and fair hearing. Thus, the parties have a right to develop evidence relevant to the claim.

Twenty-nine C.F.R. § 18.21(a) provides that "if . . . a party upon whom a request is made pursuant to §§ 18.18 through 18.20 . . . fails to respond adequately or objects to the request, or any part thereof . . . , the discovering party may move the administrative law judge for an order compelling a response . . . ." Pursuant to 20 C.F.R. § 725.465, a claim may be dismissed upon failure of the claimant to comply with a lawful order of the administrative law judge, or failure to attend a scheduled hearing. 20 C.F.R. § 725.465 (2000) and (2008).

For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28.

## **VI. Medical examinations**

### **A. Multiple examinations permitted**

#### **1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

##### **a. Generally**

Twenty C.F.R. § 725.414 (2000) allows the putative responsible operator to require that the claimant submit to a physical examination by a doctor of the operator's choice. See also 20 C.F.R. §§ 725.413 and 725.414(a) (2000). This section does not limit the number of examinations of the miner, *Horn v. Jewell Ridge Coal Co.*, 6 B.L.R. 1-933 (1984), and an employer may have the claimant examined more than one time. *King v. Cannelton Indus., Inc.*, 8 B.L.R. 1-146 (1985), *aff'd.*, Case No. 85-1878 (4<sup>th</sup> Cir. Jan. 30, 1987)(unpub.).

##### **b. Motion to compel examination, factors to consider**

If the claimant has already undergone one or more medical examinations at the employer's request, and the employer submits a motion seeking to compel an additional examination, such motion should be granted only if (1) the claimant has submitted evidence indicating a substantial change in condition from the time of the last submitted evidence, (2) the employer has not previously submitted reasonably contemporaneous evidence, or (3) the record is incomplete as to an issue requiring adjudication. *Harlan Coal Co. v.*

*Lemar*, 904 F.2d 1042 (6<sup>th</sup> Cir. 1990); *Marx v. Director, OWCP*, 870 F.2d 114 (3<sup>rd</sup> Cir. 1989); *North American Coal Co. v. Miller*, 870 F.2d 948 (3<sup>rd</sup> Cir. 1989); and *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).

In addition, before granting a motion to compel a medical examination, consideration should be given to hardship on the claimant. See *Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-68 (1985); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984). In response to an employer's motion to compel a medical examination, the claimant may file a motion for protective order pursuant to 29 C.F.R. § 18.15. To prevail, the claimant must demonstrate good cause by setting forth facts demonstrating that the examination is annoying, embarrassing, oppressive, or unduly burdensome. Further, a claimant cannot be required to travel more than 100 miles for an examination unless authorized by the district director. 20 C.F.R. § 725.414(a) (2000). The employer does have alternatives to obtaining evidence including interrogatories, depositions, consultative reviews of the medical evidence, and rereading x-rays. See 20 C.F.R. § 725.414(a) (2000) and 29 C.F.R. § 18.15.

### **c. Failure to cooperate**

In a claim filed prior to January 19, 2001, the Board held that Employer has a right to request a physical examination of Claimant in order to ensure a "full and fair hearing." The Board noted that Employer is not limited to only one examination, or to an examination by the same physician. Thus, where the record revealed that a pulmonary function study could not be interpreted by Employer's physician due to poor effort, it was proper for the judge to order a second examination. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27, 1-29 (1987).

As previously noted, Employer may have the miner examined more than once, either by the same physician or by different physicians of Employer's choosing. It is within the administrative law judge's discretion to compel Claimant to submit to a second Employer-procured examination. *King v. Cannelton Industries, Inc.*, 8 B.L.R. 1-146 (1985), *aff'd. mem.*, 811 F.2d 1505 (4<sup>th</sup> Cir. 1987) (it was proper to order Claimant to submit to further blood gas testing where the validity of testing already conducted was questioned; the judge properly left the record open to allow Claimant the opportunity to respond to the post-hearing blood gas study results).

### **d. Evidentiary development before district director required**

Twenty C.F.R. § 725.414(e)(2) (2000) requires that the employer make a "good faith" attempt to develop its evidence while the claim is pending before the district director. Failure to make such effort may constitute a waiver of the right to an examination of the claimant or to have the claimant's

evidence evaluated by a physician of the operator's choice. See *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986).

On the other hand, if it is determined that the claimant has unreasonably refused to submit to a medical examination, all evidentiary development of the claim should be suspended and the claim denied by reason of abandonment or dismissed (as appropriate). 20 C.F.R. § 725.408 (2000). However, before a claim can be denied by reason of abandonment or dismissed for failure to submit to a medical examination, the claimant must be notified of the reasons for the potential denial or dismissal and of any action that needs to be taken to avoid the denial or dismissal. 20 C.F.R. § 725.409 (2000); *Couch v. Betty B Coal Co.*, BRB No. 88-4067 BLA (June 29, 1992)(unpub.).

In *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984), the Board held that the administrative law judge erred in requiring Claimant to submit to a post-hearing examination conducted by a physician of Employer's choice after determining that, while the claim was pending before the district director, Employer failed "to undertake a good faith effort to develop its evidence and, consequently, had waived its right to have . . . Claimant examined by a physician of its choice." See 20 C.F.R. § 725.414(e)(2). The Board stated:

The administrative law judge initially determined that the employer had failed to proffer any good reason why it had delayed for almost a year after being apprised of its potential benefits liability to schedule claimant for an examination.

. . .

Furthermore, while the fact that the employer did not intentionally obstruct the expedient processing and adjudication of (the) claim is certainly relevant to the issue of whether the employer had made a 'good faith' effort to develop its evidence, that determination, in and of itself, is not sufficient to compel the claimant to submit to a physical exam conducted by employer's physician post-hearing.

*Id.* at 1-764.

In *Pruitt v. USX Corp.*, 14 B.L.R. 1-129 (1990), the Board held that Employer's failure to engage in "good faith" development of the evidence at the district director's level may result in a waiver of its right to have Claimant examined by a physician of its choice or to have Claimant's evidence reviewed by a physician of its choice. See also *Hardisty v. Director, OWCP*, 7 B.L.R. 1-322 (1984), *aff'd.*, 776 F.2d 129, 8 B.L.R. 2-72 (7<sup>th</sup> Cir. 1985); *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

In *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986), the Board held that, because Employer failed to contest the district director's denial of its request to have Claimant examined and took no further action in the two years prior to the hearing, the judge properly concluded that Employer waived its right to have Claimant examined.

**e. Response to medical reports**

A party must be provided an opportunity to respond to medical reports submitted into the record by the opposing party, or to cross-examine the physicians who prepared the reports. *North American Coal Co. v. Miller*, 870 F.2d 98 (3d Cir. 1989); *Pruitt v. USX Corp.*, 14 B.L.R. 1-129 (1990); *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986); *Chancey v. Consolidation Coal Co.*, 7 B.L.R. 1-240 (1984). However, in dealing with the rebuttal of the claimant's evidence in claims filed on or before January 19, 2001, there is no requirement that the employer be allowed to submit an equal number of medical reports as the claimant. See *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987); *King v. Cannelton Indus., Inc.*, 8 B.L.R. 1-146 (1985); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984).

**f. Physician may consider evidence not admitted**

It is proper for the administrative law judge to consider a medical opinion that reviews medical evidence not formally admitted into the record. *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7<sup>th</sup> Cir. 1999).

