

## PART IV

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

#### A. THE CLAIMS PROCESS

##### 4. PROCEDURAL ISSUES AT THE DISTRICT DIRECTOR OR THE HEARING LEVEL

###### f. Claimants' Rights (Including Criteria for Ordering a Physical Examination)

The right to a full and fair hearing is extended to each party. See 20 C.F.R. §725.452(b) and Part IV.C. of the Desk Book. Moreover, the rights of claimant, without benefit of counsel, are protected by case law. See Part IV.C.3. of the Desk Book. While the conduct of the hearing is within the sound discretion of the administrative law judge, 20 C.F.R. §725.455(c), the administrative law judge is obliged to ensure that all parties have the opportunity to fully present their case by way of argument, proof, and cross-examination of witnesses. 20 C.F.R. §725.455(b). Since the state of claimant's health is the principal issue in Black Lung claims, the party opposing entitlement is given wide latitude in requesting that claimant be required to submit to testing and examinations by its physicians. This right is not absolute, however, as a claimant may reasonably refuse such procedures where, for instance, his physician advises that they are medically contraindicated.

#### CASE LISTINGS

[Eighth Circuit held that DOL did not fulfill responsibility for providing complete pulmonary evaluation by arranging to obtain opinion and then rejecting it as not credible] **Newman v. Director, OWCP**, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

[Section 725.414(a), which provides that operator may have miner examined employer selected physician, not limited to only one examination or one examination by same physician] **King v. Cannelton Industries, Inc.**, 8 BLR 1-146 (1985), *aff'd mem.*, 811 F.2d 1505 (4th Cir. 1987).

[adjudicator may order claimant to submit to post-hearing physical examinations and may dismiss claim where claimant unreasonably failed to attend scheduled medical examinations] **Goines v. Director, OWCP**, 6 BLR 1-897 (1984).

[within discretion of adjudicator under Section 725.456(e) to allow post-hearing examination of claimant to learn more about effects of claimant's back injury] **Lefler v. Freeman United Coal Co.**, 6 BLR 1-579 (1983).

[adjudicator properly denied request for dismissal under Sections 725.456(e), 725.408 as testimony supports treating physician's opinion that blood gas study contraindicated and ventilatory test affected by pulmonary impairments] **Bertz v. Consolidation Coal Co.**, 6 BLR 1-820 (1984).

### DIGESTS

The administrative law judge's finding that employer waived its right to have claimant examined was affirmed by the Board where employer waited two years before appealing the district director's prior denial for extension to have claimant examined or in seeking an order to compel claimant to undergo an examination. **Morris v. Freeman United Coal Mining Co.**, 8 BLR 1-505 (1986).

A remand to the administrative law judge was required to discuss claimant's refusal to attend a medical examination at employer's request. **Settlemoir v. Old Ben Coal Co.**, 9 BLR 1-109 (1986).

The right to a hearing is a right to a fair opportunity by a claimant to present his case to an impartial judge. When a claimant appears with freely chosen counsel of his own selection and participates in a hearing in which the administrative law judge properly discharges his duty of impartiality, claimant's right to a hearing has been upheld, see 20 C.F.R. §725.452. **Collins v. Director, OWCP**, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986).

Although the reasonableness of a party's refusal to participate in discovery is a determination which is within the administrative law judge's discretion, this discretion must be exercised within the parameters of Section 725.456(e). In the instant case, the Board held that the administrative law judge abused his discretion in denying Director's Motion to Compel a Physical Examination because the denial effectively denied the Director of an opportunity to submit responsive evidence to a medical report which was submitted to the district director *after* claimant had requested a hearing before an administrative law judge, but *prior* to the time the case was actually transferred. Under the facts of the case, the denial deprived the Director of the opportunity for a full and a fair hearing. **Thomas v. Director, OWCP**, 9 BLR 1-239 (1987).

Citing **King v. Cannelton Industries, Inc.**, 8 BLR 1-146 (1985), *aff'd mem.*, 811 F.2d

1505 (4th Cir. 1987), and contrasting Section 725.414(a) with Section 725.456(e), which gives an administrative law judge the discretion to provide for further submission or development of evidence, the Board affirmed the administrative law judge's order compelling claimant to submit to a second employer procured examination as within the administrative law judge's discretion. **Blackstone v. Clinchfield Coal Co.**, 10 BLR 1-27 (1987).

It is within the administrative law judge's discretion to proceed with a hearing despite the absence of claimant's counsel. While the unexcused failure of any party to attend a hearing shall constitute a waiver of that party's right to present evidence at the hearing under 20 C.F.R. §725.461(b), when claimant is present for the hearing, the absence of claimant's counsel should not be determinative of the outcome of the case. The administrative law judge acted properly, in this case where claimant was present at the hearing, in inquiring whether claimant wished to proceed with the hearing without his counsel present and fully informed him of his rights with respect to the presentation of his case. **Prater v. Clinchfield Coal Company**, 12 BLR 1-121 (1989).

The Act and the regulations make no distinction regarding the duty of the Department of Labor to provide the miner with an updated pulmonary evaluation upon the filing of each new claim, whether it be his first application for benefits or a duplicate claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.405(b). **Hall v. Director, OWCP**, 14 BLR 1-51 (1990)(en banc).

Where the Director conceded that there was no credible evidence in the record on the issue of the cause of claimant's disability in a Part 718 case, the Board remanded the case to the district director to provide claimant an opportunity to substantiate his claim by means of a complete, credible pulmonary evaluation at no expense to claimant as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b). **Petry v. Director, OWCP**, 14 BLR 1-98 (1990)(en banc).

In order to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations, see 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); **Newman v. Director, OWCP**, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); **Petry v. Director, OWCP**, 14 BLR 1-98 (1990)(en banc), the Director must provide a medical opinion that addresses all of the elements of entitlement. **Hodges v. BethEnergy Mines, Inc.**, 18 BLR 1-84 (1994).

Where the Director has conceded that she has failed to provide claimant with a complete and credible pulmonary evaluation, complete medical opinions submitted by employer are insufficient to meet the Director's statutory duty of providing claimant with an "an opportunity to substantiate his claim." The Board rejected employer's assertion that such a holding would be contrary to the Board's holding in **Melnick v. Consolidation Coal Co.**, 16 BLR 1-31 (1991)(en banc). The decision in **Melnick**

prohibits the administrative law judge from according the opinions of physicians engaged by the Department of Labor a presumption of greater credibility based on that status alone and does not concern the question of whether submission of a medical opinion by a physician engaged by an employer provides claimant with "an opportunity to substantiate" his claimant within the meaning of the Act. **Hodges v. BethEnergy Mines, Inc.**, 18 BLR 1-84 (1994).

An administrative law judge has discretionary authority under 20 C.F.R. §725.456(e) to remand a case to the district director for a complete pulmonary evaluation, prior to the assembly of the evidentiary record at the formal hearing and without prior notice to the parties. **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*).

Applying **Greene v. King James Coal Mining, Inc.**, 575 F.3d 628, BLR (6th Cir. 2009), the Board held that the administrative law judge erred in concluding that the claimants had not received complete pulmonary evaluations because the physicians' reports did not provide a detailed explanation for their findings. Because the physicians had performed all of the necessary tests and their reports addressed the requisite elements of entitlement, the Board agreed with the Director that, pursuant to **Greene**, the Director had satisfied his obligation to provide a complete pulmonary evaluation under the Act and therefore, vacated the administrative law judge's Orders of Remand issued pursuant to 20 C.F.R. §725.456(e). **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*).

The Board vacated an administrative law judge's Order of Remand pursuant to 20 C.F.R. §725.456(e). In accordance with **Greene v. King James Coal Mining, Inc.**, 575 F.3d 628, BLR (6th Cir. 2009), the Board held that because the DOL-examining physician had performed all of the necessary tests and his report addressed the requisite elements of entitlement, the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. **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*).

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