

R.G.B.	)	BRB No. 08-0491 BLA
	)	Case No. 08-BLA-5265
Claimant-Respondent)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	
)	
Employer-Petitioner	)	DATE ISSUED: 08/28/2009
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
)	
R.H.	)	BRB No. 08-0521 BLA
	)	Case No. 08-BLA-5416
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
)	
L.S.	)	BRB No. 08-0463 BLA
	)	Case No. 07-BLA-6088
Claimant-Respondent)	
)	
v.)	
)	
CENTRAL OHIO COAL COMPANY)	
)	
Employer-Petitioner)	
)	

DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
R.G.	)	BRB No. 08-0464 BLA
	)	Case No. 07-BLA-5454
Claimant-Respondent)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
R.E.B.	)	BRB No. 08-0465 BLA
	)	Case No. 07-BLA-5136
Claimant-Respondent)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest	)	DECISION AND ORDER
	)	<i>EN BANC</i>

Appeal of Five Orders of Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wendy Adkins and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for the employers.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Southern Ohio Coal Company, Consolidated Coal Company and Central Ohio Coal Company (employers) have filed interlocutory appeals of five Orders of Remand issued by Administrative Law Judge Larry S. Merck in claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In each claim, the administrative law judge determined, *prior to a hearing*, that the respective claimants had not received a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Thus, the administrative law judge remanded the claims to the district director “for the completion of his evidentiary development responsibilities.” Orders of Remand dated January 23, 2008, February 6, 2008, March 13, 2008 and April 1, 2008. The respective employers filed motions for reconsideration in three claims (*L.S. v. Central Ohio Coal Co.*, BRB No. 08-0463 BLA, *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA and *R.E.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA), asking the administrative law judge to consider whether deposition testimony provided by the physicians who performed the evaluations on behalf of the Department of Labor (DOL) cured the defects identified by the administrative law judge with respect to their written reports.¹ The administrative law judge, however, summarily denied the employers’ motions for reconsideration. Orders Denying Employers’ Motions for Reconsideration dated February 27, 2008. Thereafter, each of the employers filed an interlocutory appeal with the Board. On July 15, 2008, the Board acknowledged each of the five interlocutory appeals and granted the employers’ motion to consolidate those appeals for purposes of a decision only. *See* Motion for Consolidation dated April 9, 2008; *R.G.B. et al. v. Southern Ohio Coal Company et al.*, BRB Nos. 08-0941 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA and 08-0578 BLA (July 15, 2008) (unpub. Order).² The employers also filed a consolidated motion for oral argument, which was granted by the Board. *See* Consolidated Motion for Oral Argument dated December 23, 2008; *R.G.B. et al. v. Southern Ohio Coal Company et al.*, BRB Nos. 08-0941 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA 08-0465

¹ The administrative law judge based his findings with regard to the pulmonary evaluations on his review of Form CM-988, entitled “Medical History and Examination of Coal Mine Workers’ Pneumoconiosis.” Orders of Remand dated January 23, 2008, February 6, 2008, March 13, 2008, April 1, 2008 and August 13, 2008.

² The Board originally consolidated six interlocutory appeals. On March 23, 2009, the Board received a motion from Eric Mills, Esquire, indicating that he wished to withdraw as counsel for claimant in the case of *J.H. v. Martin County Coal Corp.*, BRB No. 08-0578 BLA. Mr. Mills also requested that the Board postpone the oral argument in order for J.H. to obtain new counsel. On April 9, 2009, the Board granted the motion to withdraw and ordered that BRB No. 08-0578 BLA be severed from the consolidated appeals scheduled for oral argument. *J.H. v. Martin Coal Corp.*, BRB No. 08-0578 BLA (Apr. 9. 2009) (unpub. Order).

BLA and 08-0578 BLA (Feb. 19, 2009) (unpub. Order). Oral argument was held in Pittsburgh, Pennsylvania on April 21, 2009.

The employers assert that the administrative law judge exceeded his authority under 20 C.F.R. §725.456(e), by issuing his remand orders prior to the admission of all of the evidence at the formal hearing and without prior notice to the parties. The employers argue that, in the interest of due process, liability for benefits must transfer to the Black Lung Disability Trust Fund (the Trust Fund) in claims where it is determined that a claimant did not receive a complete pulmonary evaluation subsequent to the issuance of a proposed decision and order by the district director. The employers further challenge the administrative law judge's determination in each claim that the physicians' opinions were insufficient to satisfy the district director's obligation to provide a complete pulmonary evaluation addressing all of the requisite elements of entitlement. The claimants have not responded to this appeal.

The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to uphold the administrative law judge's authority to remand a claim to the district director at any time prior to the termination of the hearing, when the administrative law judge determines that the evaluation sponsored by the DOL is either incomplete or not credible. The Director maintains that an administrative law judge has discretion to exercise his remand authority without conducting a formal hearing and without prior notice to the parties. With respect to the individual claims, the Director urges the Board to affirm the administrative law judge's Orders of Remand in *R.G.B. v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA, *R.H. v. Consolidation Coal Co.*, BRB No. 08-0521 BLA and *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA.³ However, the Director contends that the administrative law judge erred in finding the pulmonary evaluations to be incomplete in *L.S. v. Central Ohio Coal Co.*, BRB No. 08-0463 BLA and *R.E.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA and, therefore, requests that the Board vacate the orders of remand in *L.S.* and *R.E.B.* and return the cases to the administrative law judge for adjudication. In response to the employers' due process challenge, the Director contends that liability for benefits should not transfer to the Trust Fund.