**2. After applicability of 20 C.F.R. Part 725 (2008)**

**a. Generally**

Under the amended regulations at 20 C.F.R. § 725.414 (2008), the claimant and employer may each submit two medical opinions based on examinations of the miner and/or review of the medical evidence of record in originally filed claims as well as claims filed under 20 C.F.R. § 725.309 (2008). On modification, each party is permitted to submit one additional medical opinion based on examination of the miner. 20 C.F.R. § 725.310 (2008). See Chapter 4 for further discussion of the evidentiary limitations under the amended regulations (including limitations pertaining to petitions for modification).

## **b. Rebuttal of medical opinion**

For a discussion of the limitations on "rebuttal" of a medical report under the amended regulations, see Chapter 4.

## **c. Physician may consider only admitted evidence**

For claims filed after January 19, 2001, the evidentiary limitations at 20 C.F.R. § 725.414 (2008) apply. Under these regulations, medical reports or expert testimony may only be based on evidence that is properly admitted into the record. 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i), 725.457(d), and 725.458 (2008). For a discussion of the application of the amended regulations, see Chapters 3 and 4.

## **B. Failure or refusal to attend medical evaluation**

### **1. Physical examination not contraindicated, dismissal proper**

The administrative law judge may order Claimant to submit to a post hearing physical examination and may dismiss a claim where the miner unreasonably fails to attend. In *Goines v. Director, OWCP*, 6 B.L.R. 1-897 (1984), Claimants refused to attend physical examinations, which were scheduled by the district director and ordered by the administrative law judge. In support of their refusal, Claimants submitted two physicians' opinions stating that, due to Claimants' poor health, further stress testing including x-ray studies and pulmonary function and blood gas studies "would be hazardous to the claimants and should be avoided." The Board affirmed the judge's orders that Claimants undergo physical examinations, which did not include stress testing or x-ray studies, and it upheld the judge's dismissal of the claims based upon Claimants' failure to comply with his lawful orders.

### **2. Physical examination contraindicated, dismissal improper**

Dismissal was improper where testimony supported a treating physician's opinion that further blood gas testing was contraindicated. Thus, where Claimant's physician stated that further blood gas testing was not advisable due to Claimant's history of phlebitis and thrombosis, it was proper for the administrative law judge: (1) to decline to require Claimant to undergo such testing; and (2) to deny Employer's motion to dismiss for Claimant's failure to attend the examination. *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

### **C. Questionable test results; lack of cooperation**

The Board remanded a claim where the administrative law judge failed to discuss Claimant's refusal to attend a medical examination at Employer's request. The Board reversed the judge's finding that the issue was moot after concluding that the named Employer was not responsible for the payment of benefits. Consequently, the judge was required to address the issue on remand. *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. 1-109 (1986).

It was proper under 20 C.F.R. § 725.456(e) (2000) for the administrative law judge to order that Claimant undergo a second Employer-procured examination where the pulmonary function study conducted as part of the first examination could not be interpreted due to Claimant's poor effort. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).

However, the Board has also held that Employer received a full and fair hearing despite the fact that the judge denied its Motion to Require Claimant's Cooperation on a Pulmonary Function Study. Employer argued that the record contained "ample evidence" that Claimant did not cooperate during a prior pulmonary function study. The Board held that Employer did not establish "substantial prejudice" as a result of the ruling because a non-qualifying study, even if valid, would not have sustained Employer's burden. *Lafferty v. Cannelton Industries, Inc.*, 12 B.L.R. 1-190, 1-192 and 1-193 (1989).

### **D. District director's failure to act on request for medical examination, remedy for**

The administrative law judge properly resolved confusion caused by the district director's failure to act on Claimant's request for a medical examination by permitting the development of additional evidence. *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579, 1-580 and 1-581 (1983).

### **E. Notice of examination provided to claimant's representative**

Claimant's due process rights were violated where his representative was not served with notice, in contravention of 20 C.F.R. § 725.364, of the Director's request that Claimant undergo a medical examination. As a result, the Board struck the physician's report. *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-444 (1983).

Similarly, the Board held that the administrative law judge properly refused to admit a non-qualifying blood gas study offered by Employer because the study was scheduled by Employer's insurance carrier without notifying Claimant's counsel. Although Employer provided more than 20 days' notice of its intent to proffer the evidence at the hearing, the judge concluded "that the procuring of the blood gas study without first notifying claimant's attorney

effectively circumvented claimant's right to legal representation" in contravention of 20 C.F.R. § 725.364. It was also proper for the judge to deny Employer the opportunity to acquire another blood gas study because, under § 725.455, the judge is under no affirmative duty to seek out and receive all relevant evidence. *McFarland v. Peabody Coal Co.*, 8 B.L.R. 1-163, 1-165 (1985).

## **VII. Interrogatories**

Twenty-nine C.F.R. § 18.29 grants an administrative law judge the authority to compel answers to interrogatories. Before the motion to compel answers to interrogatories may be granted, however, a party must make a proper request for the answers pursuant to 29 C.F.R. § 18.18(b). The possible result claimant's failure to comply with an order to compel is dismissal of the claim for failure to comply with a lawful order of an administrative law judge pursuant to 20 C.F.R. § 725.465(a)(2) (2008).

## **VIII. Excluding evidence**

### **A. Motion to exclude evidence**

A motion to exclude evidence may be filed by any party. 20 C.F.R. § 725.456 (2000) and (2008). The common contention is that the evidence was improperly submitted so as to deny the opposing party a chance to rebut the evidence. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042 (6<sup>th</sup> Cir. 1990); *North American Coal Co. v. Miller*, 870 F.2d 948 (3<sup>rd</sup> Cir. 1989).

### **B. The 20-day rule**

Twenty C.F.R. § 725.456(b) states that no documentary evidence, including medical reports, shall be admitted if not provided to all other parties at least 20 days before the hearing. However, 20 C.F.R. § 725.456(b)(2) (2000) and 20 C.F.R. § 725.456(b)(3) (2008) allow the administrative law judge, at his or her discretion, to admit documentary evidence that is late if (1) the parties agree, or (2) "good cause" is shown. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

In dealing with a motion to exclude, the record is to be kept open to allow for rebuttal of a medical report pursuant to 20 C.F.R. § 725.456(b)(2). *See also Cabral v. Eastern Associated Coal Corp.* 18 B.L.R. 1-25 (1993)(the exchange of evidence on the eve of the twenty day deadline does not constitute unfair surprise where the evidence "at issue contains conclusions that are no different from conclusions contained within reports already exchanged with the other parties"). For further discussion of the "good cause" standard, see Chapter 4.

### **C. Due process**

In adjudicating claims under the Act, the employer has a due process right to have all relevant evidence made available for its examination. *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249, 1-258 to -259 (1979). However, regarding interpretations of x-ray evidence, this due process right may be satisfied either by (1) examination of the x-ray film from which an interpretation was made, or (2) cross-examination of the interpreting physician. *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846, 1-848 (1985). Thus, if an x-ray film is no longer available, and a party moves for the exclusion of the an interpretation of that x-ray, the motion should only be granted where it is established that (1) the x-ray film itself is unavailable for meaningful interpretation, and (2) the interpreting physician is no longer available.

### **D. Depositions**

The regulations at 20 C.F.R. § 725.458 (2000) and (2008) provide that any party may depose a witness as long as the other parties have 30 days' notice of the intended deposition. For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28. For a discussion of the admission of deposition testimony under the amended regulations, see Chapter 4.

