

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

c. Burden to Produce Evidence

It is the responsibility of the parties to introduce medical evidence into the record. The Act, the regulations and Board case law recognize that it is the claimant's burden initially to establish entitlement. *White v. Director, OWCP*, 6 BLR 1-368 (1983); *Bain v. Old Ben Coal Co.*, 2 BLR 1-1219 (1981). Although the Department of Labor, through the district director, has the duty to develop evidence pertinent to the claim when the claim is initially filed, 20 C.F.R. §725.404, *et seq.*, this requirement does not preclude the claimants from obtaining and submitting their own evidence. 20 C.F.R. §725.407(b); *White, supra*. Each claimant who files a claim for benefits under the Act shall be provided with an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *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*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

Section 725.414(e)(1) provides that "[A]ny documentary evidence obtained by a party during the time a claim is pending before the district director, which is withheld from the deputy commissioner or any other party to the claim, shall not be admitted in any later proceedings held with respect to the claim in the absence of extraordinary circumstances, unless the admission of such evidence is requested by the Director or such other party." 20 C.F.R. §725.414(e); see 43 Fed. Reg. 36,798 (1978)(comments). The language of Section 725.414(e) is almost identical to that of Section 725.456(d) wherein Section 725.414(e) is cross-referenced. See *Hall v. Director, OWCP*, 10 BLR 1-107 (1987); *Adams v. Island Creek Coal Co.*, 6 BLR 1-677 (1983); *Dotson v. Eastern Coal Co.*, 6 BLR 1-1036 (1983).

Section 725.414(e)(2) requires the operator to make a good faith effort to develop its evidence at the district director level before the case is referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. Section 725.414(e)(2) does not bar the admission of all evidence obtained after the case is referred to the OALJ, it merely provides that the operator who fails to make a good faith effort to develop the

evidence before the district director loses the right to have the miner examined or the miner's medical record reviewed by a physician of its choice. **Pruitt v. USX Corp.**, 14 BLR 1-129 (1990); **Morris v. Freeman United Coal Mining Co.**, 8 BLR 1-505, 1-507 (1986). **Hardisty v. Director, OWCP**, 7 BLR 1-322 (1984), *aff'd* 776 F.2d 129, 8 BLR 2-72 (7th Cir. 1985); see also **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984); **Scott v. Bethlehem Steel Corp.**, 6 BLR 1-760, 1-762, 1-764 (1984). Where employer fails to have claimant timely examined, it may waive the right of examination. See **Pruitt, supra**; **Morris, supra**; **Bertz v. Consolidation Coal Co.**, 6 BLR 1-820, 1-822-823 (1984).

Section 725.414(a), which provides that an operator may have the miner examined by a physician selected by the operator, see **Chancey v. Consolidation Coal Co.**, 7 BLR 1-240, 1-242 (1984), does not provide for only one examination or only examinations by one physician. **Blackstone v. Clinchfield Coal Co.**, 10 BLR 1-27 (1987); **King v. Cannelton Industries, Inc.**, 8 BLR 1-146 (1985); **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984).

CASE LISTINGS

[section 725.414(a) concerns responsible operator's development of evidence after being notified of potential liability, not at the formal hearing, or attempts by party to submit new evidence at hearing without first exchanging it] **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984).

[Director not required only to develop evidence favorable to claimant, especially where claimant represented by counsel] **Belcher v. Beth-Elkhorn Corp.**, 6 BLR 1-1180 (1984).

[Eighth Circuit held that DOL did not fulfill its responsibility for providing complete pulmonary evaluation for claimant by obtaining informed medical opinion regarding claimant's condition and then rejecting that opinion as not credible; court remanded to adjudicator to either accept import of medical opinion of record or obtain more reliable medical opinion] **Newman v. Director, OWCP**, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

[scheduling of depositions shortly before hearing does not violate Section 725.414(e)(2) where counsel received notice six weeks in advance, attended, cross-examined] **Hardisty v. Director, OWCP**, 7 BLR 1-322 (1984), *aff'd*, 776 F.2d 129, 8 BLR 2-72 (7th Cir. 1985).

