PART IV

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

B. JURISDICTION; DISMISSALS

The administrative law judge conducts the administrative hearing in claims arising under the Act. This statutory role is defined at 20 C.F.R. §725.350(c). The administrative law judge is charged with the responsibility of conducting the formal hearing, including: a) administration of oaths and examination of witnesses; b) authority to compel production of documents and subpoena witnesses; c) issue decisions and orders with respect to claims; and d) do all other things necessary to discharge the duties of the office. 20 C.F.R. §725.351(b). For a complete discussion of procedural issues at the hearing *see* Part IV.a.4. of the Desk Book. It is not within the administrative law judge's authority, however, to decide questions regarding the constitutionality of the Act, and any findings in this regard are not binding on the Board. ***Kosh v. Director, OWCP***, 8 BLR 1-168 (1985); ***McCluskey v. Zeigler Coal Co.***, 2 BLR 1-1248 (1981). After a full and fair hearing has been held, the administrative law judge must weigh and evaluate all evidence of record, and issue a timely decision and order. *See generally* ***Worrell v. Consolidation Coal Co.***, 8 BLR 1-158 (1985).

With the transfer in 1973 of jurisdiction over claims filed under the Act from the Social Security Administration of the Department of Health, Education and Welfare to the Department of Labor, questions arose as to which department had jurisdiction to decide particular cases. In general, cases filed prior to July 1, 1973, are decided by the Social Security Administration, whereas cases filed on or after July 1, 1973, are under the jurisdiction of the Department of Labor. *See* 30 U.S.C. §§921, 925, 931. Interdepartmental jurisdictional questions rarely arise today. Nevertheless, procedures to be followed by the adjudication officer are dependent upon the jurisdictional aspects of a claim, *i.e.*, when the claim was filed. The adjudication officer has the duty to determine the jurisdictional cut-off dates and the consequent procedure to be followed in deciding a case. *See* 20 C.F.R. §725.309; *see also* 20 C.F.R. §§727.101-727.108 pertaining to claims reviewed under Section 435 of the Act, 30 U.S.C. §945. For discussion of the administrative law judge's powers with regard to Motions for Modification *see* Part III.G.

The proper action for lack of jurisdiction is dismissal of the claim. In addition to dismissal for lack of jurisdiction, the regulations list several other grounds for dismissal. For example, a claim may be dismissed for claimant's failure to appear at the hearing or to comply with a lawful order of the adjudicator. *See* 20 C.F.R. §§725.461(b),

725.465(a)(1)-(2). A claim may also be dismissed based on the concepts of *res judicata* and *collateral estoppel*. *See* 20 C.F.R. §725.465(a)(3); *but see* 20 C.F.R. §725.309. Dismissal of a claim must be in the form of an order that generally has the same effect as a decision and order disposing of the claim on its merits. *See* 20 C.F.R. §725.466.

CASE LISTINGS

[adjudicator erred in dismissing claim as abandoned where claimant had written at least four times indicating no intent to abandon claim, but failed to attend hearing] ***Robertson v. Director, OWCP***, 1 BLR 1-932 (1978).

[Sixth Circuit held initial consideration of evidence clearly responsibility of adjudicator] ***Bozick v. Consolidation Coal Co.***, 732 F.2d 64, 66, 6 BLR 2-23, 2-25, *remanded for recon.*, 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984).

[adjudicator dismissal of claims affirmable where claimants failed to comply with lawful order for post-hearing physical examinations] ***Goines v. Director, OWCP***, 6 BLR 1-897, 1-901-902 (1984); *see* 20 C.F.R. §§725.408, 725.465(a)(2); ***Peabody Coal Co. v. Benefits Review Board***, 560 F.2d 797, 802 (7th Cir. 1977).

[adjudicator properly interpreted Section 725.410(c)(1) to mean that district director may only grant extension of time if extension request filed before expiration of 60 day period for request for hearing] ***Fetter v. Peabody Coal Co.***, 6 BLR 1-1173, 1-1175 (1984); *see* ***Clark v. Director, OWCP***, 9 BLR 1-205 (1986).

