

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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CHAPTER 26 Motions

Chapter 26

Motions	26.1
I. Generally	26.1
A. 10 days to respond	26.1
B. Dismissal of a claim, defense or party	26.1
C. Caption	26.1
II. Remand to the district director	26.2
A. District director's obligation to provide complete examination	26.2
B. The employer or Director, OWCP withdraws controversion	26.2
Sample Order	26.3
C. Calculation of liability for medical treatment	26.3
D. Inability to locate the claimant or abandonment of the claim	26.3
Sample Order:	26.3
E. Consolidation of claims	26.4
Sample Order:	26.4
Sample Order:	26.4
F. Determination of responsible operator (or motion to dismiss as a party)	26.5
1. Prior to applicability of December 2000 regulations	26.5
Sample Order:	26.5
Sample Order:	26.6
2. After applicability of December 2000 regulations	26.7
III. Transfer of liability to the Black Lung Disability Trust Fund	26.8
IV. Amend controversion form	26.8
VI. Motions for discovery and proffers of evidence	26.8

	A.	Discovery, generally	26.8
		Sample Order (deposition of governmental official):	26.9
	B.	Medical examinations	26.11
	C.	Interrogatories	26.13
	D.	Excluding evidence	26.13
		1. Prior to applicability of December 2000 regulations	26.13
		2. After applicability of December 2000 regulations	26.14
	E.	Submission of post-hearing evidence/leaving the record open	26.14
VI.		Reopen the record	26.14
	A.	Submission of additional evidence/change in legal standard	26.14
	B.	On remand	26.17
		Sample Order:	26.17
	C.	<i>A de novo</i> hearing	26.18
VII.		Dispose of a claim	26.18
	A.	Withdrawal	26.18
		Sample Order:	26.19
	B.	Dismissal/abandonment	26.20
		1. Prior to applicability of December 2000 regulations	26.20
		2. After applicability of December 2000 regulations	26.20
	C.	Summary judgment	26.21
	D.	Subject matter jurisdiction	26.22
VIII.		Representation issues	26.22
	A.	Appointment of a representative	26.22
		Sample Order:	26.22
	B.	Withdrawal as a representative	26.22
		Sample Order:	26.23
	C.	Sanctions	26.23
IX.		Miscellaneous procedural motions and orders	26.23
	A.	Extension of time	26.23
	B.	Continuance/postponement of hearing	26.23
	C.	Decision on the record	26.24
	D.	Reconsideration	26.24
		Sample Order:	26.24
	E.	Petitions for modification	26.25
		Sample Order (further record development):	26.25
	F.	Organize or to reconstruct the record	26.26
		Sample Order:	26.26
	G.	Correcting a clerical mistake	26.27

Chapter 26

Motions

I. Generally [III(D)]

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.

Sample orders regarding some of the motions which are commonly encountered have been included throughout this Chapter.

A. 10 days to respond

Generally, parties are afforded a period of ten days to respond to a motion unless otherwise provided 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 for filing motions and responses thereto.

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. 20 C.F.R. § 725.465.

C. Caption

Although each administrative law judge may have a preferred way of setting forth the caption of each decision and order, the following constitutes a *sample caption* which may be used in all “BLA” claims. Note, however, that the “BLA” case number may be a (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*), or (5) “BCP” for black lung civil money penalty claims.

Case No.: XX-BLA-XXX

In the Matter of:

XXXXXXXXXXXXX

Claimant,

v.

XXXXXXXXXXXXX,

Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

II. Remand to the district director

A. District director's obligation to provide complete examination

If, during the pendency of a claim before this Office, it is determined by the administrative law judge that the documentary evidence submitted pursuant to 20 C.F.R. § 725.456(e) is incomplete as to any issue which must be adjudicated, 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.

B. The employer or Director, OWCP withdraws controversion

If the employer or Director, OWCP accepts responsibility for the payment of benefits, the claim should be remanded to the District director for the payment of benefits. *Pendley v. Director, OWCP*, 13 B.L.R. 1-23 (1989)(*en banc*). Twenty C.F.R. § 725.462 provides that an administrative law judge shall remand a case to the district director for issuance of an appropriate order if a party withdraws controversion of all issues set for formal hearing.

An employer's failure to timely file a controversion will also result in its liability for the payment of benefits. In *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th 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.

Sample Order:

ORDER OF REMAND

On XXXXXX XX, XXXX, the above-captioned matter was referred to this Office for a formal hearing. By letter dated XXXX XX, XXXX, the district director notified this Office that Employer had withdrawn its controversion to all issues and agreed to pay all benefits.

Pursuant to 20 C.F.R. § 725.462, “[a] party may . . . withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the [district director] for the issuance of an appropriate order.”

IT IS HEREBY ORDERED that this case be remanded to the district director for appropriate proceedings in accordance with Employer's withdrawal of its controversion to the claim.

Administrative Law Judge

C. Calculation of liability for medical treatment
[III(B)]

In benefit treatment dispute cases, the regulations provide that resolution of this issue shall commence with the district director, who “shall attempt to informally resolve such dispute.” 20 C.F.R. § 725.707(a). The sole province of the administrative law judge in these cases is to determine whether certain medical expenses are related to the miner's black lung condition. Thus, if the Director, OWCP has not calculated the amount for reimbursement, the case should be remanded.