### **E. Claimant's refusal to consent to release of records**

It is imperative that due process (notice and an opportunity to be heard) be observed. In *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249 (1979), the Board held that an administrative law judge improperly considered evidence that Employer could not review because the miner would not give his consent to a release of medical records.

## **IX. Submission of post-hearing evidence and leaving the record open**

For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28.

### **A. Curing a violation of the 20 day rule**

An administrative law judge may keep the record open to allow for the submission of post-hearing evidence in response to evidence submitted in violation of the 20 day rule. 20 C.F.R. § 725.456(b)(2); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4<sup>th</sup> Cir. 1991). However, 20 C.F.R. § 725.458 provides, in pertinent part, that "[n]o post-hearing deposition or interrogatory shall be permitted unless authorized by the judge upon a motion

of the party to the claim." Due process may require the development of post-hearing evidence in certain circumstances where a party has not had the opportunity to respond to evidence that the judge finds dispositive.

In *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984), Claimant contended that the judge improperly permitted Employer the opportunity to conduct a post-hearing examination. The judge admitted an x-ray interpretation offered by Claimant at the hearing, which was not exchanged in accordance with the 20-day rule. As a result, the Board concluded that the judge properly left the record open for 60 days to permit Employer the opportunity to submit rebuttal evidence. The Board further determined that Employer had the right to have Claimant re-examined during this period and to submit the post-hearing report before the record closed.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990)(en banc), the Board concluded that an employer's opportunity to respond to evidence not exchanged in accordance with the 20-day rule does not automatically include having Claimant re-examined.

## **B. Lack of due diligence, no post-hearing submission**

Notions of due process, however, do not require leave to develop post-hearing evidence to overcome a party's own lack of due diligence. See *Richardson v. Perales*, 402 F.2d U.S. 389, 404-05 (1971) (due process satisfied where opposing party had the opportunity to confront and cross-examine reporting physicians, but failed to request subpoenas). The Board set forth the parameters for approving a request for post-hearing deposition in *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983): (1) the proffered evidence should be probative, and not merely cumulative; (2) the proponent must establish that reasonable steps were taken to secure the evidence; and (3) the evidence must be reasonably necessary to insure the opportunity for a fair hearing. *Id.* at 1-547 and 1-548.

### **1. Delay in obtaining the evidence**

Refusal to reopen the record is proper where Claimant did not establish "good cause" for failure to obtain a physician's affidavit earlier or to make a timely request that the record remain open. In applying the principles of *Lee* to admission of post-hearing documentary evidence, the Board held that the administrative law judge properly excluded a post-hearing affidavit from consideration where Claimant did not request that the record be left open for submission of the affidavit. The evidence was neither obtained, nor submitted, before the judge issued a decision denying benefits. *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984).

## **2. Failure to timely request extension of time**

*Haer v. Penn Pocahontas Coal Co.*, 1 B.L.R. 1-579 (1978) (the administrative law judge properly denied an untimely written request for extension of time to submit post-hearing evidence). *See also Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984); *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984).

### **C. Post-hearing medical evaluation**

#### **1. Factors to consider**

In *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984), the Board cited to the factors set forth in *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983) (admission of post-hearing depositions) as instructive on the issue of admission of post-hearing medical evaluations. Under *Lee*, post-hearing depositions may be obtained with the permission, and in the discretion, of the administrative law judge pursuant to 20 C.F.R. § 725.458 (2000) of the regulations.

The party taking the deposition "bears the burden of establishing the necessity of such evidence." Among the factors to consider in determining whether to admit post-hearing depositions are the following: (1) whether the proffered deposition would be probative, and not merely cumulative; (2) whether the party taking the deposition took reasonable steps to secure the evidence before the hearing or it is established that the evidence was unknown or unavailable at any earlier time; and (3) whether the evidence is reasonably necessary to ensure a fair hearing.

Under the facts of *Lee*, the judge properly refused to permit a post-hearing deposition of a physician for the purpose of clarifying his earlier report. On the other hand, it was an abuse of discretion for the judge to refuse the physician's post-hearing deposition where he commented on additional medical evidence that was unknown prior to the hearing because the opposing party failed to fully answer interrogatories. Due process would be satisfied in permitting the post-hearing deposition as the opposing party would have an opportunity to cross-examine the physician during the deposition.

#### **2. Post-hearing report based on pre-hearing examination**

Submission of a post-hearing report based on a pre-hearing medical examination should not be automatically excluded as a violation of the 20-day rule. The Board has held that, where Claimant was examined shortly before the 20-day deadline commenced to run, but the report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted that "[b]ecause employer never

received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

### **3. Post-hearing evidence responsive to evidence filed on eve of 20 day deadline**

After the hearing, the judge properly admitted re-readings of x-rays by both the Director and Employer "in fairness" to the parties where Claimant's original reading was submitted in compliance with the 20-day rule by only a few days. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

## **X. Reopening the record on remand**

### **A. Submission of additional evidence, change in legal standard**

After the time specified for submission of evidence has expired, a party may submit a motion to reopen the record. Usual grounds for such motions are that a party has inadvertently failed to meet a deadline or the legal standards, which were in place at the time of the hearing, subsequently changed. In *Shrewsberry v. Itmann Coal Co.*, BRB No. 89-2927 (Aug. 27, 1992)(unpub.), the Board stated that "the administrative law judge has broad discretion in resolving procedural issues, and absent compelling circumstances or a showing of good cause, is not required to open the record for submission of post-hearing evidence." However, in *Toler v. Associated Coal Co.*, 12 B.L.R. 1-49 (1989)(en banc on recon.) the Board concluded that an administrative law judge may reopen the record on remand to accept evidence addressing a new legal standard.

When a party has failed to meet a deadline, the decision to reopen the record is discretionary. Factors which should be taken into account are: (1) the reasonableness of the request and its grounds; (2) whether the opposing party objects to the motion; and (3) whether the opposing party would be prejudiced by the grant of an extension.

A *significant* change in the legal standards in effect at the time of the hearing may constitute grounds for reopening the record:<sup>1</sup>

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<sup>1</sup> In its comments to the amended regulations, the Department states the following:

With respect to rules that clarify the Department's interpretation of former regulations, the Department quoted *Pope v. Shalala*, 998 F.2d 473 (7<sup>th</sup> Cir. 1993), *overruled on other grounds*, *Johnson v. Apfel*, 189 F.3d 561, 563 (7<sup>th</sup> Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to rules of substantive law, may be given retroactive effect.

## 1. Third Circuit

*Marx v. Director*, OWCP, 870 F.2d 114 (3<sup>rd</sup> Cir. 1989). *But see Williams v. Bishop Coal Co.*, Case No. 88- 672 BLA, 1992 U.S. App. LEXIS 32679 (3d Cir. Dec. 16, 1992)(unpub.)(the new standard under 20 C.F.R. § 727.203(b)(2), that the miner be disabled for *any* reason, is not significant enough to warrant reopening the record on remand to permit additional evidence to be considered under (b)(3)).

