

PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

C. FULL AND FAIR HEARING

2. CONDUCT OF HEARING; DUE PROCESS

The conduct of the hearing is within the sound discretion of the adjudication officer. He or she is not bound by formal rules of evidence or procedure, except as provided for in Section 5 of the Administrative Procedure Act. See 20 C.F.R. §§725.455-725.460. Hearings under the Act, however, are limited to contested issues of law or fact raised before, or identified by, the district director. 20 C.F.R. §§725.455(a), 725.463(a); see *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985); *Stidham v. Cabot Coal Co.*, 7 BLR 1-97 (1984); see also *Chaffins v. Director, OWCP*, 7 BLR 1-431 (1984). The adjudication officer may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. 20 C.F.R. §725.463(b).

At the hearing, the adjudication officer is required to inquire fully into the matters at issue and to receive into evidence, upon motion, all testimony and documents that are relevant and material to the claim. 20 C.F.R. §725.455(b); see also 30 U.S.C. §923(b). The adjudication officer is obliged, above all, to insure a full and fair hearing on all the issues presented. The elements of a full and fair hearing include the opportunity to present a claim or defense by way of argument, proof and cross-examination of witnesses with knowledge of the evidence to be presented at the hearing, the witnesses to be heard, and the contentions of the opposing party. *Laughlin v. Director, OWCP*, 1 BLR 1-488, 1-493 (1978); see 5 U.S.C. §556(d).

A party's right to due process must be scrupulously preserved throughout the adjudicatory proceedings. A fundamental requirement of due process is the opportunity to be heard, *Grannis v. Ordean*, 234 U.S. 385 (1914), to ensure a fair disposition of the case. In some cases, due process may require that a *de novo* hearing, or additional hearing on a specific issue, be held. Procedural due process requires proper and adequate notification of proceedings. Parties must also be allowed to fairly respond to evidence, and present their own cause in full. Failure to avail oneself of the opportunity to be heard, however, may result in a waiver of the right to review, and does not constitute a denial of due process.

Allegations of unfair or prejudicial conduct on the part of the adjudication officer have been raised on appeal. The Board, however, has rejected such claims in the absence of a clear showing of prejudice. **Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission**, 458 F.2d 622 (5th Cir. 1972); see e.g., **Sykes v. Itmann Coal Co.**, 2 BLR 1-1089 (1980); **Rocchetti v. Jones and Laughlin Steel Corp.**, 1 BLR 1-812 (1978); **Sanders v. Consolidation Coal Co.**, 1 BLR 1-193 (1977). Charges of bias or prejudice, or lack of judicial temperament on the part of the adjudication officer are not to be made lightly, should be supported by concrete evidence, and should be made as early in the adjudication process as is feasible. **Marcus v. Director, OWCP**, 548 F.2d 1044, 1050 (D.C. Cir. 1976); **Zamora v. C. F. & I. Steel Corp.**, 7 BLR 1-568 (1984); see also 20 C.F.R. §725.352.

In cases where the issue concerns solely the existence and/or the amount of an overpayment, however, no oral hearing is required before the district director begins recoupment of the overpayment. See **Burnette v. Director, OWCP**, 14 BLR 1-151 (1990).

CASE LISTINGS

[failure of party to present evidence on issue constitutes waiver of right to be aggrieved by adverse decision and seek review; its not denial of due process] **Martin v. Island Creek Coal Co.**, 2 BLR 1-276 (1979); **Reale v. Barnes & Tucker Co.**, 1 BLR 1-333 (1977).

[Ninth Circuit held it proper for court to question witnesses to clarify questions and develop facts as long as its done in non-prejudicial fashion and court does not become personally over involved] **United States v. Landoff**, 591 F.2d 36 (9th Cir. 1978).

[contention that speech problem at formal hearing impeded ability to testify rejected; Board noted that adjudicator afforded lay representative great latitude and that transcript did not indicate any mental infirmity; if no formal objection raised to witness's mental qualifications and record reveals response to questions, failure of adjudicator to explore witness's mental capacity not error] **Elswick v. Eastern Asso. Coal Corp.**, 2 BLR 1-1016 (1980).