D. Inability to locate the claimant or abandonment of the claim
[II(F)(1)]

If the claimant has died or cannot be located, and it is unclear who has the 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. §§ 725.408, 725.409, and 725.410. It must be noted, however, that the regulations require that an order to show cause be issued prior to a dismissal.

Sample Order: ORDER OF DISMISSAL

On XXXXXX XX, XXXX, the undersigned issued an Order explaining the transfer of this claim to another administrative law judge for a decision on remand, as the previous administrative law judge is no longer with this Office. On XXXXX XX, XXXX, Director's counsel renewed its motion to dismiss due to the death of Claimant and attached a letter dated XXXXXX XX, XXXX, wherein Claimant's representative informed the Director of Claimant's death and the lack of heirs to further prosecute this claim. An order to show cause was issued on XXXXXX XX, XXXX directing that the parties provide the name of a legal representative to pursue the claim. Pursuant to § 725.465, this claim is considered dismissed, and the record is hereby returned to the district director.

IT IS ORDERED that this claim be DISMISSED.

Administrative Law Judge

Sample order:

ORDER OF REMAND

On XXXXXXXX XX, XXXX, the undersigned issued a Notice of Hearing and Pre-hearing Order which was returned as “undeliverable.” Claimant is unrepresented and numerous attempts to locate Claimant have been unsuccessful. Accordingly,

IT IS ORDERED that this matter be remanded to the district director to attempt to locate Claimant.

Administrative Law Judge

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. §§ 725.212-725.233. Although remand is not required to consolidate two 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.

Sample Order:

ORDER DENYING MOTION TO CONSOLIDATE

The above-captioned matter is the claim of a deceased miner which was remanded from the Benefits Review Board on XXXXX XX, XXXX. On XXXXX XX, XXXX, Employer filed a motion to consolidate this claim with the survivor's claim currently pending before the district director. As this matter is here on remand from the Benefits Review Board for the consideration of specific and limited issues, consolidating it with the developing survivor's claim would be inappropriate. This matter must be decided on the evidence of record. Accordingly, Employer's motion for consolidation is DENIED.

Administrative Law Judge

Sample Order:

ORDER GRANTING MOTION TO CONSOLIDATE

The above-captioned matter is the claim of the deceased miner which is pending before this Office. A motion to consolidate this claim with a survivor's claim, which is pending before this Office, has been filed. Pursuant to 29 C.F.R. § 725.460, it is determined that a consolidated hearing would serve the interests of fairness and judicial economy.

IT IS ORDERED that the motion for consolidation is granted.

Administrative Law Judge

F. Determination of responsible operator (or motion to dismiss as a party) [II(L), IV(A)2]

1. Prior to applicability of December 2000 regulations

The regulations require that the district director make the initial determination of the proper responsible operator. 20 C.F.R. § 725.412. 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.

Sample Order:

ORDER TO SHOW CAUSE

The above-captioned matter was referred to this Office on XXXXX XX, XXXX. On XXXXX XX, XXXX, Employer filed a motion for Partial Summary Judgment and to be dismissed as responsible operator. To date, no response has been received from the other parties.

Employer contends that other named employers employed Claimant for cumulative periods of at least one year subsequent to Claimant's employment with Employer and that it should accordingly be dismissed as a potentially responsible operator in this case.

IT IS ORDERED that the parties show cause, within thirty days of the issuance of this Order, why Employer should not be dismissed from this action.

Administrative Law Judge

In *Director, OWCP v. Oglebay Norton Co.*, 12 B.L.R. 2-357 (6th Cir. 1989), the court upheld the remand of the case to the district director for determination of the responsible operator. The case had been sent to the administrative law judge, but a hearing had not yet 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).

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 the case 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, the 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. The employer presented issues which were not reasonably ascertainable to him while the claim was before the district director due to employer's illness and unfamiliarity with the procedures.

Occasionally, the district director transfers a case to this Office 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 (4th 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* 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.

Sample Order:

ORDER DENYING MOTION TO DISMISS RESPONSIBLE OPERATOR

This matter arises under the Black Lung Benefits Act, 33 U.S.C. § 901, *et seq.*, as amended. The district director denied Claimant's claim for benefits and referred the case to this Office upon Claimant's request for a hearing. On XXXXX XX, XXXX, Y filed a motion to be dismissed as the responsible operator in this case. An Order to Show Cause was issued on XXXXX XX, XXXX, directing the parties to show why Y should not be dismissed as a responsible operator.

The regulations provide that the responsible operator shall be the "operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year." 20 C.F.R. § 725.493(a)(1). The district director's Memorandum of Conference reports that Employer W was the last coal mine employer with which Claimant had at least a cumulative year of employment. However, the district director found that there was no record of Employer W's insurance at the time of Claimant's last employment and evidence established that Employer W was no longer in business. Employer Y submitted Insurance Company's Answers to Interrogatories, which indicated that Employer W was insured during the relevant time period (*i.e.* the last day on which the miner worked for the company), specifically, XXXXXX XX, XXXX. Thus, Employer Y contends that Insurance Company, on behalf of Employer W, is capable of assuming liability for any payment of benefits and that Y should therefore be dismissed as responsible operator.