## 2. Fourth Circuit

In *Robinson v. Pickands Mather & Co.*, 914 F.2d 1144 (4<sup>th</sup> Cir. 1990), the court modified the legal standard for determining the cause of total disability. It placed a heavier burden on the employer than the previous standard promulgated in *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

However, the court denied a reopening of the record in *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4<sup>th</sup> Cir. 1998) (unpub.) and the court held that the administrative law judge properly refused to reopen the record on remand where Employer was on notice of the standard for establishing subsection (b)(2) rebuttal, *i.e.* that it must demonstrate that the miner was not disabled for any reason, from the plain language of the regulation requiring Employer establish "that the individual is able to do his usual coal mine work or comparable and gainful work." See 20 C.F.R. § 727.203(b)(2). The court reasoned that Board decisions, which had held that (b)(2) rebuttal requires that Employer demonstrate the miner is not totally disabled for any pulmonary or respiratory reason, were inconsistent with the language of the regulation and the fact that Employer "chose to restrict its evidence to the lesser standard . . . does not allow it to avoid the fact that it

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. . .

The Department's rulemaking includes a number of such clarifications. For example, the revised versions of §§ 718.201 (definition of pneumoconiosis), 718.204 (criteria for establishing total disability due to pneumoconiosis) and 718.205 (criteria for establishing death due to pneumoconiosis) each represent a consensus of the federal courts of appeals that have considered how to interpret former regulations.

. . .

Moreover, none of the appellate decisions with respect to these regulations represents a change from prior administrative practice. Thus, a party litigating a case in which the court applied such an interpretation would not be entitled to have the case remanded to allow that party an opportunity to develop additional evidence.

65 Fed. Reg. 79,955 (Dec. 20, 2000).

was on notice of the higher standard."

### 3. Sixth Circuit

*Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042 (6<sup>th</sup> Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6<sup>th</sup> Cir. 1986). In *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6<sup>th</sup> Cir. 1998), the court held that the administrative law judge erred in failing to consider evidence submitted by Employer on remand regarding rebuttal under 20 C.F.R. § 727.203(b)(3). Specifically, the administrative law judge declined to reopen the record and reconsider his findings under subsection (b)(3) on remand because the Board "explicitly affirmed (his) finding that there was no rebuttal under § 727.203(b)(3) of the regulations." The court, however, held otherwise and reasoned that a change in the legal standard under subsection (b)(2) after the hearing, requiring that Employer establish that the miner was not totally disabled for *any* reason, shifted emphasis to subsection (b)(3) rebuttal. The court noted that subsection (b)(3) became the less stringent rebuttal provision of the two subsections. The court then stated the following:

In the case at hand, Peabody presented new evidence as to (b)(2) and (b)(3), however, the ALJ refused to consider the new evidence as to (b)(3), and thus, only considered (b)(2) rebuttal. This was error. It is clear that Peabody was entitled to reconsideration as to both (b)(2) and (b)(3). (footnote omitted). Thus, in accord with (*Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 832 (6<sup>th</sup> Cir. 1997)), the Board committed a manifest injustice by denying Peabody full consideration.

Similarly, in *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827 (6<sup>th</sup> Cir. 1997), the court reiterated that the administrative law judge must reopen the record to permit the introduction of evidence where there is a change in legal standards. Specifically, the court held that "when an employer rebuts the interim presumption under the pre-*York* standard applicable to § 727.203(b)(2), but not under the post-*York* standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-*York* standards applicable to § 727.203(b)(2) or another regulatory subsection." (emphasis added). See also *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6<sup>th</sup> Cir. 1998).

## **4. Seventh Circuit**

In *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7<sup>th</sup> Cir. 1999), the court held that an administrative law judge improperly excluded an autopsy report of Dr. Naeye on grounds that no good cause was established for its late submission on remand. Moreover, the court concluded that the administrative law judge improperly discredited a reviewing physician's report which was based, in part, on the excluded autopsy report. In the administrative law judge's decision on remand, he stated the following:

Dr. Naeye's review of the autopsy was submitted on April 1, 1994, well after the deadline for submission of evidence. No good cause was shown for the lateness of the submission - only a confession of inadvertence. Inadvertence may serve as a reason for failure to meet a deadline; it will not do as an excuse. Dr. Naeye's report is rejected. That being the case, to the extent that Dr. Fino's appraisal of the extent of Claimant's pneumoconiosis is based on Dr. Naeye's report, that appraisal is flawed.

The Seventh Circuit held that a medical expert may base his or her opinion on evidence that has not been made part of the record in administrative proceedings.

The court stated that "[t]he reason these rules are not applicable to agencies is that being staffed by specialists the agencies are assumed to be less in need of evidentiary blinders than lay jurors or even professional, though usually unspecialized, judges." It stated that "Naeye's report may have been put into evidence late, but there is no suggestion that it was too late to enable the claimant to prepare a rebuttal or that Fino was irresponsible in relying on the report in formulating his own opinion about the causality of (the miner's) disability." As a result, the Seventh Circuit vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for consideration of Dr. Fino's opinion.

Notably, claims filed after January 19, 2001 must be based on evidence properly admitted into the record. 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i), 725.457(d), and 725.458 (2008) require that a medical opinion consider only evidence properly admitted into the record].

### **B. On remand**

#### **1. Within the judge's discretion**

The Board has held that, where its remand decision did not require reopening the record for additional evidence, the decision whether to submit

new evidence is a matter within the discretion of the administrative law judge. *Meecke v. I.S.O. Personnel Support Dep't*, 14 B.R.B.S. 270 (1981). This is true even when the party seeks to submit evidence that was not available at the time of the original hearing. *White v. Director, OWCP*, 7 B.L.R. 1-348 (1984). As previously discussed in this *Chapter*, an administrative law judge is required to reopen the record on remand only when there has been a significant change in law subsequent to the formal hearing.

It is within the administrative law judge's discretion to reopen the record for the submission of evidence. 20 C.F.R. § 725.456(e). See also *Lynn v. Island Creek Coal Co.*, 12 B.L.R. 1-146 (1988), *aff'd on recon.*, 13 B.L.R. 1-57 (1989)(en banc); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6<sup>th</sup> Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). In particular, the administrative law judge must determine whether "manifest injustice" will result against either party in refusing to admit evidence on remand. *Cochran v. Consolidation Coal Co.*, 16 B.L.R. 1-101 (1992).

## **2. Evidence is vague or unreliable, no "good cause" to reopen**

"Good cause" to reopen the record is not established where the proffered evidence is "vague and unreliable." *Borgeson v. Kaiser Steel Coal Co.*, 12 B.L.R. 1-169 (1989)(en banc) ("good cause" to reopen the record was not established where the administrative law judge found that the proffered evidence was "vague and unreliable").

## **3. Miner's condition worsening, no "good cause" to reopen**

Moreover, "good cause" is not established based on a premise that the miner's condition is worsening. *White v. Director, OWCP*, 7 B.L.R. 1-348, 1-351 (1988) (although Claimant offered evidence on remand to demonstrate a worsening of his pulmonary condition, the administrative law judge was not bound to accept it, and the judge provided reasons for not doing so; the Board noted that the evidence could be submitted on modification before the district director).

## **C. A de novo hearing**

The Board has held that a *de novo* hearing is required, where the administrative law judge who originally heard the case is no longer available to consider the case *and* the substituted fact finder's decision is dependent on a credibility evaluation. In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board stated that "the object [of the procedural guarantee of a *de novo*] hearing is to provide for credibility evaluation on a direct basis, based on appearance and demeanor on the part of the testifying witness." *Id.* at 1-432.