The Board's scope of review is defined by statute. The administrative law judge's Orders must be affirmed if they are rational, supported by substantial evidence, and in

³ In two cases, *R.G.B. v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA and *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA, although the Director, Office of Workers' Compensation Programs (the Director), agrees that a remand is necessary, he argues that the claimants did not receive a complete pulmonary evaluation on grounds that are different than those cited by the administrative law judge.

accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge’s procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

I. Authority to Remand under Section 725.456(e)

The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The regulation at Section 725.456(e) provides:

If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to [20 C.F.R.] §725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement (see [20 C.F.R.] §725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e).

In this consolidated appeal, although the employers recognize that an administrative law judge is given discretionary authority to remand a case to the district director for the purpose of correcting deficiencies in the DOL-sponsored pulmonary evaluation, they assert that the administrative law judge erred in concluding that the pulmonary evaluations were incomplete based on his *sua sponte* review of the CM-988 report. Employers’ Brief in Support of Consolidated Petition for Review (Employers’ Brief) at 24. The employers maintain that under Section 725.456(e), an administrative law judge is required to consider the DOL-sponsored pulmonary evaluation “within the context of the evidentiary record as a whole.” Employers’ Consolidated Oral Argument Brief (Employers’ OA Brief) at 4. Thus, the employers assert that the administrative law judge erred in exercising his remand authority under Section 725.456(e), prior to commencement of the formal hearing pursuant to 20 C.F.R. §725.455, and the assembly

⁴ Because the claimants’ coal mine employment occurred in Ohio, these five claims arise within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

of the evidentiary record pursuant to Section 725.456. Employers' OA Brief at 4; Employers' Brief at 25.

In support of their position, the employers raise three primary points. First, the employers argue that the administrative law judge is not vested with remand authority until commencement of the hearing, since that authority is delineated within the regulation at Section 725.456, which pertains to the procedures and method by which documentary evidence is admitted into the record *at a formal hearing* held by an administrative law judge. *See* 20 C.F.R. §725.456(a)-(d); Employers' OA Brief at 6. The employers contend that only after the administrative law judge utilizes subsections (a)-(d) of Section 725.456 to assemble the evidentiary record, is he or she given the authority under subsection (e) to consider whether the DOL-sponsored examination complies with the applicable quality standards or fails to address a requisite element of entitlement. Employers' OA Brief at 6. Thus, the employers maintain that "when considered within the context of the procedures set forth in [Section] 725.456 and the subpart in which that regulation is contained, [Section] 725.456(e) permits remand only after the initiation of a formal hearing" and the compilation of the evidentiary record as a whole. *Id.*

Second, the employers note that the pulmonary evaluation report does not become part of the record until the formal hearing, when it is admitted as part of the Director's Exhibits, subject to objection by the parties. Employers' OA Brief at 4. Thus, the employers maintain that a remand order pursuant to Section 725.456(e) must be deemed premature if it is based on a DOL-sponsored pulmonary evaluation that has yet to be made a part of the record at the time of the administrative law judge's review. *Id.* Third, the employers assert that because Section 725.456(e) gives the administrative law judge an option to allow the parties to obtain additional information needed to complete the pulmonary evaluation, it follows that all relevant evidence must be assembled at the hearing and considered, as a whole, in order to determine whether there is any other medical evidence of record that may serve to correct the deficiencies identified by the administrative law judge with respect to that examination. Employers' Brief at 26, *citing* *W.C. v. Whitaker Coal Corp.*, BRB No. 07-0649 BLA (Apr. 30, 2008) (unpub.); Employers' Consolidated Reply Brief (Employers' Reply Brief) at 6.

In response to employers' arguments, the Director urges the Board to reject the employers' restrictive interpretation of Section 725.456(e). The Director states that "in the absence of an express limitation," the regulation should be interpreted to permit an administrative law judge broad discretion to correct "a faulty [S]ection 413(b) examination *at any point in the adjudicatory proceedings*[,] prior to the termination of the

hearing.”⁵ Director’s Supplemental Oral Argument Brief (Director’s OA Brief) at 2 (emphasis added). The Director explains:

Although the regulation states a clear end to the [administrative law judge’s] authority to remand a claim - the termination of the hearing – it sets no corresponding beginning point. *In the absence of express limitation, the authority recognized in [S]ection 725.456(e) must commence at the time the [administrative law judge] assumes jurisdiction over the case.* To limit the [administrative law judge’s] authority to remand [pursuant to Section 725.456(e)] and confine it to the point at which the hearing commences – a point that would never be reached in cases when a hearing is waived – would interfere with the [administrative law judge’s] independence, a characteristic necessary to perform the judicial function of reviewing a case *de novo*. Adopting the employers’ strained interpretation of [S]ection 725.456(e) would result in stripping an [administrative law judge] of much of his discretionary authority to determine how an evidentiary record is developed.