[remand for proper development of evidence required where district director failed to develop evidence or to identify contested issues prior to referral to adjudicator] ***Stidham v. Cabot Coal Co.***, 7 BLR 1-97, 1-101 (1984); *see* 20 C.F.R. §725.456(e).

[adjudicator lacked authority to change name of party liable for benefits after order became final; change is *substantive* rather than clerical] ***Johnson v. Midland Coal Co.***, 7 BLR 1-206, 1-208 (1984)(Clarke, J., dissenting).

[despite general rule that party is bound by acts of attorney, rule not to be applied in mechanical way to punish party; here extreme sanction of dismissal with prejudice not appropriate without consideration of client's conduct before binding him to his attorney's misfeasance] ***Howell v. Director, OWCP***, 7 BLR 1-259, 1-262-263 (1983); *see* ***Link v. Wabash***, 370 U.S. 626, 630-631 (1962); ***Reizakis v. Loy***, 490 F.2d 1132 (4th Cir. 1974); *see also* ***McCargo v. Hedrick***, 545 F.2d 393 (7th Cir. 1976); ***Flaska v. Little River Marine Construction Co.***, 389 F.2d 885 (5th Cir. 1968).

[fact-finder has jurisdiction to determine whether insurance fund liable under contract for

payment of benefits; this jurisdiction does not extent to matters outside insurance contract] ***Gilbert v. Williamson Coal Co.***, 7 BLR 1-289, 291-292 (1984).

[adjudicator under *no* affirmative duty to seek out and receive all relevant evidence] ***McFarland v. Peabody Coal Co.***, 8 BLR 1-163, 1-165 (1985); *see also* ***Stephenson v. Director, OWCP***, 7 BLR 1-212 (1984); ***Scott v. Bethlehem Steel Corp.***, 6 BLR 1-760 (1984).

[not within adjudicator's authority to decide questions of constitutionality; such findings are not binding on Board] ***Kosh v. Director, OWCP***, 8 BLR 1-168, 1-169 (1985).

[Motion for New Trial properly denied even though the adjudicator who wrote decision did not preside at hearing, since credibility of lay testimony not dispositive] ***Berka v. North American Coal Corp.***, 8 BLR 1-183, 1-184 (1985); *see* ***White v. Director, OWCP***, 7 BLR 1-348 (1984); ***Strantz v. Director, OWCP***, 3 BLR 1-431, 1-433 (1981).

[fact-finder has no special duty to develop evidence to enhance claimant's case] ***King v. Consolidation Coal Co.***, 8 BLR 1-262, 1-264 (1985).

[adjudicator erred in permitting Director, without an excuse, to litigate issues not checked as contested issues that were easily ascertainable before district director] ***Thornton v. Director, OWCP***, 8 BLR 1-277, 1-280 (1985).

DIGESTS

The Board, in reversing the administrative law judge's Order to Remand to the district director held that the administrative law judge's decision to allow further development of evidence that could have been obtained within the three years the claim was awaiting hearing constitutes an abuse of discretion. ***Morgan v. Director, OWCP***, 8 BLR 1-491, 1-494 (1986).

The Board affirmed its holding in ***Fetter v. Peabody Coal Co.***, 6 BLR 1-1173, 1-1175, that Section 725.409 does not require the district director to provide an additional thirty days 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). The Board rejected claimant's argument, that the case could be distinguished from ***Fetter*** on the ground that the word "abandoned" did not appear in the initial denial letter, as the clear implication of the letter was that failure to take action would result in a final denial unless, within one year, claimant requested reconsideration of the claim. ***Clark v. Director, OWCP***, 9 BLR 1-205, 1-207 (1986).

The Board held that the administrative law judge properly determined that claimant was

not entitled to benefits as the claim was abandoned as a result of claimant's failure to request a hearing within 60 days or modification within one year of the district director's denial. ***Stephens v. Director, OWCP***, 9 BLR 1-227, 1-230 (1987); *see* 20 C.F.R. §§725.310, 725.410.

An administrative law judge may not decide on Motions for Summary Judgment whether the prior or successor operator is the responsible operator where the factual issue of whether the successor operator even actually gained control of the mine is a contested issue. The Board held that, pursuant to Federal Rules of Civil Procedure 56, the administrative law judge must deny a Motion for Summary Judgment if there are unresolved factual issues in the case. ***Montoya v. National King Coal Co.***, 10 BLR 1-59, 1-61 (1986).