A *de novo* hearing is "required where the credibility of witnesses is an important, crucial, or controlling factor in resolving a factual dispute." *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-60 (1985)(citing 5 U.S.C. §554(d); *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954); *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973)). The Board has also held that a *de novo* hearing is required where a hearing on a modification petition is requested. *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000) (see Chapter 23 for additional discussion regarding modification).

The amended regulations at 20 C.F.R. § 725.452(d) (2008) provide the following regarding the requirement of an oral hearing:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. § 725.452(d) (2008).

## **XI. "Good cause" generally**

### **A. The 20-day rule and violations of the rule**

The regulations at 20 C.F.R. § 725.456(b)(3) direct that waiver or "good cause" be established prior to admitting evidence not exchanged at least 20 days prior to hearing. Specifically, the administrative law judge is required to make a finding that "good cause" exists under 20 C.F.R. § 725.456(b)(3) (2008) before admitting late evidence. *Jennings v. Brown Badgett, Inc.*, 9 B.L.R. 1-94 (1986), *rev'd on other grounds sub. nom., Brown Badgett, Inc. v. Jennings*, 842 F.2d 899 (6<sup>th</sup> Cir. 1988).

The Board similarly held that 20 C.F.R. § 725.456(b)(3) requires a preliminary determination of whether "good cause" exists for a party's failure to comply with the 20 day rule. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984) (the judge improperly admitted a medical report and deposition not exchanged in accordance with the 20-day rule; error not corrected by offering to leave the record open where opposing party continued to object to admission of report and did not accept alternative of leaving the record open).

If there is no waiver and "good cause" is not established, the judge may either exclude the evidence from the record, *Farber v. Island Creek Coal Co.*, 7 B.L.R. 1-428 (1984), or remand the case to the district director for further

development of the evidence. *Trull v. Director, OWCP*, 7 B.L.R. 1-615 (1984).

Finally, it is noted that in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-53 (2004) (en banc), *vacated and remanded on other grounds sub. nom.*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), a case decided under the amended regulations, the Board concluded that it was proper for the administrative law judge to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted that the judge left the record open for 45 days for Employer to respond and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

## **1. "Good cause" not established**

### **a. Unreasonable delay**

Delay in obtaining evidence that was readily available does not support a finding of "good cause" to allow the untimely evidence.

A medical report was properly excluded where the employer failed to explain why it waited more than two and one-half years to secure a review of a pulmonary function study. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

It was proper to disregard a medical opinion that was not exchanged in accordance with the 20-day rule where counsel failed to submit the opinion while the record was kept open. *Kuchwara v. Director, OWCP*, 7 B.L.R. 1-167 (1984).

In a similar vein, Employer's request for a continuance to obtain autopsy slides for an independent review properly denied where Employer had access to the slides for one year, but failed to secure them. *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984).

### **b. Knowledge of contents of late evidence not relevant**

A case was remanded for a determination of whether Employer established "good cause" as to why an affidavit had not been timely exchanged pursuant to 20 C.F.R. § 725.456(b)(2). The Board held that the fact that Claimant would not be surprised by the contents of the affidavit does not satisfy the "good cause" standard. *White v. Douglas Van Dyke Coal Co.*, 6

B.L.R. 1-905, 1-907 and 1-908 (1984).

**c. Relevancy of evidence not determinative**

"Good cause" is not established by mere reference to the relevancy of the evidence. The administrative law judge erred in admitting evidence which was mailed to the opposing party less than 20 days before the hearing on grounds that it was his intention "to consider all relevant medical evidence." While the judge acknowledged that the opposing party's objection was "technically correct," he erroneously overruled it. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

**2. "Good cause" established**

**a. Evidence exchanged in earlier state claim**

"Good cause" was established where evidence not exchanged 20 days prior to the hearing was nevertheless admitted on grounds that the evidence was sent to the opposing party "three years earlier in connection with a state claim (which) gave claimant's counsel reason to believe that employer's counsel already had a copy of the report." The Board noted that the judge left the record open for 30 days, but the opposing party failed to respond to admission of the report. The Board held that it was proper to admit the report but cautioned that:

Affirmance of the administrative law administrative law judge's exercise of discretion in this case . . . should not be construed as an endorsement of the view that documents exchanged in connection with an earlier state claim uniformly satisfy the 20-day rule. Documents, generally speaking, must be exchanged during the course of proceedings before the Department of Labor in order to satisfy the 20-day rule . . .

*Buttermore v. Duquesne Light Co.*, 7 B.L.R. 1-604, 1-607 (1984), *modified on recon.*, 8 B.L.R. 1-36 (1985).

**b. Evidence used for impeachment**

The Board remanded a case for the administrative law judge to consider whether a tape recording, which was not exchanged at least 20 days prior to the hearing, was admissible for impeachment purposes. Claimant argued that the recording was of his conversation with a physician who stated that Claimant had "black lung," contrary to the diagnosis contained in the physician's written report. *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22

(1991).

**c. Examination more than 20 days before hearing, report available after hearing**

Where Claimant was examined shortly before the 20-day deadline and the medical report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted that "[b]ecause employer never received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days." *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

**B. Admission of late evidence; must allow response**

If late evidence is admitted, the regulatory provisions at 20 C.F.R. § 725.456(b)(4) (2008) require that the record be left open for 30 days to permit the filing of responsive evidence.

While the administrative law judge has broad discretion in procedural matters and may properly refuse to admit medical evidence submitted post-hearing, *Itell v. Ritchey Trucking Co.*, 8 B.L.R. 1-356 (1985) (the judge properly refused to reopen the record for post-hearing evidence "absent compelling circumstances or a showing of good cause"), s/he must provide rationale prior to issuing a decision for accepting or rejecting post-hearing evidence. *Covert v. Westmoreland Coal Co.*, 6 B.L.R. 1-1111 (1984).

Where evidence is admitted post-hearing, then the administrative law judge must allow submission of responsive evidence. In *Coughlin v. Director, OWCP*, 757 F.2d 966, 7 B.L.R. 2-177 (8<sup>th</sup> Cir. 1983), the court held that it was error for the judge to permit the Director to obtain a post-hearing re-reading of an x-ray study without providing Claimant with a copy of the re-reading or permitting him the opportunity to rebut the new reading. The court held that "fundamental concepts of fairness require that litigants be given equal opportunities to present their respective positions." *Id.* at 969.

Similarly, the Board concluded that, if the judge determines that a post-hearing affidavit regarding Claimant's work history was properly admitted, then Employer must be given an opportunity to "depose and cross-examine the affiant." *Lane v. Harmon Mining Corp.*, 5 B.L.R. 1-87, 1-89 (1982).

The judge reasonably concluded that "fairness" required the post-hearing admission of x-ray evidence and that "good cause" was implicitly found to exist. Specifically, Claimant's reading of an x-ray study was submitted in compliance with the 20-day rule "by only a few days" such that Employer was

properly permitted to submit responsive evidence post-hearing. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-153 (1989)(en banc).

In *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-200 (1986), Claimant submitted the report of his physician immediately prior to the 20-day deadline and objected to admission of a rebuttal report based upon an examination conducted 18 days prior to the hearing. The Board held that the administrative law judge generally has broad discretion in dealing with the conduct of the hearing, but remanded the case to state that:

Claimant's submission of Dr. Mastine's report just prior to the deadline imposed by the 20-day rule for submitting documentary evidence into the record, coupled with the administrative law judge's refusal to allow employer the opportunity to respond to claimant's introduction of the 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990)(en banc), the Board concluded that an employer's opportunity to respond does not automatically include having Claimant re-examined.