Id. at 2-3 (emphasis added). Relying on the general authority given to the administrative law judge to discharge the duties of the office and to determine the conduct and course of the adjudicatory proceedings, *see* 20 C.F.R. §§725.351(b), 725.455, the Director maintains that the administrative law judge’s authority to remand pursuant to Section 725.456(e) begins when he or she assumes jurisdiction of the case.⁶ Director’s Response Brief at 6.

Furthermore, the Director disagrees with the employers’ contention that the evidentiary record must be assembled and considered as a whole before the administrative law judge can determine whether the pulmonary evaluation is complete. The Director states that “the obligation to provide a complete, credible pulmonary evaluation is the Director’s alone; therefore ‘opinions submitted by employer are . . . insufficient to meet the Director’s statutory duty of providing claimant ‘with an

⁵ The pertinent regulation provides that “[h]earings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge.” 20 C.F.R. §725.475.

⁶ The Office of Administrative Law Judges’ Rules of Practice and Procedure define adjudicatory proceedings as “judicial-type proceeding[s] leading to the formulation of a final order.” 29 C.F.R. §§18.1, 18.22. The Director maintains that a formal hearing is just one component of the adjudicatory process. Director’s Response Brief at 6.

opportunity to substantiate his claim.” Director’s Response Brief at 8, *quoting Hodges*, 18 BLR at 1-91 (citations omitted). Additionally, the Director notes that Section 725.456(e) permits an administrative law judge to remand a claim if any part of the DOL-sponsored pulmonary evaluation fails to comply with the quality standards. Because this type of flaw “can readily be identified on the face of the examination report,” the Director argues that it makes no practical sense for an administrative law judge to wait until the hearing to issue his remand order pursuant to Section 725.456(e).

Finally, the employers suggest that an Order of Remand issued pursuant to Section 725.456(e), and prior to the hearing, is not “an efficient use of judicial resources.” Employers’ OA Brief at 9. The Director, however, contends that the employers fail to rationally explain why it is more efficient to have the parties complete their evidentiary development in reliance on an incomplete pulmonary evaluation, as opposed to correcting a deficient pulmonary evaluation at the earliest point in the adjudicatory process. The Director explains that allowing an administrative law judge the option of correcting a deficient pulmonary evaluation prior to commencement of the hearing makes practical sense because it “saves time by allowing the other parties to have the corrected report reviewed by their experts before the hearing.” Director’s Response Brief at 7. Because judicial efficiency is a primary goal of the revised regulations, the Director asserts that requiring an administrative law judge to wait until commencement of the hearing to issue an Order of Remand, after which time the parties have completed most, if not all, of their medical development, would only result in costly delay to all parties involved. *Id.* Thus, the Director urges the Board to reject the employers’ argument that the administrative law judge erred in issuing his remand orders prior to commencement of the hearing and without consideration of the evidence as a whole.

We are persuaded by the Director’s position in this case. The Director is charged with the administration of the Act and, therefore, special deference is generally given to the Director’s reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskay]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). We consider the Director’s interpretation of Section 725.456(e) to be reasonable and consistent with the broad discretion given to an administrative law judge to resolve procedural issues, particularly where the statute and the regulations do not provide explicit guidance as to the action that an administrative law judge should take when the requirements of a regulation are not satisfied. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *citing Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Benefits Review Board [Whited]*, 909 F.2d 193, 14 BLR 2-32 (7th Cir. 1990). Because Section 725.456(e) does not provide specific guidance as to when an administrative law judge may first exercise his or her discretionary remand authority,

we defer to the Director's reasonable interpretation of Section 725.456(e). We, therefore, hold that the administrative law judge has discretion to exercise his or her remand authority, pursuant to Section 725.456(e), at any time in the adjudicatory process, beginning when the administrative law judge assumes jurisdiction of the claim and ending with the termination of the hearing. Thus, we reject the employers' assertion that the administrative law judge was without authority to issue his Orders of Remand pursuant to Section 725.456(e), prior to commencement of the hearing and the compilation of the evidentiary record as a whole. *See generally L.P. v. Amherst Coal Co.*, 24 BLR 1-55 (2008).⁷

II. Prior Notice of Intent to Remand

The employers also assert that the administrative law judge erred in failing to "provide notice of his concerns" as to the completeness of the DOL-sponsored pulmonary evaluations to the parties, prior to issuing his Orders of Remand. Employers' OA Brief at 15. Relying on Section 725.456(e), which gives the administrative law judge the option to allow the parties to develop evidence to cure defects in the DOL-sponsored pulmonary evaluation, the employers assert that the administrative law judge should first obtain the position of the parties as to whether a remand is necessary. The employers point out that in three cases, *R.H. v. Consolidation Coal Co.*, BRB No. 08-0521 BLA, *L.S. v. Central Ohio Coal Co.*, BRB No. 08-0463 BLA and *R.E.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA, they specifically obtained deposition testimony from the DOL-examining physicians which served to cure defects identified by the administrative law judge with respect to their written reports (Form CM-988). Thus, the employers contend that by depriving the parties of prior notice, the administrative law judge "risk[s] duplication of medical evidence previously developed by the parties." *Id.* at 16.

