

# Chapter 4

## Limitations on Admission of Evidence for Purposes of Entitlement and Responsible Operator Designation

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The amended regulations at 20 C.F.R. Parts 718 and 725, which became effective on January 19, 2001, contain a number of changes limiting the admissibility of evidence. Limitations on the admission of medical evidence pertaining to entitlement significantly alter the adjudication and processing of the claims, and are found at 20 C.F.R. § 725.414 as well as 20 C.F.R. § 725.310 (for petitions for modification), and 20 C.F.R. § 725.309 (for subsequent claims). And, there are limitations on evidence that may be considered by the Administrative Law Judge regarding designation of the responsible operator. 20 C.F.R. § 725.456.

### **I. Limitation of documentary medical evidence**

#### **A. Limitations are mandatory**

##### **1. Cannot be waived by the parties**

In *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-69 (2004), the parties agreed to waive the evidentiary limitations at 20 C.F.R. § 725.414, and the Administrative Law Judge admitted proffered evidence without discussion. The Board held this constituted error as the provisions at 20 C.F.R. § 725.456(b)(1) mandate that the Administrative Law Judge find "good cause" prior to lifting the evidentiary restrictions at 20 C.F.R. § 725.414. See also *Phillips v. Westmoreland Coal Co.*, BRB No. 04-0379 BLA (Jan. 27, 2005) (unpub.).

##### **2. Failure to object to evidence irrelevant**

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), the Board held a failure to object to admission of evidence in excess of the limitations at 20 C.F.R. § 725.414 is irrelevant. Rather, such medical evidence in excess of the limitations must be excluded absent a finding of "good cause."

### **3. Parties must designate evidence; use of the evidence summary form**

By unpublished decision in *Saylor v. Mullins & Sons Coal Co.*, BRB No. 09-0727 BLA (June 30, 2010) (unpub.), a claim involving a petition for modification of the denial of a subsequent claim, the Administrative Law Judge "was not required to limit his consideration of evidence designated by claimant on the most recent evidence summary form only." To the contrary, an Administrative Law Judge is permitted to consider evidence that does not exceed the limitations, even if the evidence is not designated on a party's evidence summary form. The Board stated:

[T]he proper inquiry is whether the evidence considered by the administrative law judge falls within claimant's allowable evidence pursuant to the combined evidentiary limits of 20 C.F.R. § 725.414 and 20 C.F.R. § 725.310.

*Slip op.* at 5.

### **4. Substitution of evidence**

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), *vacated and remanded sub. nom. on other grounds*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), once Employer designated two medical reports in support of its affirmative case, the Administrative Law Judge did not abuse his discretion in refusing to permit Employer to withdraw one of the reports at the hearing for the purpose of substituting the report of another physician. The Administrative Law Judge "reasonably considered claimant's objection that he had relied on employer's prior designation of its two medical reports in developing his medical evidence." On the other hand, the Administrative Law Judge properly allowed Employer to substitute Dr. Wiot's reading of an October 2002 x-ray study for that of Dr. Bellotte. In a footnote, the Board stated, "Claimant (did) not argue that he uniquely relied on Dr. Bellotte's reading in developing his rebuttal of the October 2, 2002 x-ray." *See also Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246, 1-259 n. 18 (2006) (it was proper for the Administrative Law Judge to deny Employer's request to substitute a chest x-ray report more than one year after the hearing in the claim).

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4<sup>th</sup> Cir. 2006), *cert. denied* (Mar. 19, 2007), the Administrative Law Judge properly permitted Claimant to designate two medical reports (out of three reports filed) in support of his claim as permitted by 20 C.F.R. § 725.414. The court cited to the Board's decision in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) with approval.

## **5. Administrative Law Judge not required to retain excluded evidence**

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), *vacated and remanded sub. nom. on other grounds*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), the Board held an Administrative Law Judge is not required to "retain the large number of excluded exhibits in the record." Citing to 20 C.F.R. §§ 725.456(b)(1) and 725.464 as well as 29 C.F.R. §§ 18.47 and 18.52(a), the Board concluded the "procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence."

## **6. Special circumstances**

### **a. State claim evidence**

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), *vacated and remanded sub. nom. on other grounds*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at 20 C.F.R. § 725.414. In so holding, the Board noted such records (1) "do not fall within the exception for hospitalization or treatment records," and (2) "they are not covered by the exception for prior federal black lung claim evidence" at 20 C.F.R. § 725.309(d)(1).