The Director responds that "[t]he mere fact that an employer may not, in the final analysis, be determined to be the correct responsible operator is not sufficient reason to dismiss that employer if there is a dispute between the potentially liable entities as to which party is the correct responsible operator and as long as the potential exists for that employer to be named the responsible operator." Although Employer Y and Insurance Company have stated that Employer W was insured at the time of Claimant's last employment there, the Director notes that they have not stipulated that Claimant's last coal mine employment was with Employer W. The Director argues that if Employer Y is

dismissed and the evidence proffered at the hearing demonstrates that Y is the correct responsible operator, then the other parties would be prejudiced by a dismissal of Y at this point. *See Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-345 (1984).

Granting this motion to dismiss would require a decision on the issue of Employer Y's and Insurance Company's liability as the last employer and carrier, and their ability to render benefits without a formal hearing. However, granting such a motion is appropriate only when no genuine issue of material fact remains in question. 29 C.F.R. § 18.41. *See also* Fed. R. Civ. P. 56(c). In this case, contested issues of fact remain with regard to whether Employer W has the ability to pay and is the last responsible operator for which Claimant had at least one year of cumulative employment.

The decision in *Crabtree*, mandates that the responsible operator issue be resolved in a preliminary proceeding or that all potential responsible operators be proceeded against at every stage of adjudication. The failure to do so precludes the designation of another operator and exposes the Black Lung Disability Trust Fund to liability. Hence, the dismissal of Employer Y at this juncture could result in liability falling upon the Trust Fund if Employer W is found incapable of assuming liability, or is not the last operator with which Claimant had at least one year of cumulative employment. Accordingly, as this issue must proceed to hearing, granting the dismissal of Employer Y at present would be premature.

ORDER

Employer Y's motion to be dismissed as responsible operator is DENIED.

Administrative Law Judge

2. After applicability of December 2000 regulations

Under the amended regulations, a claim is forwarded with only one operator listed as responsible for the payment of any benefits. Section 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) (Dec. 20, 2000). 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) (Dec. 20, 2000). For further discussion of this issue, see Chapters 4 and 7.

III. Transfer of liability to the Black Lung Disability Trust Fund [III(C)(2)(d)]

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 provided for reconsideration of claims previously dismissed. The Fund was deemed liable in such cases so that employers would not suffer liability in claims which they reasonably expected were finally adjudicated. 20 C.F.R. § 727.101 *et seq.*. These motions are generally granted but, see Chapter 22 for a discussion of the transfer of liability provisions.

IV. Amend controversion form [IV(A)(3), IV(A)(4)(b)]

Every claim file in which an employer is involved contains a Form CM 1025 or the like. This form sets forth the contested issues by the employer. The hearing is confined to the issues included on the controversion form. 20 C.F.R. § 725.463. 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 and at the level of the district director. 20 C.F.R. § 725.463(a).

When new issues are raised before the administrative law judge, s/he has the discretion under 20 C.F.R. § 725.463(b) to remand the case to the district director, to hear and resolve the new issue, or to 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 (10th 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).

VI. Motions for discovery and proffers of evidence

A. Discovery, generally

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. § 725.463 set forth the hearing procedure 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. *See* 29 C.F.R. § 8.6. 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 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)(2), a claim may be dismissed upon the failure of the claimant to comply with a lawful order of the administrative law judge.

Sample Order (deposition of governmental official):

ORDER

This matter is before me for consideration of whether Employer is entitled to reimbursement from the Black Lung Disability Trust Fund for interim benefits it paid Claimant. Following a determination of entitlement at the district director level, liability for benefits was subsequently transferred from Employer to the Trust Fund and thereafter extinguished altogether due to Claimant's inability to establish entitlement to benefits, as determined by the administrative law judge and affirmed by the Benefits Review Board.

On XXXXX XX, XXXX, Employer requested reimbursement from the Department of Labor for the benefits it had previously paid to Claimant. After repeated denials of reimbursements by the district director, Employer requested a hearing with an administrative law judge. On XXXXX XX, XXXX, the claim was referred to this Office, at which time the parties began extensive discovery.¹ On XXXXX XX, XXXX, due to an objection from the Director, an Order to Show Cause why Employer should be permitted to depose a United States Department of Labor official, Steven Breeskin,² was issued. Employer responded, contending that the controlling statutory language, providing funds for the reimbursement of employers where a claim “is or has been approved in accordance with the provisions of [30 U.S.C. § 945],” 26 U.S.C. § 9501(d)(7),³ is a matter of interpretation and that Employer is entitled to know the Department of Labor's established policy in this regard. The Director contends that she has complied with all of the discovery requests of Employer and that Employer has demonstrated no need for the taking of this deposition or how it would aid in the interpretation of this statute. The Director suggests the possibility that no Department of Labor policy exists for this issue and argues that, even if it did exist, as the issue is a question of law, the testimony of Steven Breeskin is immaterial.

