PART IV

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

C. FULL AND FAIR HEARING

1. RIGHT TO A HEARING; WAIVER

Any party to a claim may request, in writing, an administrative hearing of any contested issues of law or fact. 20 C.F.R. §725.451. The hearing shall be conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. §554 (1976). 33 U.S.C. §919(d), as incorporated by 30 U.S.C. §932(a). Should claimant be physically unable to attend a hearing, the adjudicator must make every effort to obtain the testimony of the claimant through interrogatories, deposition, or holding the hearing at a place most convenient for the claimant, including the claimant's home if he or she is bedridden. ***Robertson v. Director, OWCP***, 1 BLR 1-932, 1-934 (1978). If no genuine issue exists as to any material fact, a party may file a Motion for Summary Judgment, 20 C.F.R. §725.452(c), with supporting brief, prior to the administrative hearing.

The parties to a claim may waive their rights to a hearing before the adjudication officer, 20 C.F.R. §725.461, by filing a written waiver with the Chief Administrative Law Judge or the administrative law judge assigned to the case. The adjudicator must assure that any attempted waiver of the right to a hearing is made with full knowledge of the claimant's rights, the facts of the case and the applicable law. The waiver must be in writing, and it must be voluntary and intentional. 20 C.F.R. §725.461(a); ***Morgan v. Carbon Fuel Co.***, 3 BRBS 302, 307 (1976). A waiver may be withdrawn, upon a showing of good cause, any time prior to the issuance of a written decision. 20 C.F.R. §725.461(a). Further, an administrative law judge may hold a hearing despite the filing of a valid waiver by all of the parties, if he or she finds that the appearance and testimony of the parties would be of value. 20 C.F.R. §725.461(a).

The unexcused failure of a party to attend the administrative hearing constitutes a waiver of the right to present evidence at the hearing and may result in dismissal of the claim. 20 C.F.R. §§725.461(b), 725.465. Dismissal is proper where claimant and his attorney fail to appear at the hearing absent a showing of good cause. *See* ***Clevinger v. Regina Fuel Co.***, 8 BLR 1-1 (1985); *see also* **Howell v. Director, OWCP**, 7 BLR 1-259 (1984).

[claimant has right to hearing but is not required to be present at hearing, 20 C.F.R. §725.450, but employer may subpoena claimant to appear where it feels claimant's testimony necessary] ***Palovich v. Bethlehem Mines Corp.***, 5 BLR 1-70, 1-72-73 (1982).

[adjudicator violated party's right to respond to evidence and thereby right to full and fair hearing by closing record prematurely] ***Lane v. Harman Mining Corp.***, 5 BLR 1-87, 1-90 (1982).

[employer's failure to attend hearing not waiver of appeal rights where his attorney intended to appear but inadvertent delay caused arrival after hearing was over] ***Kimmel v. Diamond Coal Co., Inc.***, 6 BLR 1-288, 1-290 n.3 (1983).

[adjudicator did not have to grant employer continuance to obtain autopsy slides for independent evaluation and verification employer had ample time to secure such evidence] ***Witt v. Dean Jones Coal Co.***, 7 BLR 1-21, 1-23 (1984)(Clarke, J., dissenting).

[Board declines to fashion any broad rule regarding scope of waiver that may be implicit in party's failure to attend hearing or adjudicator's obligation, if any, to inform absent party in writing of proceedings missed or right to submit additional evidence post-hearing] ***DeLara v. Director, OWCP***, 7 BLR 1-110, 1-113 (1984).

[*de novo* hearing required if credibility of witnesses is crucial, important, or controlling factor in resolving factual dispute] ***Gamble-Skogmo, Inc. v. Federal Trade Commission***, 211 F.2d 106, 115 (8th Cir. 1954); ***Van Teslaar v. Bender***, 365 F.Supp 1007 (D. Md. 1973); ***Worrell v. Consolidation Coal Co.***, 8 BLR 1-158, 1-160 (1985); ***White v. Director, OWCP***, 7 BLR 1-348, 1-351 (1984); ***Strantz v. Director, OWCP***, 3 BLR 1-431, 1-433 (1981).

[where credibility of witnesses not at issue, substituted fact-finder need not hold *de novo* hearing] ***White v. Director, OWCP***, 7 BLR 1-348, 1-351 (1984); *see* ***Worrell v. Consolidation Coal Co.***, 8 BLR 1-158, 1-160 (1985).