[contention of denial of fair hearing because both attorneys did not stand equal distance from claimant while he testified rejected; although claimant hard of hearing and Director's counsel allowed to move closer to claimant, nothing indicated harassment, intimidation or prejudice] **Casias v. Director, OWCP**, 6 BLR 1-438, 1-445 (1983).

[fundamental fairness was violated resulting in prejudicial error where issue parties agreed not to litigate considered by adjudicator] **Derry v. Director, OWCP**, 6 BLR 1-553, 1-555 (1983).

[adjudicator properly resolved confusion caused by district director's failure to act on request for medical examination of claimant by permitting development of additional evidence] **Lefler v. Freeman United Coal Co.**, 6 BLR 1-579, 1-580-581 (1983).

[due process requires remand to reopen record where employer never received copy of report admitted at hearing and adjudicator seemed unaware when record closed] **Pendleton v. United States Steel Corp.**, 6 BLR 1-815, 1-819 (1985).

[adjudicator's finding that claimant's unreasonable refusal to submit to medical testing constituted violation of opposing party's due process rights affirmed] **Goines v. Director, OWCP**, 6 BLR 1-897, 1-901-902 (1984).

[due process violated where adjudicator declined to grant employer 30 day period to respond to evidence submitted pursuant to Section 725.456(b) before record closed] **Baggett v. Island Creek Coal Co.**, 6 BLR 1-1311, 1-1314 (1984); see **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933, 1-936-937 (1984).

[no abuse of discretion in denying employer's request for continuance of hearing for independent review and verification of autopsy slides where employer failed to secure evidence in timely manner] **Witt v. Dean Jones Coal Co.**, 7 BLR 1-21, 1-23 (1984); cf. **Kislak v. Rochester & Pittsburgh Coal Co.**, 2 BLR 1-249 (1979).

[error to conduct hearing without issues specified due to lack of statement of contested issues, never submitted] **Stidham v. Cabot Coal Co.**, 7 BLR 1-97, 1-101 (1984).

[denial of due process where adjudicator substituted personal knowledge and experience in place of hearing testimony, incorrectly accused claimant's counsel of asking leading questions and impeded examination of witnesses] **Hutnick v. Director, OWCP**, 7 BLR 1-326, 1-328 (1984).

[due process and efficient administration of Act require Director to resolve responsible operator issue in preliminary proceeding, see 20 C.F.R. §725.410(d), and/or proceed against all putative responsible operators at every stage of adjudication; entitlement against one employer does *not* bind any other operator not a party] **Crabtree v. Bethlehem Steel Corp.**, 7 BLR 1-354, 1-356-357 (1984).

[procedural due process requires interested parties be notified of pendency of action and afforded opportunity to present objections; here fundamental fairness required by due process afforded employer where provided copy of post-hearing autopsy and allowed a thirty-day response period] **Gladden v. Eastern Associated Coal Corp.**, 7 BLR 1-577, 1-579 (1984).

[no abuse of discretion in admitting evidence of previous denials of claim where denials

given no weight] **Clifford v. Director, OWCP**, 7 BLR 1-817, 1-819 (1985).

[closing of record not abuse of discretion where held open for ten months to allow Director to submit x-ray rereading and Director had failed to do so] **Amorose v. Director, OWCP**, 7 BLR 1-899, 1-900 (1985); **Oggero v. Director, OWCP**, 7 BLR 1-860, 1-865 n.4 (1985).

[adjudicator may provide for further development of evidence where evidence on an issue incomplete, 20 C.F.R. §725.456(e)] **King v. Cannelton Industries**, 8 BLR 1-146, 1-148 (1985).

[contention that claimant prejudiced because decision not issued within twenty days rejected before decisions in **Underhill**, 4 BLR 1-62, and **Van Nest**, 3 BLR 1-526, issued; case not affected and no prejudice shown] **Worrell v. Consolidation Coal Co.**, 8 BLR 1-158, 1-162 (1985); **Williams v. Black Diamond Coal Mining Co.**, 6 BLR 1-188, 1-191 (1983).

[request for *de novo* hearing properly denied where original adjudicator unavailable as credibility of lay witnesses not crucial] **Berka v. North American Coal Corp.**, 8 BLR 1-183, 1-184 (1985); *cf.* **White v. Director, OWCP**, 7 BLR 1-348, 1-351 (1984); **Strantz v. Director, OWCP**, 3 BLR 1-431 (1981).