### **b. Living miner's and survivor's claims**

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board determined, while miners' and survivors' claims may be consolidated for purposes of a hearing under 20 C.F.R. § 725.460, evidence must be specifically designated in each claim in compliance with the limitations at 20 C.F.R. § 725.414. In so holding, the Board agreed "with the Director's reasonable position . . . that the parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim." The only exception to this limitation is the admission of treatment or hospitalization records pertaining to the miner's pulmonary or respiratory disease. The Board stated these records are not limited under 20 C.F.R. § 724.414(a)(4), and may be considered in both claims. The Board also noted 20 C.F.R. § 725.456(b)(1) permits the admission of evidence in excess of the limitations for "good cause."

**c. Subsequent claim**

In *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.), the Board held, "when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record. See 20 C.F.R. § 725.309(d)."

Twenty C.F.R. § 725.309(d)(1) provides that evidence admitted in conjunction with prior claims is automatically admitted in a subsequent claim:

Any evidence submitted in connection with any prior claim shall be made part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

20 C.F.R. § 725.309(d)(1).

**d. Evidence generated by opposing, dismissed party**

By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006) (unpub.), if the District Director dismisses a responsible operator in a claim governed by the amended regulations, then any medical evidence submitted by the dismissed operator must be excluded, unless a party specifically designates the evidence as part of its case under 20 C.F.R. § 725.414 of the regulations.

**B. Evidence rulings must be made *prior to issuance* of decision on the merits**

In *L.P. v. Amherst Coal Co.*, 24 B.L.R. 1-55 (2008) (on recon. en banc), the Board noted "adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency." From this, the Board concluded:

Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude that consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under

Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

*Id.* at 1-63.

Similarly, in *C.S. v. Koch Carbon Raven Division VA*, BRB No. 08-0340 BLA (Feb. 27, 2009) (unpub.), the Board reiterated the Administrative Law Judge must render all evidentiary rulings prior to closing the record and issuing a decision. The Board reasoned, "Procedural due process requires that interested parties be notified of the evidence contained in the record and that they be afforded the opportunity to present objections to that evidence." See 20 C.F.R. § 725.456(a)(2). As a result, the Board vacated the Administrative Law Judge's *sua sponte* admission of Claimant's Exhibit 9 after the close of the hearing.

The records at Claimant's Exhibit 9 were originally offered by Claimant's counsel at the hearing, and then withdrawn when the exhibits could not be located in the record. In his decision, however, the Administrative Law Judge advised he had located the treatment records at issue, and he further found they had been exchanged between the parties. Thus, *sua sponte*, the Administrative Law Judge proceeded to admit the treatment records in his decision on the merits of the claim. The Board noted:

On remand, the administrative law judge has discretion, upon motion by claimant's counsel, to admit Claimant's Exhibit 9 into the record, if that evidence is properly identified and employer's counsel is afforded the opportunity to object to its admission in accordance with 20 C.F.R. § 725.456(a)(2).

*Slip op.* at 5-6.

**C. An original claim or a claim filed pursuant to  
20 C.F.R. § 725.309**

**1. In support of claimant's position**

The provisions at 20 C.F.R. § 725.414(a)(2) provide the following regarding the limitation on the submission of documentary medical evidence by the claimant:

(i) The claimant shall be entitled to submit, in support of his affirmative case, no more than two chest X-ray interpretations,

the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas results, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.

(ii) The claimant shall be entitled to submit, in rebuttal of this case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to § 725.406. In any case in which the party opposing entitlement has submitted the results of other testing pursuant to § 718.107, the claimant shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. § 725.414(a)(2)(i) and (ii).<sup>1</sup>

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<sup>1</sup> In *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151 (2006), the Board held, under 20 C.F.R. § 725.414, each party is entitled to submit one x-ray *interpretation* for each x-ray *interpretation* offered by the opposing party. Under the facts of the case, Claimant offered two *interpretations* of a single x-ray *study*. The Administrative Law Judge permitted one *rebuttal interpretation* of the study because 20 C.F.R. § 725.414(a)(3)(ii) provides Employer may "submit, in rebuttal of the case presented by the claimant, no more than one physician's *interpretation* of each chest X-ray . . . submitted by the claimant under paragraph (a)(2)(i) . . ." (emphasis added). Since Claimant submitted two interpretations of one study, the Administrative Law Judge looked to the plain language of the regulations, and concluded Employer was entitled to only one rebuttal interpretation of the study.