The Director maintains, however, that the administrative law judge acted in accordance with his discretionary authority under Section 725.456(e) in considering the DOL-sponsored pulmonary evaluation *sua sponte* and without prior notice to the parties. The Director notes that the regulation does not contain a specific notice requirement because "the regulation itself constitutes notice to the parties of the [administrative law judge's] authority to review the [S]ection 413(b) examination for completeness." Director's OA Brief at 4. Furthermore, the Director contends that "the employers'

⁷ Contrary to the employers' contention, by acting promptly to cure any deficiencies in the pulmonary evaluation prior to the hearing, the administrative law judge's remand orders are consistent with the principles of fairness and judicial efficiency discussed in *L.P. v. Amherst Coal Co.*, 24 BLR 1-55 (2008), in which case the Board held that "if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order." *L.P.*, 24 BLR at 1-63.

complaint of lack of prior notice is really a red herring, given that the regulations allow the parties to request reconsideration of the [administrative law judge's] remand order, as the employer[s] did here in three of the cases.” *Id.* at 5, *citing* 20 C.F.R. §725.479.

We agree with the Director on this issue. Contrary to the employers’ assertion, there is no explicit notice requirement contained in Section 725.456(e). Rather, Section 725.456(e) gives the administrative law judge *discretion* to either remand a claim to the district director or allow the parties to develop additional evidence to correct defects in the DOL-sponsored pulmonary evaluation. Specifically, Section 725.456(e) provides:

The administrative law judge shall, *in his or her discretion*, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e) (emphasis added). Based on the specific language of the regulation, we reject the employers’ argument that the administrative law judge’s remand orders violate Section 725.456(e).⁸ Although we recognize that there are circumstances when it may be more judicially efficient to give notice to the parties, prior to remanding a claim pursuant to Section 725.456(e), any prejudice to the parties arising from the lack of prior notice may be cured by filing a motion for reconsideration in response to a remand order. *See generally Maddeleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Therefore, we conclude that the employers were not unduly prejudiced by the administrative law judge’s decision to review the DOL-sponsored pulmonary evaluations *sua sponte*, nor by the issuance of his remand orders without prior notice to the parties.

III. Transfer of Liability

In three of the five claims before us, *R.G.B v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA, *R.H. v. Consolidation Coal Co.*, BRB No. 08-0521 BLA and *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA, the Director concedes that the claimants did not receive a complete pulmonary evaluation. The employers maintain that when it is determined, either by an administrative law judge or by the concession of the Director, that a DOL-sponsored pulmonary evaluation is incomplete, and the claim is

⁸ Although prior notice is not required pursuant to 20 C.F.R. §725.456(e), an administrative law judge should consider whether the principles of fairness and judicial efficiency are best served if the administrative law judge seeks input from the parties, and particularly the Director, as to whether the statutory requirements for a complete pulmonary evaluation have been satisfied.

then remanded to the district director for evidentiary development to satisfy the requirements of Section 725.406, liability for benefits must transfer to the Trust Fund. The employers reason that by issuing a proposed decision and order and forwarding a claim to the Office of Administrative Law Judges (OALJ), the district director “certifies to the parties” and the administrative law judge that the pulmonary evaluation is complete on the issues of entitlement. Employers’ OA Brief at 18, *citing* 20 C.F.R. §725.450.⁹ The employers assert that any failure on the part of the district director to provide a complete pulmonary evaluation prior to issuance of the proposed decision and order, “taints medical evidence subsequently developed by the parties” and results in “prejudice to the responsible operator who relies to its detriment on the pulmonary evaluation sponsored by the [Office of Workers’ Compensation Programs] as well as the [d]istrict director’s findings in the proposed decision and order.” Employers’ OA Brief at 18. The employers note that circuit courts have held that liability must transfer to the Trust Fund where the actions of the DOL deny the due process rights of the responsible operator. *Id.* at 24-25, *citing* *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999) and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998). Because the complete pulmonary evaluation is a “critical piece of medical evidence,” which serves as the foundation for the evidentiary record, the employers assert that “the loss of medical evidence critical to the resolution of a federal black lung claim is a ‘procedural outrage’ and not merely a ‘misstep’ or ‘glitch’ in litigation.” *Id.* at 21-22. The employers ask the Board to apply a “bright line rule” that liability for the payment of benefits must transfer to the Trust Fund in those cases where it is determined at the OALJ level that the pulmonary evaluation is not complete and that a claim must be remanded for further evidentiary development to satisfy the requirements of Section 725.406. Oral Argument Transcript at 24.

The Director, however, urges the Board to reject the employers’ due process challenge and states:

A determination at the [administrative law judge] level that the DOL-sponsored pulmonary evaluation is incomplete and requires a remand – whether initiated by the claimant, the Director, or as is the case here, the [administrative law judge] *sua sponte* – does not violate an employer’s right to due process and is not grounds for relieving the properly identified responsible operator from liability for benefits.

⁹ The regulation at Section 725.450 states, in pertinent part, that “[t]here shall be no right to a hearing until the processing and adjudication of the claim by the district director has been completed.” 20 C.F.R. §725.450.