The Board holds that an administrative law judge cannot enter Orders of Dismissal which contain a provision allowing the orders to be set aside at some indefinite future time if it is ever determined by the Kentucky Workers' Compensation Board that claimants did not diligently and in good faith pursue their federal Black Lung Claims. Judicial finality requires either that claimants continue to pursue their federal claims, or that the claims be unconditionally withdrawn or dismissed. ***Slone v. Wolf Creek Collieries, Inc.***, 10 BLR 1-66, 1-70 (1987).

The Board held that in order to receive the new evidence into the record the administrative law judge must make a finding that there was "good cause" for the failure to obtain and exchange the evidence in compliance with Section 725.456(b)(2). ***Hensley v. Grays Knob Coal Co.***, 10 BLR 1-88, 1-92 (1987); *see generally* ***Stephenson v. Director, OWCP***, 7 BLR 1-212 (19840; ***Thomas v. Freeman United Coal Mining Co.***, 6 BLR 1-739 (1984).

The Board held that the administrative law judge was without jurisdiction to reverse the district director's finding that employer has shown "good cause" for its failure to respond to the Notice of Initial Finding and to dismiss the claim. The Board ruled that a commissioner's finding of "good cause" constitutes a discretionary determination pursuant to Section 725.413(b)(3) reviewable first by the Board, and also by the United States Court of Appeals. ***Whary v. Bush Coal Co.***, 11 BLR 1-150, 1-153-154 (1988)(en banc) (McGranery, J., concurring).

The Board vacated the administrative law judge's finding on a miner's claim due to lack of jurisdiction as the claim was found to be abandoned. ***Kubachka v. Windsor Power House Coal Co.***, 11 BLR 1-171, 1-173 (1988).

The Board held that the administrative law judge has the authority to issue, *sua sponte*, Orders To Show Cause Why Order of Summary Judgment Denying Claim Should Not Be Entered and Orders of Summary judgment. ***Smith v. Westmoreland Coal Co.***, 12 BLR 1-39, 1-43 (1988), *aff'd sub nom.*, ***Hanshew v. Royal Coal Co.***, 871 F.2d 417 (4th

Cir. 1989)(table).

The Board affirmed the administrative law judge's decision that the survivor's claim was barred under 20 C.F.R. §725.301(d) since the claim was not filed during the lifetime of the miner's surviving spouse. ***Bianco v. Director, OWCP***, 12 BLR 1-94, 1-96 (1989).

The Board vacated the Decision and Order of the administrative law judge as he did not have jurisdiction to review the district director's conclusion that "good cause" was shown for employer's/carrier's late controversion. ***Slaton v. Pyro Mining Co.***, 12 BLR 1-100, 1-103 (1987)-(*note* ***Pyro Mining Co.*** (6th Cir. 1989) above for that circuit only).

The Board held that the question of whether a miner's claim for benefits is timely filed is appropriately a matter within the purview of the administrative law judge. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149, 1-151-152 (1989)(en banc); *see* 20 C.F.R. §725.308.

The Third Circuit held that since employer did not file a controversion within 30 days, the Board properly ruled that the district director's award of survivor's benefits automatically became final and, consequently, that the administrative law judge never attained jurisdiction over the claim. ***Pothering v. Parkson Coal Co.***, 861 F.2d 1321, 1329, 12 BLR 2-60, 2-73 (3d Cir. 1988); *see* 20 C.F.R. §§725.413(b)(3), 725.419(d).

The Sixth Circuit held, in reversing three consolidated decisions awarding benefits, that the administrative law judge had jurisdiction to decide whether adequate notice was provided to employers/carriers as dictated in ***Warner Coal Co.***, 9 BLR 2-158. ***Pyro Mining Co. v. Slaton***, 879 F.2d 187, 190, 12 BLR 2-328, 2-334 (6th Cir. 1989), *rev'g sub nom.* ***Saylor v. Warner Coal Co.***, 12 BLR 1-205, 1-208 (1988)(McGranery, J., concurring and dissenting).