### **1. Record left open for both parties**

In *Baggett v. Island Creek Coal Co.*, 6 B.L.R. 1-1311 (1984), the administrative law judge admitted an x-ray re-reading by Employer on the grounds that Employer established "good cause" as to why the reading was not exchanged in compliance with the 20-day rule. The judge left the record open to permit the parties an opportunity to submit any further evidence. Claimant was subsequently granted two extensions of time to submit evidence, but Employer was denied an extension of time. The Board concluded that this was error because § 725.456(b)(2) requires that the record be left open for both parties.

### **2. Failure to timely submit response, waiver of right of cross-examination**

Employer was afforded due process where the judge reopened the record to admit an autopsy report, provided Employer with a copy, and waited more than 30 days for Employer to respond before issuing a decision. In failing to submit rebuttal evidence while the record was left open, Employer "waived" its right to cross-examination. *Gladden v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-577, 1-579 (1984).

The Director, who was absent at a hearing, was precluded from objecting to admission of new evidence at the hearing. The administrative law judge

properly left the record open for 30 days after the hearing pursuant to 20 C.F.R. § 725.456(b)(3) (2000) for the Director to respond. However, the Director: (1) did not request notification of the newly submitted evidence; (2) made no attempt to ascertain what had transpired during the hearing; and (3) did not submit rebuttal during the 30 days in which the record was left open. *DeLara v. Director, OWCP*, 7 B.L.R. 1-110 (1984).

## **XII. Dispose of a claim**

### **A. Withdrawal**

The regulations at 20 C.F.R. § 725.306 (2008) provide that the administrative law judge may grant a motion to withdraw a claim if it is *in the best interests of the claimant* and certain requirements set forth below are met.

#### **1. Threshold requirements**

##### **a. No decision on the merits issued**

In *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc) and *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc), the Board held that once a decision on the merits issued by an adjudication officer<sup>2</sup> becomes effective pursuant to 20 C.F.R. §§ 725.419, 725.479, and 725.502 (2008)<sup>3</sup>, there no longer exists an "appropriate" adjudication officer authorized to approve a withdrawal request under 20 C.F.R. § 725.306 (2008).

In *Keene v. Dominion Coal Co.*, BRB No. 05-0384 BLA (Sept. 30, 2005) (unpub.), the Board held that the administrative law judge had authority to grant Claimant's request to withdraw his claim where the written request was submitted after the district director issued a schedule for the submission of additional evidence, but prior to issuance of a decision on the merits.

##### **b. Request is in writing**

A motion for withdrawal must be in written form to the proper adjudicating officer and must set forth the reasons for seeking withdrawal. See 20 C.F.R. § 725.306(a) (2008).

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<sup>2</sup> The Board noted that, pursuant to 20 C.F.R. § 725.350 (2000) and (2008), "adjudication officers" are district directors and administrative law judges.

<sup>3</sup> A district director's proposed decision and order becomes "effective" 30 days after the date of its issuance unless a party requests a revision or hearing. An administrative law judge's decision and order on the merits becomes "effective" on the date it is filed in the office of the district director. See 20 C.F.R. §§ 725.419, 725.479, and 725.502(a)(2) (2008).

**c. Withdrawal is in "best interests" of claimant**

The motion for withdrawal may only be granted on the grounds that withdrawal is in the best interests of the claimant. 20 C.F.R. § 725.306(a)(2) (2008); *Rodman v. Bethlehem Steel Corp.*, 16 B.L.R. 123 (1984); *Matthews v. Mid-States Stevedoring Corp.*, 11 B.R.B.S. 139 (1979).

A claimant is permitted to withdraw the request to withdraw at any time prior to the approval of such request. When a claim has been withdrawn pursuant to 20 C.F.R. § 725.306(a), "the claim will be considered not to have been filed." 20 C.F.R. § 725.306(b) (2008).

Notably, if a withdrawal is granted, it is as if the miner or survivor never filed the claim. Therefore, the administrative law judge must consider the impact, if any, of the three-year statute of limitations at 20 C.F.R. § 725.308 (2008) in determining whether withdrawal is in the claimant's best interests. For further discussion of this issue, see Chapter 11.

**d. Claimant not receive interim benefits**

If a claimant has been receiving benefits and then decides to withdraw the claim, s/he must agree to repay the benefits received. See 20 C.F.R. § 725.306(a)(3) (2008). Before any motion to withdraw is granted, a show cause order should be issued to afford opposing parties the opportunity to object to the withdrawal, which the employer or Director may do if interim benefits are being, or have been, paid.

**e. Withdrawal of petition for modification**

In *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-\_\_\_\_, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008), the Board held that a petition for modification may be withdrawn under 20 C.F.R. § 725.306 at any time before a decision becomes "effective." Here, the miner filed a petition for modification in 2001, after the Board affirmed the denial of benefits in his first claim on October 18, 2000. Subsequently, the miner sought withdrawal of the petition. Adopting the Director's position, the Board held that the petition could be withdrawn as there was no effective decision on the petition:

Although the Director agrees that the August 2001 application constituted a modification request, the Director also asserts that the modification request was properly withdrawn by claimant. The Director contends that a withdrawn modification request is treated in a manner similar to a withdrawn claim, insofar as it must be considered never to have been filed. See 20 C.F.R. § 725.306(b).

Citing to *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002) (holding a claim may be withdrawn before a denial becomes effective), the Board held that, since the district director in this case had not issued a decision regarding the 2001 modification petition prior to receiving a letter from Claimant seeking its withdrawal, it was proper to allow withdrawal of the petition for modification. The Board concluded that the 2001 petition would be "treated as if it were never filed."

With regard to evidence submitted in conjunction with the 2001 petition, Employer argued that such evidence should automatically be part of the record for consideration in any subsequent proceeding. The Board disagreed and held that "evidence developed in conjunction with the August 2001 application must be treated as if it had never been filed, and is not part of the record unless the parties choose to specifically designate that evidence under Section 725.414."

## **2. Withdrawal improper, example of**

It was not in the claimant's best interests to allow withdrawal of the claim in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6<sup>th</sup> Cir. 1997). Under the facts of *Jonida Trucking*, Claimant was found entitled to benefits but refused payments from Employer, who was Claimant's long-time friend. Instead, Claimant sought payments from the Trust Fund. Employer stated that it failed to contest the claim "because it had relied on information from (Claimant) that any award would run against the Trust Fund and not against (Employer)." When Claimant was informed that he could not receive benefits from the Trust Fund, he requested a withdrawal of his claim, which was denied by the Board.

Because Claimant did not join Employer in its appeal of the Board's denial of withdrawal of the claim, the court held that Employer did not have "standing to appeal the withdrawal issue." The court stated that "it is clear that an employer is not the proper party to argue that its employee's best interests are served by allowing him to forfeit payments from the employer." The court then upheld an order directing that Employer, a trucking company, secure the payment of \$150,000 in benefits pursuant to 20 C.F.R. § 725.606 (2000).