Director's OA Brief at 6. The Director contends that the facts of the circuit court cases cited by employer (*Holdman, Lockhart, Borda* and *Venicassa*) are distinguishable from the facts of the claims presented on appeal, since the circuit court cases dealt with "significant infringements" of the responsible operators' due process right to mount a meaningful defense to those claims. *Id.* at 8. The Director asserts that "none of the cases involve [sic] the types of *minor procedural inconveniences* the employers complain of here." *Id.* (emphasis added).

We agree with the Director that the employers have failed to demonstrate how they are unduly prejudiced by the administrative law judge's decision to remand these claims for completion of the pulmonary evaluation mandated by the Act. A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385 (1914). In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that the DOL's inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. *Lockhart*, 137 F.3d at 808, 21 BLR at 2-322. Thus, the court held that liability for benefits was to be transferred to the Trust Fund. *Id.* In *Borda*, the Fourth Circuit noted that *Lockhart* established a straightforward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: Did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Borda*, 171 F.3d at 183, 21 BLR at 2-559-60 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560.

Based on the facts of the cases before us, we fail to see how the employers are unduly prejudiced by the administrative law judge's Orders of Remand. Specifically we are not persuaded that the employers will be unable to mount a meaningful defense if these claims are remanded for pre-hearing development of the DOL-sponsored pulmonary evaluation. Contrary to the employers' contention, although a remand may result in further delay of the adjudication of the claims presented in this appeal, and the parties will likely incur increased litigation costs based on the evidentiary development undertaken by the district director, these factors alone do not rise to the level of a due process violation that requires transfer of liability to the Trust Fund. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). In the absence of a showing that there will be a significant infringement on the due process rights of the parties, we reject the employers' assertion that liability must transfer in all claims where, after the claim is forwarded to the OALJ, it is determined that a miner did not receive a complete pulmonary evaluation. Thus, we reject the employers' contention that liability for benefits must transfer to the Trust Fund in the three claims presented in

this appeal, where the Director has conceded that the claimants did not receive a complete pulmonary evaluation.

IV. Review of the Administrative Law Judge's Orders of Remand

The employers challenge the administrative law judge's Orders of Remand in each claim, asserting that he applied an incorrect standard in finding the DOL-sponsored pulmonary evaluations to be incomplete. The Director agrees with employer that in four of the five claims,¹⁰ the administrative law judge cited improper reasons for concluding that the pulmonary evaluations were insufficient to satisfy the Director's obligation under Section 413(b) of the Act. The Director asserts that "the administrative law judge's desire for a more detailed explanation of [a] doctor's conclusion is not a valid basis for finding [that] the Director failed to provide a complete and credible pulmonary evaluation." Director's Response Brief at 11. The Director further asserts that while the DOL "is charged with providing a reasoned and documented medical opinion that addresses all elements of entitlement, the opinion need not be dispositive of the issues in the case[.]" Director's Response Brief at 11.

The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all 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. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., --- F.3d ---, --- BLR ---, No. 08-4094, slip op. at 18-19, 2009 WL 2253369 at *11 (6th Cir. July 30, 2009). The court held in *Greene*, that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary

¹⁰ *R.G.B v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA, *L.S. v. Central Ohio Coal Co.*, BRB No. 08-0463 BLA, *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA and *R.E.B. v. Southern Ohio Coal Company*, BRB No. 08-0465 BLA.

evaluation, given that the physician's report addressed all of the elements of entitlement "even if lacking in persuasive detail." *Greene*, slip. op. at 19, 2009 WL 2253369 at *11.

Applying the standard set forth in *Greene*, we review each of the administrative law judge's Orders of Remand for error.

R.G.B v. Southern Ohio Coal Co., BRB No. 08-0491 BLA

Claimant, R.G.B., filed a subsequent claim on October 30, 2006. R.G.B. Director's Exhibit 3. Dr. Mavi performed the DOL-sponsored pulmonary evaluation on January 10, 2007, and obtained a chest x-ray, a pulmonary function study (PFS) and an arterial blood gas study (ABGS). R.G.B. Director's Exhibit 14. Dr. Mavi diagnosed: 1) chronic obstructive pulmonary disease (COPD) based on the smoking history and abnormal PFS; 2) pneumoconiosis based "coal mine work for an extended time," an abnormal x-ray and an abnormal PFS; 3) coronary artery disease (CAD); 4) pulmonary embolism; and 5) a lung nodule. *Id.* Dr. Mavi opined that claimant was one hundred percent disabled due to a combination of these conditions, with thirty percent due to COPD, thirty percent due to pneumoconiosis, thirty percent due to CAD, and ten percent due to the pulmonary embolism. *Id.*

In reviewing Dr. Mavi's report, the administrative law judge found that the DOL-sponsored evaluation was not complete because "Dr. Mavi did not provide any rationale for why [c]laimant's coal dust exposure did not contribute to or aggravate his COPD" or "why smoking did not contribute to or aggravate [c]laimant's pneumoconiosis." Order of Remand dated March 13, 2008 at 3. The administrative law judge also stated that the examination was deficient because it was "unclear if Dr. Mavi's finding of pneumoconiosis was a finding of legal or clinical pneumoconiosis." *Id.* at 4. The administrative law judge concluded that "because Dr. Mavi does not provide a reasoned rationale" for his findings, the Director failed to satisfy his burden to provide claimant with a complete pulmonary evaluation. *Id.*