DIGESTS

The Board, in vacating the administrative law judge's denial of benefits and remanding the case for a hearing *de novo*, held that the administrative law judge abused his discretion in denying claimant's request for continuance where: 1) claimant was denied his due process rights where a party to a hearing is entitled to be represented and advised by counsel and claimant had not been able to retain an attorney by the date of the initial hearing; 2) claimant had not waived his statutory right to counsel; and 3) the Director, did not oppose claimant's request for continuance. **Johnson v. Director, OWCP**, 9 BLR 1-218, 1-220 (1986).

The administrative law judge did not abuse his discretion by awarding claimant benefits where claimant failed to attend the hearing before the administrative law judge because of a disabling stroke. The administrative law judge appropriately protected the employer's interests by leaving the record open for forty-five days to allow employer to secure claimant's testimony or to develop any further medical evidence. **Chaney v. Sahara Coal Co.**, 10 BLR 1-8, 1-10 (1987).

The Board affirmed the administrative law judge's finding that 20 C.F.R. §§725.412 and 413 do not establish a requirement that the district director send a copy of the Notice of Initial Finding to the carrier in addition to the notice which is sent to the employer. In the

instant case, employer failed to timely controvert the Notice of Initial Finding of Entitlement and argues that the district director's notice to the employer (in view of the failure to notify the carrier) was insufficient pursuant to 20 C.F.R. §§725.412 and 725.413. There was no dispute over the fact that employer failed to timely controvert the claim. The Board affirmed the administrative law judge's finding that lack of notice to the carrier alone does not constitute good cause for failure to timely controvert a claim, and affirmed the award of benefits. This case arises in the Fourth Circuit. The Sixth Circuit has spoken to the contrary on this issue. See **Slaton, supra; Saylor, supra; Osborne v. Tazco, Inc. and Old Republic Companies**, 10 BLR 1-102, 1-106-107 (1987).

The Board affirmed the administrative law judge's finding that employer's inability to participate in the Social Security Administration determination of Part B entitlement, which is accepted by the Department of Labor as its initial determination of entitlement to medical benefits only under Part C, did not violate employer's due process rights. **Ariotti v. North American Coal Corp.**, 9 BLR 1-113, 1-118 (1986), *aff'd*, 854 F.2d 386, 11 BLR 2-216 (10th Cir., 1988); see 20 C.F.R. §725.701A(b)(1); **Zaccaria v. North American Coal Corp.**, 9 BLR 1-119, 1-122 (1986).

The Sixth Circuit overruled the Board's prior holdings in **Warner Coal Co. v. Saylor** and **Pyro Mining Co. v. Slaton**. The Court held that both as a matter of constitutional law (pursuant to the Due Process clause of the 14th Amendment) and statutory interpretation (pursuant to 20 C.F.R. §725.360(a)(4) and 33 U.S.C. §919(b)(1982)) insurance carriers for the claimant's employer must be given written notice of the black lung claim prior to the administrative adjudication of a claim affecting the carrier's liability. In **Warner Coal Co. v. Director, OWCP [Warman, Henry]**, 804 F.2d 346, 11 BLR 2-62 (6th Cir. 1986).

The Board held that a *de novo* hearing was required in this case because the parties' procedural due process rights were violated: (1) notice that the case was assigned to a different administrative law judge on remand was not given until the Decision and Order on remand was issued and (2) the parties were not given an opportunity to comment about the transfer of the case from the administrative law judge who heard the case to another administrative law judge or to request a *de novo* hearing. **McRoy v. Peabody Coal Co.**, 10 BLR 1-33 (1987), *vacated and remanded*, 11 BLR 1-107 and 1-139 (1987) (McGranery, J., dissenting).

The Board, in affirming the award of medical benefit rejected the employer's assertion that the Department of Labor's failure to provide proof of medical benefit reimbursements violated reporting requirements under Sections 725.701A(h), 725.704, and 725.706, and thus deprived the employer of due process rights to a full and fair inquiry into the reasonableness and necessity of the expenditures. The Board held that only after liability is established and a demand for reimbursement tendered are there obligations to present the requisite documentation for reimbursement. **Lute v. Split**

Vein Coal Co., 11 BLR 1-82, 1-84 (1987).