In *Pacific Gas & Electric Co. v. FERC*, 746 F.2d 1383 (9th Cir. 1984), the court stated that the extent of discovery to which a party in an administrative proceeding is entitled is determined primarily by the particular agency, that the rules of civil procedure are inapplicable, and that the

¹After the district director's denial of reimbursement, Employer appealed to the Benefits Review Board, which remanded the case to this Office, citing *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990).

²Mr. Breeskin's title is Chief, Branch of Claims and Review, of the United States Department of Labor . In this position, he supervises the review of claims in litigation and performs tasks associated with contractor auditing of medical bills.

³Twenty-six U.S.C. § 9501(d) provides, in pertinent part, that

Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for --

* * * *

(7) the reimbursement of operators and insurers for amounts paid by such operators and insurers . . . at any time in satisfaction (in whole or in part) of any claim denied (within the meaning of section 402(i) of the Black Lung Benefits Act) before March 1, 1978, and which *is or has been approved* in accordance with the provisions of section 435 of the Black Lung Benefits Act (emphasis added).

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, does not provide expressly for discovery. Twenty-nine C.F.R. Part 18 governs the procedures and practices of the United States Department of Labor's Office of Administrative Law Judges. Section 18.14 addresses the scope of discovery:

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . .

Section 18.15 provides for protective orders and reads in pertinent part:

(a) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

Employer has sought discovery on this issue through requests for documents and admissions. The Director represents that she has supplied all relevant material in response to Employer's various discovery requests. Employer states that it has received no written statement of policy relating to this issue.

In general, top governmental executives should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions. *United States v. Morgan*, 313 U.S. 409 (1941). They should be free to conduct their jobs without the constant interference of the discovery process. *Church of Scientology v. Internal Revenue Service*, 138 F.R.D. 9 (D. Mass. 1990). An exception to this general rule exists where top officials have direct personal factual information related to material issues in an action, *American Broadcasting Companies v. United States Information Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984), but a top government official may only be deposed on a showing that the information sought is not available through any other source. *Church of Scientology*, 138 F.R.D. at 11 (precluding deposition where plaintiff made no showing that information sought was otherwise unavailable), citing *Community Federal Savings and Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983).

In *American Broadcasting Companies v. United States Information Agency*, 599 F. Supp. at 769, the court permitted the deposition of the Director of the United States Information Agency because he was the only individual responsible for the documents in question and because plaintiffs were not seeking to discern his "deliberative thought processes." The court concluded that the deponent was a crucial fact witness. See *Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981) ("Where an agency head possesses particular information necessary to the development or maintenance of the party's case, which cannot be reasonably obtained by another discovery mechanism, the deposition should be allowed to proceed."). In *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985), plaintiff's witness list included the Solicitor of Labor, the Secretary of Labor's Chief of Staff, the Regional Administrator for the Administration, and the Administration's Area Director. *Id.* at 586. Although *Simplex* is distinguishable from the present case because the area of questioning involved the discretionary activities of the officials, the court ruled that the administrative law judge properly denied this request to question these witnesses because *Simplex* did not "suggest[] any information in the possession of these officials that it could not obtain from published reports and available agency documents." *Id.* at 587. The administrative law judge found that "their testimony on OSHA and Administration policies was unnecessary and unduly burdensome as such policies were available from various publications" and that they had no first-hand knowledge of the facts of the case. *Id.* at 586.

In the present case, Employer argues that it has been unable to determine any relevant departmental policy concerning this reimbursement issue through other discovery methods. For example, in response to Employer's request to admit, the Director stated that she could neither admit nor deny the existence of such a policy, and in her response to the Order to Show Cause, the Director

states that Employer has been unable to locate this policy because it does not exist (p. 7).⁴ Employer has sufficiently demonstrated that the information it seeks is not readily available through the discovery methods it has utilized thus far. Employer has not, however, shown that Mr. Breeskin has any knowledge of the material facts or issues in this specific case or that other discovery methods with respect to Mr. Breeskin would not reveal this information. Therefore, to accommodate Employer's right to discovery and to prevent the unnecessary burdening of a government official, Employer is allowed further discovery of Mr. Breeskin in the form of interrogatories, requests to admit, and production of documents. Accordingly,

(1) IT IS ORDERED that Employer's Motion to Depose Steven Breeskin is DENIED, the Director's Motion for a Protective Order is GRANTED, and Employer is GRANTED the right to conduct further discovery through Mr. Steven Breeskin; and

(2) IT IS FURTHER ORDERED that the parties are granted 60 days from the issuance of this Order to submit any testimony and legal arguments concerning the reimbursement of Employer from the Trust Fund under these circumstances, after which time the record will close and the matter will be submitted to me for a decision on the record.

Administrative Law Judge

B. Medical examinations

Twenty C.F.R. § 725.414 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). 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 (4th Cir. Jan. 30, 1987)(unpub.). Moreover, 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, 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).