[neither DOL nor adjudicator obligated to have x-ray reread for a claimant] **King v. Consolidation Coal Co.**, 8 BLR 1-262 (1985).

DIGESTS

The Board held that such complete pulmonary evaluation was likewise required in a case involving a duplicate claim. **Hall v. Director, OWCP**, 14 BLR 1-51 (1990).

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 vacating the administrative law judge's finding that the time limits under 20 C.F.R. §725.414 prohibited consideration of evidence submitted by employer that was inconsistent with the district director's finding of eligibility, the Board construed the regulations contained in Section 725.414. The Board held that Section 725.414(b) requires employer to respond to the district director's initial finding by either accepting or contesting the finding and by submitting any available evidence. Failure to either accept or contest the district director's initial finding within the time set by the district director shall be deemed an acceptance of the initial findings of the district director and the operator shall not be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim. 20 C.F.R. §§725.413, 725.414(b). Further, if the operator fails to submit any additional evidence not previously submitted to the district director, the evidence shall not be admitted in any later proceedings held with respect to the claim in the absence of extraordinary circumstances. 20 C.F.R. §725.414(b), (e)(1). Finally, if the operator does not undertake a "good faith effort" to develop its evidence before the district director, it shall be considered to have waived its right to either have claimant examined by a physician of its choosing or have claimant's evidence submitted for review by a physician of its choosing. 20 C.F.R. §725.414(e)(2). **Pruitt v. USX Corp.**, 14 BLR 1-129 (1990).

Where employer failed to appeal the district director's denial of its request to have claimant examined and did not seek an order to compel claimant to undergo an examination or take any other action in the two years prior to the hearing date, the administrative law judge properly found that employer had waived its right to have claimant examined. **Morris v. Freeman United Coal Mining Co.**, 8 BLR 1-505, 1-507 (1986).

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 claim within the meaning of the Act. **Hodges v. BethEnergy Mines, Inc.**, 18 BLR 1-84 (1994).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.701(e), providing, in a medical benefits case, a presumption that a treated pulmonary disorder is caused by pneumoconiosis, shifts only the burden of production, not the burden of proof, to operators to produce evidence that the treated disease was unrelated to pneumoconiosis. Because the ultimate burden of proof remains on claimants at all times, the revised regulation is valid, not arbitrary or capricious, and not inconsistent with **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir.1993). **Nat'l Mining Ass'n v. Department of Labor [NMA]**, 292 F.3d 849, 872-873, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). However, Section 725.701 is impermissibly retroactive as applied to pending claims. **NMA**, 292 F.3d at 866-867.

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*).

An administrative law judge has discretionary authority under 20 C.F.R. §725.456(e) to remand a case in order for the district director to satisfy its obligation to provide claimant with a complete pulmonary evaluation. The Board held that this remand order may be exercised, prior to the assembly of the evidentiary record at the formal hearing and without prior notice to the parties. The Board further rejected employer's assertion that liability for benefits must transfer to the Trust Fund because the district director had not satisfied its obligation prior to forwarding the case to the Office of Administrative Law Judges. ***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 Sixth Circuit held that DOL's duty under 30 U.S.C. §923(b) to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him, but rather, is met when DOL pays for an examining physician who: (1) performs all of the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a); and (2) specifically links each conclusion in his or her medical opinion to those medical tests. In this case, while the administrative law judge declined to credit Dr. Baker's opinion, the court held that DOL met its statutory obligation because Dr. Baker performed all the required diagnostic tests and linked his conclusions to those tests, albeit briefly, in addressing all of the elements a claimant must prove to obtain benefits under the Act. ***Greene v. King James Coal Mining, Inc.***, 575 F.3d 628, BLR (6th Cir. 2009).

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