The Board rejected employer's contention that the denial of its Motion to Require claimant's cooperation on a pulmonary function study resulted in a denial of employer's due process rights to a full and fair hearing. In order to establish a denial of due process in an administrative hearing there must be a showing of substantial prejudice, see **Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission**, 458 F.2d 622 (5th Cir. 1972). In the instant case, employer failed to show substantial prejudice by the absence of a valid pulmonary function study because the study would not by itself establish rebuttal. **Lafferty v. Cannelton Industries, Inc.**, 12 BLR 1-190, 1-192-193 (1989).

The Third Circuit held that employer's due process rights were violated where the administrative law judge provided no opportunity for a response to medical evidence which was relied upon for an award of benefits. **North American Coal Co. v. Miller**, 870 F.2d 948, 12 BLR 2-222, 2-227-230 (3d Cir. 1989).

The Sixth Circuit vacated the Board's decision awarding benefits, holding that under the rationale of **Warner Coal**, 9 BLR 2-158, the district director had the authority to notify the proper carrier when investigation reveals that the wrong carrier was notified. The court thus remanded to the Board for consideration of the merits of the claim with respect to the liability of the carrier, although no error was found in barring the employer from participating in view of its failure to timely respond. **Caudill Construction Co. v. Abner**, 679 F.2d 1086, 12 BLR 2-335, 2-338 (1989).

The administrative law judge did not violate claimant's right to due process by denying claimant's request for subpoenas. Claimant's due process right to subpoena is limited to a right to request the subpoena. The ultimate issuance of the subpoena is a matter of discretion for the administrative law judge. **Bowman v. Clinchfield Coal Co.**, 15 BLR 1-22 (1991).

In conducting a hearing, the Board held that the administrative law judge acted within his discretion in proceeding in claimant's absence. Claimant's right to participate fully at the hearing was adequately protected inasmuch as the administrative law judge allowed claimant an opportunity to submit his testimony at a later date. See 20 C.F.R. §718.452(b). **Wagner v. Beltrami Enterprises**, 16 BLR 1-65 (1990).

The Board has the authority to reassign the case to a different administrative law judge on remand, when it determines that an administrative law judge has exhibited bias against one of the parties. **Cochran v. Consolidation Coal Co.**, 16 BLR 1-101 (1992).

The Board rejected employer's argument that granting the Director's Motion to Remand for a complete pulmonary evaluation of claimant would deprive employer of a full and fair hearing. Allowing employer the opportunity to submit evidence in response to the

evidence developed on remand cures any procedural defects in regard to the presentation of employer's case, see generally 20 C.F.R. §725.456(b)(2); **Bethlehem Mines Corp. v. Henderson**, 939 F.2d 143, 16 BLR 21 (4th Cir. 1991); **North American Coal Corp. v. Miller**, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). **Hodges v. BethEnergy Mines, Inc.**, 18 BLR 1-84 (1994).

The Director, in defending a Part C claim, acting for the interests of the participants in the Trust Fund, has not been provided with due process and the right to a full and fair hearing if the Trust Fund is assessed liability resulting from an obligation arising from a Part B claim. **Reigh v. Director, OWCP**, 19 BLR 1-64 (1995).

The Board vacated the administrative law judge's Order Denying Motion to Compel Discovery of opinions of employer's experts based on his finding that the information was not subject to discovery under the Federal Rules of Civil Procedure. The Board agreed with the Director that the Federal Rules of Civil Procedure do not govern the scope of discovery in black lung cases. The Board remanded the case for the administrative law judge to reconsider his Order Denying Motion to Compel Discovery pursuant to the standard for the scope of discovery provided in 29 C.F.R. §18.14 in conjunction with the provisions of 20 C.F.R. §725.455. The Board also instructed the administrative law judge to take into consideration the provision of 30 U.S.C. §923(b), which provides: "In determining the validity of claims under this part, all relevant evidence shall be considered..." In conclusion, the Board noted the discretionary authority given to the administrative law judge in the provisions at 29 C.F.R. §18.14 and 20 C.F.R. §725.455. **Cline v. Westmoreland Coal Co.**, 21 BLR 1-69 (1997).

Procedural rules should not be applied "when to do so would 'sacrifice . . . the rules of fundamental justice.'" **Johnson v. Royal Coal Co.**, 22 BLR 1-132 (2002) (Hall, J., dissenting), quoting **Hormel v. Helvering**, 312 U.S. 552, 557 (1941).

The Seventh Circuit affirmed the administrative law judge's award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur's opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers' opinion to be too equivocal to carry employer's burden. The Seventh Circuit reversed the administrative law judge's onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that the sixteen-year delay in adjudicating this claim deprived employer of its right to due

process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice to employer despite this delay. **Amax Coal Co. v. Director, OWCP [Chubb]**, 312 F.3d 882 (7th Cir. 2002).

The Fourth Circuit held that the administrative law judge's decision to reserve ruling on a motion to compel discovery was within his discretion and did not deprive employer of a meaningful hearing. The Court noted that 20 C.F.R. §725.455 affords the administrative law judge considerable discretion in conducting hearings, and that no statute or regulation requires an administrative law judge to rule on discovery motions prior to the merits hearing. **Consolidation Coal Co. v. Williams**, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that an administrative law judge's remarks at the hearing and within his order allowing discovery concerning the potential bias of expert witnesses did not demonstrate judicial bias against employer or its witnesses. Rather, in the Court's view, the administrative law judge's comments expressed "the unremarkable proposition that experts can be biased, and that doctors in coal mine cases are no less subject to bias than other experts;" further, the tone and tenor of frustration expressed in the administrative law judge's comments did not, in and of themselves, establish bias against employer. The Court noted that judicial rulings alone almost never constitute a valid basis for a finding of bias or partiality, and that the administrative law judge herein properly determined that the frequency with which employer's experts testified on behalf of coal mine companies justified discovery concerning potential bias. **Consolidation Coal Co. v. Williams**, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Board held that in denying claimant's motion to compel discovery, the administrative law judge properly relied on 29 C.F.R. §18.14 of The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, which provides, in pertinent part, that a party may obtain discovery regarding any relevant matter, not privileged, upon showing substantial need of the materials in the preparation of the party's case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. **Keener v. Peerless Eagle Coal Co.**, 23 BLR 1-229 (2007)(*en banc*).

The Fourth Circuit held that, under the facts of this case, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are *not* entitled to protection under the work product doctrine. The court emphasized that employer had sought discovery of the draft reports and attorney-expert communications for the legitimate purpose of exploring the trustworthiness and reliability of the opposing party's physicians. The court also stated, in footnote twenty-five of its opinion, that any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under

the work product doctrine. **Elm Grove Coal Co. v. Director, OWCP [Blake]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

The Board held that, in reconsidering the case on remand, following the Fourth Circuit court's decision in **Elm Grove Coal Co. v. Director, OWCP [Blake]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), the administrative law judge erred in denying employer's request to re-depose claimant's medical experts on the grounds that employer had already deposed them. The Board noted that in **Blake**, the court premised its determination that employer was entitled to discovery of the communications between claimant's experts and claimant's counsel on the principle that access to these communications was necessary to the proper cross-examination of claimant's experts. **Blake**, 480 F.3d at 301, 23 BLR at 2-467. Therefore, the Board held that the administrative law judge's denial of employer's request to re-depose claimant's experts following the completion of discovery was inconsistent with the court's holding. **[V.B.] v. Elm Grove Coal Co.**, 24 BLR 1-107 (2009).

The Board rejected the employers' due process challenge to the issuance of orders of remand by an administrative law judge pursuant to 20 C.F.R. §725.456(e). The Board rejected the employers' contention that liability for benefits must transfer to the Trust Fund in all claims where, after the claim is forwarded to the Office of Administrative Law Judges, it is determined that a miner did not receive a complete pulmonary evaluation. The Board agreed with the Director that the employers had failed to demonstrate how they were unduly prejudiced by the administrative law judge's decision to remand the claims for completion of the pulmonary evaluation mandated by the Act. **R.G.B., et. al. v. Southern Ohio Coal Co., et. al.**, BLR , BRB Nos. 08-0491 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA (Aug. 28, 2009) (*en banc*).

11/09