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

⁴Employer's contention that it is entitled to know of this policy to be prepared to argue against adopting the Department's construction out of deference to the administering agency is inappositive. Because the Director has repeatedly maintained that no policy concerning this statute exists or that, if it does exist, she is unaware of it, the Director cannot now come forth with the argument that the administrative law judge should defer to the agency's standard interpretation based on its policy for these circumstances. To do so would be tantamount to an admission that her previous representations were untruths. Although the Director's construction may be entitled to some weight as is traditional, the deference in this case cannot be based on any policy. In the alternative, however, Employer could potentially discover that a policy favoring its position exists or existed. It is this contingency which requires the decision I reach here.

motion should be granted only if the claimant has submitted evidence which indicates a substantial change in condition from the time of the last submitted evidence, if the employer has not previously submitted reasonably contemporaneous evidence, or if the record is incomplete as to an issue requiring adjudication. *Harlan Coal Co. v. Lemar*, 904 F.2d 1042 (6th Cir. 1990); *Marx v. Director, OWCP*, 870 F.2d 114 (3d Cir. 1989); *North American Coal Co. v. Miller*, 870 F.2d 948 (3d Cir. 1989); and *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).⁵

In addition, before granting a motion to compel a medical examination, consideration should be given to the hardship to 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 protection pursuant to 29 C.F.R. § 18.15. To prevail, the claimant must demonstrate good cause by setting forth facts which show that such an 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). The employer does have alternatives to obtaining evidence which include, but are not limited to, interrogatories, depositions, consultative reviews of the medical evidence, and rereading x-rays. See 20 C.F.R. § 725.414(a) and 29 C.F.R. § 18.15.

Note that 20 C.F.R. § 725.414(e)(2) 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). In addition, 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 by dismissal as is appropriate. 20 C.F.R. § 725.408. However, before a claim can be dismissed by reason of abandonment for failure to submit to a medical examination, the claimant must be notified of the reasons for denial of protection and of the action that needs to be taken to avoid dismissal. 20 C.F.R. § 725.409; see *Couch v. Betty B Coal Co.*, BRB No. 88-4067 BLA (June 29, 1992)(unpub.).

An administrative law judge may require that the district director provide a complete pulmonary examination to the claimant who files a duplicate claim. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990). However, the Board has made clear that the employer does not have an "absolute right" to a medical examination on modification. *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173 (1999)(en banc).

⁵ As to the limitations on medical evidence under the December 2000 amendments to the regulations, see Chapter 4.

C. 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 result of failing to comply with an order to compel may result in the 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.

D. Excluding evidence

1. Prior to applicability of December 2000 regulations

A motion to exclude evidence may be filed by any party, either at the hearing, or as a post-hearing motion. 20 C.F.R. § 725.456(a). 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 (6th Cir. 1990); *North American Coal Co. v. Miller*, 870 F.2d 948 (3d Cir. 1989).

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)⁶ allows the administrative law judge, at his or her discretion, to admit documentary evidence which is late if the parties agree or if 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”).

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 of the opposing party, this due process right may be satisfied either by examination of the x-ray film from which an interpretation was made or by 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 interpretations of that x-ray, the motion should only be granted where it is established that the x-ray film itself is unavailable for meaningful interpretation and that the interpreting physician is no longer available.

It is also noteworthy that the regulations at 20 C.F.R. § 725.458 provide for the taking of a deposition as long as the other parties have 30 days notice of the intended deposition.

⁶ See 20 C.F.R. § 725.456(b)(3) (Dec. 20, 2000).

2. After applicability of December 2000 regulations

The new regulations contain significant limitations of the admission of evidence and hearing testimony by experts. See Chapter 4 for a discussion of these limitations.

E. Submission of post-hearing evidence/leaving the record open [IV(A)(4)(a), IV(A)(4)(d)(2)]

As noted above, an administrative law judge may keep the record open to allow the submission of post-hearing evidence to respond to evidence submitted in violation of the 20 day rule. 20 C.F.R. § 725.456(b)(2); see *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th 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 which the judge finds dispositive. *Bethlehem Mines Corp. v. Henderson*, 939 F.2d at 149. 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). The proffered evidence should be probative, and not merely cumulative. The proponent must establish that reasonable steps were taken to secure the evidence, and the evidence must be reasonably necessary to insure the opportunity for a fair hearing. *Id.* at 1-547, 1-548. See *Weber v. Midland Coal Co.*, 94-BLA-524 (ALJ Order, Sept. 5, 1995).

VI. Reopen the record

A. Submission of additional evidence/change in legal standard [IV(A)(4)(c), IV(A)(4)(d)(2)]

After the time specified for the submission of evidence has expired, either 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 that the legal standards which were in place at the time of the hearing have subsequently changed. In *Shrewsbury 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.”

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: the reasonableness of the request and its grounds, whether the opposing party objects or does not oppose the motion, and whether the opposing party would be prejudiced by the grant of an extension.