Southern Ohio Coal Company asserts that claimant received a complete pulmonary evaluation and that, contrary to the administrative law judge's finding, "the lack of a detailed explanation" for a physician's opinion does not require remand. Employers' Reply Brief at 15. The Director agrees that the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation on the ground that Dr. Mavi did not fully explain the rationale for his diagnoses of pneumoconiosis and COPD. The Director, however, urges the Board to affirm the administrative law judge's remand order on an alternate ground, noting that Dr. Mavi failed to address "whether claimant's chronic respiratory or pulmonary impairment alone would totally disable him." Director's Response Brief at 12.

Based on the Sixth Circuit's holding in *Greene*, the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation because Dr. Mavi did not fully explain the basis for his diagnoses of pneumoconiosis and COPD. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11. We, therefore, vacate the administrative law judge's finding. Notwithstanding, we agree with the Director that claimant did not receive a complete pulmonary evaluation with respect to the issue of total disability. As noted by the Director, Dr. Mavi opined that claimant was totally disabled due to a combination of respiratory and non-respiratory conditions, but he did not specifically address whether claimant was totally disabled by a respiratory or pulmonary impairment. R.G.B. Director's Exhibit 14; *see* 20 C.F.R. §718.204(b)(1). Because Dr. Mavi's opinion fails to address all of the requisite elements of entitlement, we affirm the administrative law judge's Order of Remand on an alternate ground and remand the case to the district director for "a supplemental opinion from Dr. Mavi addressing whether claimant's COPD and pneumoconiosis alone would preclude claimant from performing the physical demands of his former coal mine work." Director's Response Brief at 12; *see Greene*, slip op. at 18-19, 2009 WL 2253369 at *11.

R.H. v. Consolidation Coal Co., BRB No. 08-0521 BLA

Claimant, R.H., filed an initial claim on May 2, 2007. R.H. Director's Exhibit 2. Dr. Knight performed the DOL-sponsored pulmonary evaluation on May 31, 2007, and obtained a chest x-ray, a PFS and an ABGS. R.H. Director's Exhibit 10. He diagnosed: "chest x-ray consistent with pneumoconiosis" and "CAD, status post coronary artery bypass graft surgery." *Id.* Under Section 7 of the Form CM-988, Dr. Knight was asked to provide the etiology for the diagnosed conditions. *Id.* Dr. Knight indicated that the pneumoconiosis was due to coal dust exposure and, with respect to the etiology of CAD, he wrote, "usual." *Id.* Under Section 8 of the Form CM-988, Dr. Knight was asked whether claimant had a chronic respiratory or pulmonary disease and, if so, to explain the degree of impairment in relation to claimant's usual coal mine work. *Id.* Dr. Knight wrote, "pulmonary function impairments show disabling decreases in volume inflow" and further indicated that he considered the "pulmonary impairment to be the main disabling factor." *Id.*

In reviewing Dr. Knight's report, the administrative law judge determined that Dr. Knight was "not responsive" to the question of whether claimant was totally disabled, and that he failed to address whether claimant had legal pneumoconiosis. Order of Remand dated April 1, 2008 at 3-4. The administrative law judge also specifically found that Dr. Knight failed to provide a "satisfactory rationale for his findings and did not answer some of the questions posed" on the Form CM-988. *Id.* at 5. Thus, the administrative law judge concluded that the pulmonary evaluation by Dr. Knight was not complete. *Id.*

Consolidation Coal Company argues that the administrative law judge erred in finding that claimant did not receive a complete pulmonary evaluation, while the Director contends that the administrative law judge acted properly in remanding this claim. We agree with the Director. The administrative law judge properly found that Dr. Knight's pulmonary evaluation was not complete because the doctor did not address two requisite elements of entitlement in claimant's case, the existence of legal pneumoconiosis and total respiratory disability. *See* R.H. Director's Exhibit 10. We, therefore, affirm the administrative law judge's Order of Remand pursuant to Section 725.456(e). *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11.

L.S. v. Central Ohio Coal Co., BRB No. 08-0463 BLA

Claimant, L.S., filed a subsequent claim on October 11, 2006. L.S. Director's Exhibit 3. Dr. Knight performed the DOL-sponsored pulmonary evaluation on November 9, 2006, and obtained a chest x-ray, a PFS and an ABGS. L.S. Director's Exhibit 10. Dr. Knight diagnosed coal workers' pneumoconiosis (CWP), based on a positive x-ray and claimant's history of coal mine employment, and emphysema due to smoking. *Id.* Dr. Knight indicated that the PFS showed very severe obstruction and that the ABGS showed "moderate hypoxemia, compensated acidosis." *Id.* Dr. Knight opined that claimant was totally disabled from performing his usual coal mine work due to "combined CWP and tobacco related disease." *Id.*

Central Ohio Coal Company deposed Dr. Knight on January 25, 2008. L.S. Employer's Exhibit 2 (marked for identification). Dr. Knight testified that claimant suffered from severe obstructive disease from emphysema due, in large part, to smoking. *Id.* at 24. Dr. Knight explained that coal dust exposure "added on" to claimant's lung condition as evidenced by the "abnormal nodules on x-ray." *Id.* at 26. When asked whether coal dust exposure was a significant contributing factor in claimant's lung disease, Dr. Knight responded, "Yes." *Id.* at 27.