The Board affirmed the denial of benefits after vacating the administrative law judge's determination concerning whether a material change in conditions had occurred. The administrative law judge had no jurisdiction on that matter, the Board found that ***Lukman***, 11 BLR 1-71, was not to be retroactively applied and that the administrative law judge thus had jurisdiction to consider the merits of the duplicate claim. ***Salyers v. Director, OWCP***, 12 BLR 1-193, 1-195-196 (1989).

Relying on ***Amax Coal Company v. Director, OWCP, [Oxendine]***, 892 F.2d 578, BLR (7th Cir. 1989), the Board held that an administrative law judge's Decision and Order becomes final thirty days after it is filed in the district director's office and that an administrative law judge is without authority to extend the thirty day period. ***Mecca v. Kemmerer Coal Co.***, 14 BLR 1-101 (1990).
The Board held that the administrative law judge's dismissal of the claim violated 20 C.F.R. §725.465(d), which provides that "[n]o claim shall be dismissed in a case with

respect to which payments prior to final adjudication have been made to the claimant in accordance with §725.522, except upon the motion or written agreement of the Director." 20 C.F.R. §725.465(d). The Director opposed claimant's motion to dismiss the claim because benefits were paid by the Black Lung Disability Trust Fund on behalf of the named responsible operator. The Board found that in light of the Director's objection, the administrative law judge should not have granted claimant's motion to dismiss. ***Sizemore v. Shamrock Coal Co., Inc.***, 16 BLR 1-1 (1991); *see also* ***Palovich v. Bethlehem Mines Corp.***, 5 BLR 1-70 (1982).

Where the district director has issued a supplementary order of default assessing a twenty percent penalty pursuant to Section 14(f) of the Longshore and Harbor Workers' Compensation Act, (the LHWCA), 33 U.S.C. §914(f), as incorporated into the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*., and as implemented by 20 C.F.R. §725.607, and, where no factual issues have been raised by the parties nor did employer pay the penalty assessed, the Department of Labor had no jurisdiction to adjudicate questions regarding the supplementary order of default pursuant to Section 18(a) of the LHWCA, 33 U.S.C. §918(a), which was a final order when issued, and the Board will dismiss appeals filed in such cases. *See* 20 C.F.R. §725.605(b). Furthermore, pursuant to Section 18(a), supplementary orders of default for additional compensation issued by a district director are subject to enforcement by the federal district courts, *see* ***Providence Washington Insurance Co. v. Director, OWCP, {Kain}***, 765 F.2d 1381, 17 BRBS 135 (CRT) (9th Cir. 1985); ***Tidelands Marine Service v. Patterson***, 719 F.2d 126, 16 BRBS 10 (CRT)(5th Cir. 1983), *rev'q* 15 BRBS 65 (1981). ***Bertinotti v. Mathies Coal Co.***, 16 BLR 1-16 (1991).

Intervening law following remand by the Board to an administrative law judge does not justify "return" of the case to the Board. Here the administrative law judge's Order on Remand, which was not timely appealed by either party, failed to transfer jurisdiction to the Board and was held to be a nullity. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *See* ***Briggs v. Pennsylvania R.R.***, 334 U.S. 304 (1948). The case was returned to the administrative law judge to issue a decision and order on remand. ***Muscar v. Director, OWCP***, 18 BLR 1-7 (1993).

The Board held that Rule 60(a) of the Federal Rules of Civil Procedure allowed the administrative law judge to correct the misidentification of the party liable for the attorney's fees, thereby overruling the Board's holding in ***Johnson v. Director, OWCP***, 7 BLR 1-206 (1984) (2-1 decision with Clarke, J., dissenting). The Board noted that the correction under Rule 60(a) is proper if the thing "spoken, written or recorded *is not what the person intended to speak, write or record,"* whereas a modification of the judgment is necessary when that which is erroneous is so "because the person later discovers that the thing said, written or recorded was wrong." ***Allied Materials Corp. v. Superior Products Co.***, 620 F.2d 224, 226 (10th Cir. 1980). ***Coleman v. Ramey Coal Co.***, 18 BLR 1-9 (1993).