A *significant* change in the legal standards that were in effect at the time of the hearing may

be grounds for reopening the record:⁷

- ! **Third Circuit.** *Marx v. Director*, OWCP, 870 F.2d 114 (3d Cir. 1989). See also *Williams v. Bishop Coal Co.*, Case No. 88- 672 BLA, 1992 U.S. App. LEXIS 32679 (3d Cir. Dec. 16, 1992)(unpub.)(holding that 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)).
- ! **Fourth Circuit.** In *Robinson v. Pickands Mather & Co.*, 914 F.2d 1144 (4th 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). As an example, the court denied a reopening of the record in *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.). 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 (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 which requires that 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 that 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 was on notice of the higher standard.”
- ! **Sixth Circuit.** *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042 (6th cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986). In *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6th 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

⁷ 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 (7th Cir. 1993), *overruled on other grounds*, *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to rules of substantive law, may be given retroactive effect.

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.

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 the change in standard under subsection (b)(2) after the hearing, whereby Employer had to establish that the miner was not totally disabled for *any* reason, shifted emphasis to subsection (b)(3) rebuttal of under which the causal nexus between the miner's total disability and his coal mine employment must be “ruled out.” Indeed, 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 (6th Cir. 1997)), the Board committed a manifest injustice by denying Peabody full consideration.

In *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827 (6th 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).

! **Seventh Circuit.** In *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th 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, upon 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 upon evidence which has not been made part of the record in administrative proceedings which

are not confined by the federal rules of evidence. The court reasoned 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.

[Editor's note: Twenty C.F.R. § 725.456(d) provides that documentary evidence which is obtained by any party during the time a claim is pending before the district director, and which is withheld by such party until the claim is forwarded to this Office shall not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim. *See* 20 C.F.R. § 725.414(e)(1)].

B. On remand

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). Generally, 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. *See* immediately preceding section, *supra*. In *Barrett v. N & V Coal Co.*, 89-BLA-1475 (ALJ Order, Apr. 7, 1993), an administrative law judge denied the claimant's request to reopen the record on remand, even though the claimant contended that the evidence was not available at the hearing and that it established a worsening of his condition, because the remand called only for a reexamination of the evidence of record. A reopening of the record would turn the Board's remand into a request for modification without having to meet the threshold requirements of a change in condition or a mistake in the determination of fact under 20 C.F.R. § 725.310. As a result, the administrative law judge declined to allow the claimant to re-litigate the claim and found no “good cause” to reopen the record.

Sample Order:

ORDER TO SHOW CAUSE

On XXXXXX XX, XXXX, Administrative Law Judge XXXXX XXXXXX issued a Decision and Order denying benefits in the above-captioned matter. Claimant appealed, and on XXXXX XX, XXXX, the Benefits Review Board remanded the case to this Office for further proceedings. Specifically, the Board has instructed the administrative law judge to consider whether due process requires that the record be reopened for Claimant to obtain re-readings of two recent x-rays.

As Judge XXXXXX is no longer with this Office, this matter will be reassigned to another judge. Any party may object within 30 days of the issuance of this Order. *See Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981). After ruling on any objections received, the parties will be provided

an opportunity to submit briefs on the issues remanded.

Administrative Law Judge

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). A oral hearing may also be required if a change in the law necessitates a reopening of the record for facts that require a credibility determination.

It is noted that, under the amended regulations, § 725.452(d) 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) (Dec. 20, 2000).

VII. Dispose of a claim

A. Withdrawal [IV(A)(1)]

At any time prior to the issuance of a final decision and order, the claimant may withdraw his or her claim for benefits. The 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). The motion for withdrawal may only be granted on the grounds that withdrawal is in the best interests of the claimant. See 20 C.F.R. § 725.306(a)(2); *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 the claim 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).

It was found not to be in the claimant's best interests to allow withdrawal of the claim in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th 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.

If a claimant has been receiving interim benefits and then decides to withdraw the claim, he must agree to repay the benefits received. See 20 C.F.R. § 725.306(a)(3). 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 may do if interim benefits are being, or have been, paid.⁸

Sample Order:

ORDER

On XXXXX XX, XXXX, Employer submitted Claimant's request to withdraw his claim for federal black lung benefits. Claimant signed a typewritten statement that he no longer wished to pursue this claim and that he was "unable to undergo any further medical tests due to my deteriorating health condition which has rendered me unable to travel." Employer submits that Claimant canceled a medical examination that it had scheduled with its physician.

Twenty C.F.R. § 725.306(a) provides that a claimant may withdraw a claim for benefits if: (1) he files a written request indicating the reasons for seeking withdrawal of the claim; and (2) the appropriate adjudicating official approves the request for withdrawal on the grounds that it is in the best interests of the claimant. See *Rodman v. Bethlehem Steel Corp.*, 16 B.L.R. 1-123 (1984); *Matthews v. Mid-States Stevedoring Corp.*, 11 B.R.B.S. 1-139 (1979).

Claimant is not represented by counsel, and I cannot determine if his withdrawal is in his best interests based on the statement submitted by Employer's counsel. Accordingly, Claimant is requested to provide the following information:

(1) The nature of his sickness that prevents him from traveling to a doctor's office or clinic for a medical examination; and

(2) A note from his treating physician indicating whether Claimant could reasonably travel to and undergo a pulmonary evaluation by a physician of Employer's choice.