### **3. Employer's interests not considered**

In *Bailey v. Dominion Coal Corp.*, 23 B.L.R. 1-85 (2005), the Board affirmed the administrative law judge's granting of Claimant's request to withdraw his claim. Under the facts of the case, Claimant submitted a request to withdraw his claim with the district director after receiving an unfavorable opinion from the physician conducting the Department-sponsored examination. Claimant's representative asserted "[i]t is impossible to win his claim because he does not meet the disability standards" and it would result in "great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time." The district director granted Claimant's request to withdraw on grounds that it was in his best interests and the administrative law judge agreed. Pursuant to 20 C.F.R. § 725.306(b), the claim was considered not to have been filed and the administrative law judge declined to require automatic admission of medical evidence generated in conjunction with the withdrawn claim if Claimant should again file a claim.

On appeal to the Board, Employer argued that it was not in Employer's best interests to have the claim withdrawn as it "paid to have claimant examined twice, thereby developing evidence that will not be included in the record, because of claimant's request for withdrawal." Moreover, Employer posited that this is a "waste of employer's financial resources and will hamper employer's ability to defend itself in any future claim."

The Board disagreed. It adopted the Director's position that § 725.306(a)(2) allows for withdrawal of a claim, if it is in the best interests of a claimant, prior to issuance of an effective decision. The Board concluded that the adjudicator is not required to consider Employer's interests. In addition, the Board stated that "employer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case."

The Board then rejected Employer's argument that evidence generated in conjunction with the withdrawn claim should be automatically included in the record of any subsequent filing without being counted under the evidentiary limitations at § 725.414 of the regulations. Employer reasoned that, in any future claim, it "risks showing the new examining physician too much relevant evidence" unless a ruling is made to specifically include evidence underlying the withdrawn claim. The administrative law judge declined to rule on the issue because she determined that, once the request to withdraw a claim is granted, the claim is considered not to have been filed under § 725.306(b). As a result, she was without authority to order the automatic inclusion of evidence into the record of any future claim. The Board agreed.

#### **4. Medical evidence generated in withdrawn claim excluded**

In *Anderson v. Kiah Creek Mining Co.*, BRB No. 03-0828 BLA (May 24, 2004) (unpub.), the Board affirmed the administrative law judge's order granting withdrawal of the miner's claim under 20 C.F.R. § 725.306 (2008) as interpreted in *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc) and *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc). With regard to medical evidence developed in connection with the withdrawn claim, the Board held that such evidence would not be included with the filing of any additional claims by the miner. However, the Board stated that a party would not be "precluded from submitting the evidence developed in (the withdrawn) claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion." See also *Feltner v. Whitaker Coal Corp.*, BRB No. 04-0823 BLA (Apr. 27, 2005); *Sizemore v. LEECO, Inc.*, BRB No. 04-0514 BLA (Feb. 7, 2005) (unpub.); *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub) (in a footnote, the Board cited to *Bailey v. Dominion Coal Corp.*, 23 B.L.R. 1-85 (2005) and 20 C.F.R. § 725.306(b) to state that, if a prior claim is withdrawn, "[t]he effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim").

See also *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-\_\_\_\_, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008) (medical evidence generated in conjunction with withdrawn petition for modification excluded).

#### **B. Dismissal/abandonment**

##### **1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

Any party may file a motion to dismiss the claim. A dismissal operates as a final disposal of a claim and, therefore, is subject to *res judicata*, unless the administrative law judge specifies in the order that the dismissal is without prejudice. See 20 C.F.R. § 725.465 (2000). A claim may be dismissed for the failure of the claimant, or claimant's counsel, to appear at a scheduled hearing or for the failure of the claimant to comply with an order issued by an administrative law judge. See 20 C.F.R. § 725.465 (2000); *Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985).

Twenty C.F.R. § 725.465 (2000) requires that an order of dismissal be preceded by an order to show cause. This allows the claimant an opportunity to explain his actions and take the steps necessary to avoid dismissal of the claim. An order to show cause should explain the steps that are necessary to avoid dismissal and provide Claimant an ample opportunity to answer the

order. If the claimant answers the show cause order within the allotted time, sets forth a reasonable explanation of earlier defects, and takes the steps set forth in the show cause order, then the claim should not be dismissed and an order denying the motion to dismiss should be issued.

If the claimant is acting *pro se*, more leeway should be given in regards to time limits in show cause orders and in making attempts to resolve the problem without having to issue the show cause order. However, if attempts to contact the claimant are not successful, or if the failure to follow an administrative law judge's order is ongoing, a claim may also be denied by reason of abandonment pursuant to 20 C.F.R. §§ 725.408 and 725.409 (2000). Abandonment occurs when the claimant fails to pursue the claim with reasonable diligence, fails to submit evidence, or refuses to undergo a required medical examination without good cause. *Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985).

## **2. After applicability of 20 C.F.R. Part 725 (2008)**

The amended regulations retain the requirement that an order to show cause should be issued prior to an order of dismissal. 20 C.F.R. § 725.465(b) (2008). However, the abandonment provisions at § 725.409 have been altered considerably and will result in a new type of case before this Office. Denial by reason of abandonment may be proper where the claimant fails to undergo a medical examination without good cause, fails to submit evidence sufficient to make a determination of the claim, fails to pursue the claim with reasonable diligence, or *fails to attend the informal conference without good cause*. 20 C.F.R. § 725.409(a) (2008). New provisions at § 725.409(b)(2) and (c) state, in relevant part, the following:

(b)(2) In any case in which a claimant has failed to attend and informal conference and has not provided the district director with his reasons for failing to attend an informal conference and has not provided the district director with his reasons for failing to attend, the district director shall ask the claimant to explain his absence.

. . .

If the claimant does not supply the district director with his reasons for failing to attend the conference within 30 days of the date of the district director's request, or the district director concludes that the reasons supplied by the claimant do not establish good cause, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(c) The denial of a claim by reason of abandonment shall become effective and final unless, within 30 days after the denial is issued, the claimant requests a hearing.

. . .

For purposes of § 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement. If the claimant timely requests a hearing, the district director shall refer the case to the Office of Administrative Law Judges in accordance with § 725.421.

Except upon the motion or written agreement of the Director, the hearing will be limited to the issue of abandonment and, if the administrative law judge determines that the claim was not properly denied by reason of abandonment, he shall remand the claim to the district director for the completion of administrative processing.

20 C.F.R. § 725.409(b) and (c) (2008).

### **C. Summary judgment**

The regulations at 29 C.F.R. § 18.40 provide that a motion for summary judgment may be filed by any party at least 20 days before the date fixed for a hearing. A motion for summary judgment requests that the administrative law judge render a decision without a formal hearing and is appropriate only when no genuine issue of material fact remains in dispute. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3<sup>rd</sup> Cir. 1990). Summary judgment may be limited to specific issues (such as length of coal mine employment) or may go to the merits of the claim for benefits. 20 C.F.R. § 725.465 (2008).

### **D. Subject matter jurisdiction**

Neither the Office of Administrative Law Judges nor the Benefits Review Board has subject matter jurisdiction over cases involving reimbursement and interest payable to the Black Lung Disability Trust Fund. The United States Court of Appeals for the Sixth Circuit held in *Youghioghney & Ohio Coal Co. v. Vahalik*, 970 F.2d 161 (6<sup>th</sup> Cir. 1992), that jurisdiction in such cases properly lies in the federal district courts. For further discussion of medical interest cases, see Chapter 21.

### **XIII. Representation issues**

#### **A. Appointment of a representative**

Twenty C.F.R. § 725.362(a) (2008) provides for the representation of parties in any proceeding in the determination of a black lung claim. This provision requires that the appointment of a representative be made in writing, or on the record at the hearing.