In considering Dr. Knight's report, the administrative law judge found that Dr. Knight "did not provide any rationale for why he determined that tobacco smoking was the sole cause of [c]laimant's pulmonary emphysema" or further address whether claimant has legal pneumoconiosis. Order of Remand dated February 6, 2008 at 4. The administrative law judge also noted that when asked on Section 8(b) of the Form CM-988 "to describe the extent to which each of the diagnoses . . . contributes to this impairment," Dr. Knight left that particular question unanswered. Director's Exhibit 10; *see* Order of Remand dated February 6, 2008 at 4. The administrative law judge, therefore, concluded that "because Dr. Knight does not provide a complete rationale for his findings," his report did not constitute a complete pulmonary evaluation. *Id.* at 5.

Central Ohio Coal Company filed a motion for reconsideration, asking the administrative law judge to consider whether the deposition testimony of Dr. Knight

cured any defects identified by the administrative law judge with regard to his written report. The administrative law judge, however, summarily denied employer's motion.

In this appeal, the Director agrees with Central Ohio Coal Company that the administrative law judge abused his discretion in finding Dr. Knight's written report to be incomplete. The Director states that "the [administrative law judge's] desire for a more detailed explanation of the doctor's conclusion" is not a valid basis for finding Dr. Knight's opinion to be incomplete. Director's Response Brief at 17. The Director also asserts that insofar as Dr. Knight "considered claimant's respiratory condition, and exercising his medical judgment, diagnosed emphysema due to smoking as opposed to coal dust exposure," the administrative law judge "wrongly concluded that Dr. Knight did not consider the possibility of legal pneumoconiosis." *Id.*

We agree with the Director's position. Because Dr. Knight 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. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11. Thus, we vacate the administrative law judge's Order of Remand and his Order Denying Employer's Motion for Reconsideration and remand this case to the administrative law judge for adjudication on the merits of claimant's entitlement to benefits.

R.G. v. Southern Ohio Coal Co., BRB No. 08-0464 BLA

Claimant, R.G., filed her claim for benefits on January 13, 2006. R.G. Director's Exhibit 2. The DOL-sponsored pulmonary evaluation was performed by Dr. Mavi on March 1, 2006, and included a chest x-ray, a PFS and an ABGS. R.G. Director's Exhibit 9. Dr. Mavi reported that claimant had a negative chest x-ray for pneumoconiosis, moderate obstruction based on the PFS and severe hypoxemia based on the ABGS. *Id.* He diagnosed COPD due to smoking and "cardiac arrhythmia, etiology unclear." *Id.* Dr. Mavi opined that claimant was totally disabled from her last coal mine job due to COPD. *Id.*

The administrative law judge determined that claimant did not receive a complete pulmonary evaluation because Dr. Mavi did not provide any rationale for his attribution of claimant's COPD to smoking, and not to coal dust exposure. Order of Remand dated February 6, 2008. Southern Ohio Coal Company filed a motion for reconsideration, asking the administrative law judge to consider whether the deposition testimony of Dr. Mavi cured defects identified by the administrative law judge with regard to Dr. Mavi's

written report.¹¹ The administrative law judge, however, summarily denied employer's motion.

Employer asserts that Dr. Mavi's written report and deposition testimony constitute a complete pulmonary evaluation. It is the Director's position that "[t]he administrative law judge should consider any additional evidence from the [Section] 413(b) physician, such as deposition testimony developed by the private parties, in determining whether the opinion is sufficient." Director's Response Brief at 8 n.3. The Director asserts that "*although the lack of a detailed explanation [as to the etiology of claimant's COPD] does not compel remand*, Dr. Mavi's deposition testimony, which appears to contradict his original conclusion that the claimant does not have pneumoconiosis, does." Director's Response Brief at 14 (emphasis added). Thus, the Director urges the Board to affirm the administrative law judge's remand order on an alternate ground.

We agree with the Director that the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation because Dr. Mavi did not sufficiently explain his opinion as to the etiology of claimant's COPD. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11. We, therefore, vacate the administrative law judge's finding. However, in light of the Director's concession that Dr. Mavi's written report and deposition testimony are contradictory as to whether claimant has legal pneumoconiosis, we affirm the administrative law judge's Order of Remand, and remand the case to the district director for further evidentiary development to satisfy the Director's statutory obligation to provide claimant with a complete pulmonary evaluation on all of the requisite elements of entitlement. *Id.*