⁸ **Editor's note:** Because withdrawal of a claim equates to a finding that no claim was ever filed, would it be in the claimant's best interests to permit the withdrawal given the limitation period for filing a claim set forth at 20 C.F.R. § 725.308?

Claimant is ORDERED to submit his statement to this Office on or before XXXXX XX, XXXX.

Administrative Law Judge

B. Dismissal/abandonment

[III(F)(1)]

1. Prior to applicability of December 2000 regulations

Any party may file a motion to dismiss the claim. A dismissal operates as a final disposal of a claim and therefore is *res judicata* unless the administrative law judge specifies in the order that the dismissal is without prejudice. *See* 20 C.F.R. § 725.465. 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; *Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985).

Twenty C.F.R. § 725.465 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 to 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 give an ample opportunity to answer the order. If the claimant answers the show cause order within the allotted time, sets forth a reasonable explanation for the failure to answer the original order, and takes the steps set out 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. 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 December 2000 regulations

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) (Dec. 20, 2000). 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) (Dec. 20, 2000). 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) (Dec. 20, 2000).

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 the administrative law judge to 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 (3d Cir. 1990). Summary judgment may be limited to specific issues or may go to the merits of the claim for benefits. For example, a motion for summary judgment may request the resolution of particular issues such as years of coal mine employment, or the final resolution of a claim in favor of the motioning party. 20 C.F.R. § 725.465.

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 (6th Cir. 1992), that jurisdiction in such cases properly lies in the federal district courts. For further discussion of medical interest cases, see Chapter 21.

VIII. Representation issues

A. Appointment of a representative

Twenty C.F.R. § 725.362(a) 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. Further, “written notice appointing a representative shall be signed by the party or his or her legal guardian.”

Sample Order:

ORDER

On XXXX XX, XXXX, this Office received correspondence from XXXXX XXXXX, Esquire. Counsel advised that he ceased representing Claimant in XXXXX XXXX, but after recent discussions with Claimant, he now asks to be reinstated as Claimant's representative. He also requests a ninety day extension from to make a proper response to the Director's submission of Dr. XXXXX's medical report. In addition, counsel suggests that a conference call be held between himself, the Director's representative, and the undersigned.

Twenty C.F.R. § 725.362(a) provides for the representation of parties in any proceeding for a determination of a black lung claim. This provision requires such an appointment be made either in writing or on the record at the hearing. Furthermore, “[a] written notice appointing a representative shall be signed by the party or his or her legal guardian. . . .” Therefore, Claimant must submit written authorization for counsel to proceed as his attorney. Claimant is GRANTED fifteen days in which to submit such authorization, at which time the request for extension and conference call will be considered. The Director is GRANTED the same fifteen days in which to respond to Claimant's motion.

Administrative Law Judge

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* 20 C.F.R. § 725.362(b). Twenty-nine C.F.R. § 18.34(g)(1) provides 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 with additional time in which to secure another representative.

Sample Order:

ORDER

By motion dated XXXXX XX, XXXX, XXXXX XXXXX, Esquire (Petitioner) notified this Office of her intent to withdraw as counsel for Claimant in the above-captioned matter. On XXXXX XX, XXXX, the undersigned issued an Order directing Petitioner to inform the undersigned of Claimant's knowledge of her intent to withdraw and of the status of his claim. Petitioner responded on XXXXX XX, XXXX. She submitted her correspondence to Claimant explaining her reasons for withdrawal and the procedural posture of the claim. Based on Claimant's response to the XXXXX XX, XXXX Order, he clearly understands that he is no longer represented and what the status of his case is.

Pursuant to 20 C.F.R. § 725.362, a request to withdraw from representation may be granted in the absence of a showing that the claimant will be prejudiced by counsel's withdrawal. Seeing no prejudice to Claimant, Petitioner's motion to withdraw as counsel is GRANTED.

Administrative Law Judge

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.

IX. 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, the relevant 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 the submission of new evidence that was not addressed at the hearing. This would be prejudicial to the opposing party and would hamper the development of rebuttal evidence. In dealing with the regular submission of evidence in a black lung claim, 20 C.F.R. § 725.456 states that all documents transmitted to the administrative law judge level will be placed into evidence. If the evidence was not placed in the record at the district director level, it shall be admitted at the administrative law judge level as long as it is sent to all other parties at least twenty days prior to a hearing in connection to the claim. *See* 20 C.F.R. § 725.456(b)(1); *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, either party may request a continuance. Typical reasons for requesting a continuance are as follows: health problems,

scheduling conflicts, unpreparedness for hearing, recent retainment of new counsel, 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). If the waiver is granted, the administrative law judge should consider all the documents and stipulations which 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).

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). 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). For further discussion of motions for reconsideration, see Chapter 25. It is noteworthy that the amended regulations contain a new provision at § 725.479(d) which provides that “[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) (Dec. 20, 2000).

Sample Order:

ORDER DENYING REQUEST FOR RECONSIDERATION

On XXXXX XX, XXXX, the undersigned issued an Order of Remand in the above-captioned matter. On XXXXX XX, XXXX, Claimant filed a Motion for Reconsideration of the remand order. Twenty C.F.R. § 725.479(b) affords parties the opportunity to request that the administrative law judge reconsider Decisions and Orders; however, such requests must be made within thirty days of its issuance. As Claimant's motion was not filed within the required thirty day period, it cannot be considered a timely request for reconsideration and must be denied on those grounds. It is hereby

ORDERED that Claimant's request for reconsideration is DENIED.

Administrative Law Judge

E. Petitions for modification
[III(G)]

Any party may request a modification of a final adjudication, if such request is filed within one year. *See* 20 C.F.R. §§ 725.310, 725.480. 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. *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000). *See* Chapter 23 for a further discussion of modification petitions. *See also* 20 C.F.R. §§ 725.310 and 725.421 (2000) (the amended regulations require that a hearing be conducted on modification unless waived in writing by the parties).

Sample Order (further record development):

ORDER OF REMAND

On XXXX XX, XXXX, Administrative Law Judge XXXXX XXXXX issued a Decision and Order Awarding Benefits in the above-captioned matter.¹ Employer appealed from this Decision and Order, and on XXXXX XX, XXXX, Employer requested a modification of the date of onset for the award of benefits, contending that Claimant continued his coal mine employment after the date set by Administrative Law Judge XXXXX (Director's Exhibit (DX) XX). Thus, the Benefits Review Board dismissed Employer's appeal and remanded the claim to the district director for consideration of the modification request (DX XX). On XXXXX XX, XXXX, the district director issued an Order to Show Cause as to why the modification request should not be granted (DX XX) and submitted a Request for Reimbursement for Employer (DX XX).

By letter dated XXXXX XX, XXXX, Employer responded and asserted that, according to the modification procedures, the district director must reconsider all of the evidence to determine if there is a change in conditions or if a mistake of fact was made in determining entitlement. Employer requested the opportunity to submit additional medical evidence (DX XX). The district director responded on XXXXX XX, XXXX, noting that Employer's XXXXX XX, XXXX request for modification dealt only with the date of onset of benefits. Thus, the district director maintained that Employer could not raise those issues now, as that would be an untimely request for modification. Further, the district director asserted that Employer had submitted no new medical evidence to support either a change in conditions or a mistake of fact (DX 69). However, the district director did allow the parties additional time to submit evidence concerning a mistake of fact, but he refused to compel Claimant to undergo a physical examination (DX 74).

On XXXXX XX, XXXX, the district director denied Employer's request for modification (DX XX). Meanwhile, Employer submitted additional medical evidence and acquired a medical authorization release from Claimant (DX XX, XX). On XXXXX XX, XXXX, the district director forwarded the record to this Office for the consideration of Employer's request for modification (DX XX), and Employer moved to have the claim remanded back to the district director for further development of the medical evidence.

Employer relies on *Consolidation Coal Co. v. Worrell*, 27 F.3d 227 (6th Cir. 1994), for the proposition that a modification request does not have to state the specific grounds for the modification. In *Worrell*, the court decided that a claim filed within one year of the previous denial should be considered a request for modification, not a second claim, regardless of the language used. This is distinguishable from the present situation because the determination is not whether Employer's

¹As Judge XXXXX is no longer with this Office, this matter is being considered by the undersigned.

request is a second claim² or a modification request, but the matter is whether Employer's modification request is sufficient to reopen all the issues or just the issue of the date of onset of disability. Thus, Employer's reliance is misplaced.

Employer's motion to remand should be granted for two reasons. First, Employer's second motion for modification on XXXXX XX, XXXX, requesting that the district director consider the other issues as well as the onset date, is a timely request for modification. Pursuant to 20 C.F.R. § 725.310(a), a party may request a modification "at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim. . . ." Employer is still paying benefits to Claimant under the terms of Judge XXXXX's XXXXX XX, XXXX Decision and Order (DX XX). Thus, the provision providing one year from the date of the last payment of benefits applies in this situation, not one year after a denial of the claim, because this claim was not denied. Clearly, even Employer's second request for modification was timely, as it has not been one year from the date of the last payment of benefits.

Second, according to the principle pronounced in *Garcia v. Director, OWCP*, 12 B.L.R. 1-24, 1-26 (1988), the one year period for a modification, as set forth in § 725.310, begins to run anew from the date of each denial issued by the district director. Because Employer's first motion was timely, and because Employer's second motion for modification, submitted on XXXXX XX, XXXX, was filed within one year of the district director's denial of XXXXX XX, XXXX, it is therefore deemed a timely request for modification.

Accordingly, IT IS HEREBY ORDERED that this claim is REMANDED to the district director for further development of the record.

Administrative Law Judge

F. Organize or to reconstruct the record

If a record is received from the district director's office that is misnumbered or out of sequence in such a manner which makes the processing of a 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:

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.

Administrative Law Judge

² Obviously, Employer's submission cannot be considered the "filing of a claim."

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 judgments, 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. . . .” Orders to vacate may also be issued to cancel an entire prior order.

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.