#### **B. Withdrawal as a representative**

The request to withdraw as the claimant's representative may be granted provided that a finding is made that the claimant will not be prejudiced by counsel's withdrawal. See *e.g.*, 20 C.F.R. § 725.362(b) (2008). Twenty-nine C.F.R. § 18.34(g)(1) states that an attorney of record must provide prior written notice of intent to withdraw as counsel. If leave to withdraw is granted, the claimant would normally be provided additional time in which to secure another representative.

#### **C. Sanctions**

Twenty-nine C.F.R. § 18.6(d)(2)(i-v) provides for the imposition of sanctions for the failure of a party or its representative to comply with an order of the administrative law judge.

### **XIV. Miscellaneous procedural motions and orders**

#### **A. Extension of time**

At the hearing, the administrative law judge may specify that the record shall remain open for a specified amount of time to allow for the submission of post-hearing briefs or evidence. The granting or denial of a motion for an extension of time is discretionary and takes into account the reasonableness of the request, circumstances, the opposing party's view on the matter, and whether any party is prejudiced by the extension. See 29 C.F.R. § 18.54.

Extensions should normally not be granted to allow for the submission of new evidence that was not addressed at the hearing. In dealing with the regular submission of evidence in a black lung claim, 20 C.F.R. § 725.456 (2008) provides that all documents transmitted to the administrative law judge by the district director will be placed into evidence (but this is subject to the limitations at 20 C.F.R. § 725.414 (2008)). If the evidence was not placed in the record at the district director's level, it shall be admitted at the administrative law judge's level as long as it is sent to all other parties at least twenty days prior to a hearing in connection to the claim and it complies with

the evidentiary restrictions at 20 C.F.R. § 725.414 (2008). See 20 C.F.R. § 725.456(b)(1) (2008); *Cochran v. Consolidation Coal Co.*, 12 B.L.R. 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-236 (1987).

## **B. Continuance/postponement of hearing**

After a hearing has been scheduled and the notice of hearing is issued, any party may request a continuance. Typical reasons for requesting a continuance are as follows: health problems, scheduling conflicts, unpreparedness for hearing, new counsel retained, claimant attempting to obtain counsel, and the attempt to resolving an issue prior to the hearing. Deciding whether to grant a motion for continuance is discretionary; no single regulation governs whether such a motion should be granted. The following factors should be considered: whether there have been prior continuances, whether the claimant would be prejudiced by a continuance, whether the grounds for the request are reasonable, and whether the opposing party has objected to the continuance. 29 C.F.R. § 18.28.

## **C. Decision on the record**

Pursuant to 20 C.F.R. § 725.461, any party may waive their right to a hearing. The waiver must be made in writing and can be withdrawn for good cause at any time prior to the mailing of the decision in the claim. However, even if all of the parties agree to waive the hearing, an administrative law judge may still conduct a hearing if he believes that the "personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue. . . ." 20 C.F.R. § 725.461(a) (2008). If the waiver is granted, the administrative law judge should consider all the documents and stipulations that comprise the record in the case.

In addition, the unexcused failure of any party to attend a hearing shall constitute a waiver of that party's right to present evidence at a hearing and may result in dismissal of the claim. 20 C.F.R. § 725.461(b) (2008).

## **D. Reconsideration**

Any party may request reconsideration of an administrative law judge's decision and order, if such request is made within 30 days after such decision and order is filed. 20 C.F.R. § 725.479(b) (2008). The administrative law judge determines the procedures to be followed in the reconsideration. During the consideration of a request for reconsideration, the time for appeal to the Benefits Review Board is suspended. 20 C.F.R. § 725.479(c) (2008).

It is noteworthy that the amended regulations contain a new provision at § 725.479(d) providing "[r]egardless of any defect in service, actual receipt of the decision is sufficient to commence the 30-day period for requesting

reconsideration or appealing the decision." 20 C.F.R. § 725.479(d) (2008).

### **1. Consecutive motions not permitted**

In *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558 (7<sup>th</sup> Cir. 1998), the court held that an administrative law judge has jurisdiction to adjudicate a motion for reconsideration, if it is filed within 30 days of the date of issuance of his or her decision. The judge is not empowered, however, to entertain subsequent motions for reconsideration filed outside the 30 day time period.

In *Knight v. Director, OWCP*, 14 B.L.R. 1-166 (1991), the Board held that a second motion for reconsideration, which was filed within 30 days of the decision on reconsideration but not within 30 days of the original decision and order, was untimely. Moreover, the Board concluded that, even if the second motion was timely, it improperly raised issues which were not raised in the first motion.

### **2. Submission of evidence on reconsideration**

In *Hensley v. Grays Knob Coal Co.*, 10 B.L.R. 1-88, 1-91 (1987), the Board held that the administrative law judge had jurisdiction to consider a motion for reconsideration, which was filed within 30 days of the date the decision and order became "effective" pursuant to 20 C.F.R. §§ 725.479 and 725.480. The Board then concluded that the judge may, but is not required to, accept new evidence on reconsideration. Prior to admitting such evidence, however, the judge must find that "good cause" existed for failure to obtain and exchange the evidence in compliance with § 725.456(b)(3) of the regulations.

### **E. Petitions for modification**

Any party may request a modification of a final adjudication, if such request is filed within one year of the prior denial or last payment of benefits, whichever is later. See 20 C.F.R. §§ 725.310 and 725.480 (2008). If an administrative law judge is assigned a petition for modification, s/he must hold a hearing unless all parties of record waive this right in writing. See 20 C.F.R. § 725.310 (2008); *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000). See Chapter 23 for a further discussion of modification petitions.

### **F. Remand to organize or reconstruct the record**

If a record received from the district director's office is improperly numbered or documents are missing, or documents are out of sequence in such a manner that makes processing the claim impractical, an administrative law judge may order the file returned to the district director to reorganize the

record. Also, when files are lost or otherwise misplaced, an administrative law judge may order the district director to reconstruct the record and return it to this Office.

**Sample Order: To Reconstruct Record**

The record in the above-captioned matter received in this Office from the district director is disorganized in that the exhibits are not consecutively paginated. Accordingly, IT IS HEREBY ORDERED that this case be REMANDED to the district director of the \_\_\_\_\_, \_\_\_\_\_ office so that an accurate and organized copy of the record may be forwarded to all parties in this matter. As this case is scheduled for hearing on XXXXX XX, XXXX, the district director is hereby ORDERED to return the case file to this Office and to provide copies to all parties no later than XXXXX XX, XXXX.

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Administrative Law Judge

**G. Correcting a clerical mistake**

An administrative law judge may issue an order correcting a clerical mistake of a previous decision and order. Rule 60 of the Federal Rules of Civil Procedure provides relief with respect to clerical errors and states that "[c]lerical mistakes in judgements, orders or other parts of the record and errors therein arising from such oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . ."

In *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993), the Board applied Rule 60(a) to hold that a clerical mistake may be corrected at any time before an appeal, if any, is docketed or, if an appeal is pending, such a correction may be made with leave of the appellate court. If no appeal is filed, there is no time limit regarding the correcting of a clerical mistake. The Board was careful to note, however, that a clerical error is "one which is a mistake or omission mechanical in nature which does not involve a legal decision or judgment by an attorney and which is apparent on the record." For further discussion of clerical errors, see Chapter 25.