R.E.B. v. Southern Ohio Coal Co., BRB No. 08-0465 BLA

Claimant, R.E.B., filed a claim on January 24, 2007. R.E.B. Director's Exhibit 3. The DOL-sponsored pulmonary evaluation was conducted by Dr. Mavi on April 11, 2007. R.E.B. Director's Exhibit 12. Dr. Mavi's examination included a negative chest x-ray (0/1), a PFS and an ABGS, and he recorded a coal mine employment history of twenty-eight years. *Id.* Dr. Mavi diagnosed CWP based on "coal mine work, [PFS] and x-ray findings" and COPD based on the smoking history. *Id.* Dr. Mavi reported that the PFS showed severe obstruction and that the ABGS showed mild hypoxemia. *Id.* He opined that claimant was totally disabled, with eighty to ninety percent of the disability due to CWP and ten to twenty percent due to COPD. *Id.* In a supplemental report dated June 11, 2007, Dr. Mavi indicated that he had been asked to address the etiology of

¹¹ Employer deposed Dr. Mavi on June 15, 2007. Dr. Mavi testified that "most of [claimant's] problems are due to coal dust exposure." R.G. Employer's Exhibit (not marked for identification) at 11.

claimant's respiratory disease in light of a fifteen-year history of coal mine employment and a negative x-ray. R.E.B. Director's Exhibit 17. Dr. Mavi amended his opinion to reflect that fifty percent of claimant's total disability was due to smoking, while fifty percent was attributed to coal dust exposure. *Id.* The district director denied benefits on October 17, 2007. R.E.B. Director's Exhibit 26. Claimant requested a hearing and the case was forwarded to the OALJ.

The administrative law judge considered Dr. Mavi's April 11, 2007 report and determined that claimant did not receive a complete pulmonary evaluation because Dr. Mavi failed to provide any rationale for his attribution of claimant's COPD to smoking, and not also to coal dust exposure. Order of Remand dated January 23, 2008 at 3. Southern Ohio Coal Company subsequently filed a motion for reconsideration, asserting that deposition testimony provided by Dr. Mavi cured the defect identified by the administrative law judge with respect to his written report. The administrative law judge, however, summarily denied employer's motion for reconsideration.

We agree with the Director that the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation because Dr. Mavi failed to provide a detailed explanation for his diagnosis of COPD due to smoking. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11. Contrary to the administrative law judge's finding, claimant received a complete pulmonary evaluation in this case as Dr. Mavi conducted all of the necessary testing and his written report addressed the requisite elements of entitlement.¹² *Id.* Thus, we vacate the administrative law judge's Order of Remand and his Order Denying Employer's Motion for Reconsideration, and remand this case to the administrative law judge for adjudication on the merits of claimant's entitlement to benefits.

V. Conclusion

We reject the employers' contention that the administrative law judge exceeded his authority pursuant to Section 725.456(e), by issuing his remand orders prior to the admission of all of the evidence at the formal hearing and without prior notice to the parties of his findings that the DOL-sponsored pulmonary evaluations were not complete in the five claims presented in these consolidated appeals. We further reject the employers' contention that liability for benefits must transfer to the Trust Fund in all claims where, after the claim is forwarded to the OALJ, it is determined that a miner did not receive a complete pulmonary evaluation. Based on our review of the administrative

¹² The Director also notes that "to the extent that the [administrative law judge] believed a more detailed explanation was necessary [as to whether claimant has a respiratory condition due to coal dust exposure], Dr. Mavi's deposition testimony provided one." Director's Response Brief at 11.

law judge's Orders of Remand in the individual claims, we affirm the administrative law judge's determination in *R.H. v. Consolidation Coal Co.*, BRB No. 08-0521 BLA, that the DOL-sponsored pulmonary evaluation was not complete. Furthermore, in *R.G.B. v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA and *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA, although the reasons provided by the administrative law judge for remanding these two cases are invalid under *Greene*, we agree with the Director that the DOL-sponsored pulmonary evaluations were not complete on all of the requisite elements of entitlement. Thus, we affirm the administrative law judge's Orders of Remand in *R.G.B.* and *R.G.* on the alternate ground that the claimants did not receive a complete pulmonary evaluation pursuant to *Greene*, and we remand those cases to the district director for further evidentiary development to satisfy the Director's statutory obligation to provide the claimants with a complete pulmonary evaluation. Finally, in accordance with *Greene*, we hold that the administrative law judge erred in finding that the claimants did not receive a complete pulmonary evaluation in *L.S. v. Central Ohio Coal Co.*, BRB No. 08-0463 BLA and *R.E.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA, and we remand *L.S.* and *R.E.B.* to the administrative law judge for adjudication on the merits of the claimants' entitlement to benefits.

Accordingly, we affirm the administrative law judge's Order of Remand in *R.H. v. Consolidation Coal Co.*, BRB No. 08-0521 BLA and we also affirm, on an alternate ground, the Orders of Remand in *R.G.B. v. Southern Ohio Coal Co.*, BRB No. 08-0491 BLA and *R.G. v. Southern Ohio Coal Co.*, BRB No. 08-0464 BLA and remand these three cases to the district director for further action consistent with this opinion. We vacate the administrative law judge's Orders of Remand in *L.S. v. Central Ohio Coal Co.*,

BRB No. 08-0463 BLA and *R.E.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA, and remand these two cases to the administrative law judge for adjudication on the merits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge