

## PART III

### PROCEDURAL ISSUES

#### F. VIABILITY OF CLAIMS

##### 1. ABANDONMENT

Dismissal of a claim by abandonment is governed by Section 725.409 in conjunction with Section 725.410. Section 725.410 provides that if the evidence does not support an initial finding of eligibility or a determination of entitlement, claimant is to be so notified by the district director and given 60 days to submit additional evidence or request a hearing before an administrative law judge. 20 C.F.R. §725.410(c). Section 725.409 does not require the district director to provide an additional 30 days of notice of an intent to deny a claim by reason of abandonment, over and above the sixty day notice mandated by Section 725.410(c). ***Adkins v. Director, OWCP***, 878 F.2d 151, 12 BLR 2-313 (6th Cir. 1989); ***Tonelli v. Director, OWCP***, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); ***Clark v. Director, OWCP***, 9 BLR 1-205, 1-207 (1986), *rev'd on other grounds*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); see also ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988); ***Fetter v. Peabody Coal Co.***, 6 BLR 1-1173 (1984). Claimant's failure to take any action on the claim within 60 days after an administrative denial will result in a determination by the district director that the claim has been abandoned. See ***Garcia, supra***.

If a claim is determined to be abandoned, claimant may still request modification of the denial or file a duplicate claim pursuant to 20 C.F.R. §725.310 within one year of the denial, see Part III.G. of the Desk Book (modifications) or, after one year, claimant may file a duplicate claim if a "material change of conditions" can be established pursuant to 20 C.F.R. §725.309(c), (d), see Part III.F.2. of the Desk Book (duplicate claims).

### CASE LISTINGS

### DIGESTS

The Board rejects claimant's contention that she did not receive constitutionally adequate notice of her right to appeal the district director's denial and holds that her claim was abandoned. The Board further held that claimant, who had an eighth grade

education, made no attempt to contact an attorney or appropriate government official for assistance for an explanation of her rights. **Stephens v. Director, OWCP**, 9 BLR 1-227 (1987).

The Fourth Circuit, agreeing with the Sixth Circuit, held that "see §725.409" was not intended to incorporate this regulation into Section 725.410(c)(1). **Tonelli v. Director, OWCP**, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); **Clark v. Director, OWCP**, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). Citing **Clark**, the Fourth Circuit distinguished Section 725.409 from Section 725.410 (Notice to Claimant) by noting that Section 725.409 applies where the record does not contain sufficient evidence to allow the agency to make a factual determination while Section 725.410 covers situations where there *is* enough evidence in the record and the appropriate agency *has* made its factual determination. **Adkins v. Director, OWCP**, 878 F.2d 179, 12 BLR 2-313 (4th Cir. 1989); *see also* **West v. Director, OWCP**, 896 F.2d 308, 13 BLR 2-323 (8th Cir. 1989).

The Eighth Circuit has held that the Department must comply with applicable notice requirements provided by the regulations promulgated pursuant to its authority under the Act, that the Department is not bound by the stricter notice requirements under the LHWCA, 33 U.S.C. §919(e). **West v. Director, OWCP**, 896 F.2d 308, 13 BLR 2-323 (8th Cir. 1989); **Tonelli v. Director, OWCP**, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989).

The Eleventh Circuit found the denial notice to be adequate and therefore claimant's failure to respond within the sixty day period or other one year limitation, *see* 20 C.F.R. §725.310, compelled a finding that the claim was abandoned. The Court held that where, as here, claimant had shown he was familiar with the administrative procedures to obtain black lung benefits and yet asserts a special problem of comprehension has an obligation to "take the next step to inquire and make his problem known." **Jordan v. Benefits Review Board**, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989).

The Board held that the miner's claim was abandoned following its denial by the district director where, although a sixty day extension was granted, nothing was received until after that sixty day period expired and the administrative law judge therefore lacked jurisdiction over the miner's claim. **Kubachka v. Windsor Power House Coal Co.**, 11 BLR 1-171 (1988); *see also* **Stephens v. Director, OWCP**, 9 BLR 1-227 (1987).

The Sixth Circuit held in a survivor's case that claimant had abandoned her 1979 and 1981 claims by failing to take timely action after receiving notice that her case would be closed unless she took action within sixty days. The court held that a handwritten note to the Director prior to claimant's receiving such notice did not constitute pursuit of the claim within the sixty day allotted period; that the Director did not waive the right to contest the administrative law judge's application of the Section 411(c)(5) presumption in the earlier claim since the Director's memorandum of conference, on which the determination of issues to be decided at hearing was based, clearly stated that claimant

was required to prove that pneumoconiosis contributed to the miner's death; that the Department of Labor's delay in promulgating regulations to repeal the Section 411(c)(5) presumption, which was applicable to the earlier claim, did not support an estoppel theory advanced by claimant. **Jordan v. Director, OWCP**, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

The Eleventh Circuit adopted the reasoning of the Fourth, Sixth, and Eighth Circuits and held in this case involving a duplicate survivor's claim, that the district director was not required to provide the claimant with the thirty-day abandonment notice addressed in 20 C.F.R. §725.409(b) in addition to the sixty-day abandonment notice that the district director provided pursuant to 20 C.F.R. §725.410(c). **Coleman v. Director, OWCP**, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003), citing **Adkins v. Director, OWCP**, 878 F.2d 151, 12 BLR 2-213 (4th Cir. 1989); **Tonelli v. Director, OWCP**, 878 F.2d 1085, 12 BLR 2-319 (8th Cir. 1989); **Clark v. Director, OWCP**, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); see also **Garcia v. Director, OWCP**, 12 BLR 1-24 (1988); **Fetter v. Peabody Coal Co.**, 6 BLR 1-1173 (1984).

11/04