[delay in issuance of adjudicator's decision did not constitute prejudicial error where intervening case law did not substantively affect the claim] ***Worrell v. Consolidation Coal Co.***, 8 BLR 1-158, 1-162 (1985).

DIGESTS

The Fourth Circuit rejected claimant's contention that inadequate performance of his counsel deprived him of the right to participate fully in his hearing, stating that 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, it is difficult to see how there could be a denial of that right. The court also agreed with the Board that on the available record there was no indication that performance of counsel at the hearing was inadequate. ***Collins v. Director, OWCP***, 795 F.2d 368, 371, 9 BLR 2-58, 2-63 (4th Cir. 1986).

The Sixth Circuit held that where the administrative law judge who presided at the hearing is not available to decide the case, a new hearing is generally not required unless witness credibility is crucial to the resolution of the case. ***Meholovitch v. Oglebay Norton Co.***, No. 85-3485 (6th Cir., May 9, 1986)(unpublished).

The Board found merit in the Director's objection to the administrative law judge's decision awarding claimant benefits pursuant to Section 727.203 without benefit of a hearing, where claimant had failed to request in writing a waiver of the right to appear pursuant to Section 725.461 and the Director had not waived his right to a hearing. The Board vacated and remanded to the administrative law judge for an order to show cause why the claim should not be dismissed pursuant to Section 725.465(c). ***Churpak v. Director, OWCP***, 9 BLR 1-71, 1-72-73 (1986).

The Board affirmed the administrative law judge's holding that the Director waived his right to present evidence on the issue of claimant's entitlement to benefits where the Director failed to contest entitlement at the administrative law judge's hearing, contest the substantive issues of entitlement in a motion for reconsideration and raise the issue of entitlement before the Board. ***Kincell v. Consolidation Coal Co.***, 9 BLR 1-221, 1-223 (1986).

The Board vacated the administrative law judge's award of benefits, reversed the denial of the Director's motion and remanded the case for further consideration. The administrative law judge erred in denying the Director's Motion for Order Compelling Physical Examination where the Director had no opportunity to respond to a medical report submitted by claimant after a hearing was requested but before the claim was filed with the Office of Administrative Law Judges. In addition, the Board held that the Director was denied a "full and fair hearing" pursuant to Section 725.456(e) where the administrative law judge abused his discretion in holding that the Director would not be prejudiced by the denial of the Motion to Compel because inquiry would be limited to evidence submitted on or before the claim's filing date. ***Thomas v. Director, OWCP***, 9 BLR 1-239, 1-241-242 (1987).

The Board held, pursuant to Section 725.414(a), employer has the right to request a

physical examination of a claimant in order to ensure a "full and fair" hearing. ***Blackstone v. Clinchfield Coal Co.***, 10 BLR 1-27, 1-29 (1987).

The Board rejected claimant's contention that the Department of Labor waived any procedural rights it may have had under Section 725.305 by not making its demand within six months of when the regulation went into effect. Further, the Board held that while the requirements of Section 725.305 provide no time period in which the Department of Labor must make its request, they do place a mandatory responsibility upon claimant to respond within six months. Claimant disregarded these requests even while having lay and legal representation. The administrative law judge, therefore, properly found that the claim had not been perfected and consequently could not be processed. ***Price v. Director, OWCP***, 11 BLR 1-124, 1-125 (1988).

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 express any comments 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 held that the administrative law judge has authority to issue orders of summary judgment *sua sponte* where the parties have been given notice and an opportunity to respond. ***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).

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 in fully informing him of his rights with respect to the presentation of his case. ***Prater v. Clinchfield Coal Company***, 12 BLR 1-121, 1-123 (1989).

The Board held that the administrative law judge's decision to admit late x-ray evidence was supported by substantial evidence as he reasonably concluded that "fairness" required the post-hearing admission of these x-rays, and implicitly found that good cause existed to allow the admission of the x-ray evidence. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149, 1-153 (1989)(en banc).
The Board limited ***McRoy*** to its facts and held that where credibility of witnesses is not at issue, a substituted administrative law judge need not hold a *de novo* hearing on

remand. ***Edmiston v. F & R Coal Co.***, 14 BLR 1-65 (1990).

The Board held that the Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment. ***Pukas v. Schuylkill Contracting Co.***, 22 BLR 1- , BRB No. 99-0786 BLA (May 10, 2000).

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