In vacating the Administrative Law Judge's decision, the Board adopted the Director's position on appeal and held, under the circumstances of the case and consistent

## 2. In support of responsible operator's or Trust Fund's position

The regulations at 20 C.F.R. § 725.414(a)(3)(i) and (ii) address the limitations on evidence submitted by the responsible operator, or by the Trust Fund:

(i) The responsible operator designated pursuant to § 725.410 shall be entitled to obtain and submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section. In obtaining such evidence, the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by § 725.406 of this part, whichever is greater, unless a trip of greater distance is authorized in writing by the District Director. If a miner unreasonably refuses-

(A) To provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or

(B) To submit to an evaluation or test requested by the District Director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. (See § 725.409 of this part).

(ii) The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy

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with the *intent* of the chest x-ray rebuttal provisions at 20 C.F.R. § 725.414(a)(3)(ii), Employer should be permitted to submit two rebuttal interpretations of the study. *See also Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 B.L.R. 2-430 (4<sup>th</sup> Cir. 2007).

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submitted by the claimant under paragraph (a)(2)(i) of this section and by the Director pursuant to § 725.406. In any case in which the claimant has submitted the results of other testing pursuant to § 718.107, the responsible operator shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the responsible operator, the responsible operator shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. § 725.414(a)(3)(i) and (ii).<sup>2</sup>

### **3. "Rebuttal" of x-ray study conducted as part of the 20 C.F.R. § 725.406 examination**

By unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006)(unpub.), the Board concluded Claimant should be allowed to submit a positive x-ray interpretation to "rebut" the positive x-ray interpretation provided in conjunction with the Department-sponsored pulmonary evaluation. In so holding, the Board rejected Employer's argument that admitting Claimant's positive re-reading

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<sup>2</sup> In *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151 (2006), the Board held, under 20 C.F.R. § 725.414, each party is entitled to submit one x-ray *interpretation* for each x-ray *interpretation* offered by the opposing party. Under the facts of the case, Claimant offered two *interpretations* of a single x-ray *study*. The Administrative Law Judge permitted one *rebuttal interpretation* of the study because 20 C.F.R. § 725.414(a)(3)(ii) provides Employer may "submit, in rebuttal of the case presented by the claimant, no more than one physician's *interpretation* of each chest X-ray . . . submitted by the claimant under paragraph (a)(2)(i) . . ." (emphasis added). Since Claimant submitted two interpretations of one study, the Administrative Law Judge reasoned the plain language of the regulations dictated that Employer was entitled to only one rebuttal interpretation of the study.

In vacating the Administrative Law Judge's decision, the Board adopted the Director's position on appeal and held, under the circumstances of the case and consistent with the *intent* of the chest x-ray rebuttal provisions at 20 C.F.R. § 725.414(a)(3)(ii), Employer should be permitted to submit two rebuttal interpretations of the study. See also *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 B.L.R. 2-430 (4<sup>th</sup> Cir. 2007).

of the x-ray study "would be to ignore the plain meaning of the word 'rebut,' which is to contradict or refute." As summarized by the Board, the Director argued:

. . . the language of the regulation does not limit a party to rebutting a particular item of evidence, rather, it permits a party to respond to a particular item of evidence in order to rebut '*the case presented by the party opposing entitlement.*' (citation omitted) [emphasis added].

The Board found the Director's interpretation, as summarized above, was reasonable and persuasive. The Board then held "rebuttal evidence submitted by a party pursuant to 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute 'the case' presented by the *opposing party.*" (emphasis added). Thus, while the Director proposed that rebuttal evidence must be responsive to "the case presented by the *party opposing entitlement,*" the Board held rebuttal evidence may be used to respond to "'the case' presented by the *opposing party.*" (emphasis added).

The Board reiterated this holding in a published decision. In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), with regard to the Department of Labor-sponsored pulmonary evaluation, the Board adopted the Director's position, reiterated its holding in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) (unpub.), and held both Claimant and Employer could submit "rebuttal" to the Department-generated x-ray interpretation which, in this case, was interpreted as positive. The Board determined it was proper for the Administrative Law Judge to allow Claimant to submit a positive interpretation of the same study as "rebuttal" to the opposing party's case. The Board concluded, with regard to the 20 C.F.R. § 725.406 examination, a party is permitted "to respond to a particular item of evidence in order to rebut 'the case' presented by the opposing party." In *dicta*, the Board also noted, if the Department-sponsored interpretation had been negative, Employer would have been allowed to submit another negative interpretation of the study to "rebut" Claimant's case.

*See also C.S. v. Koch Carbon Raven Division VA*, BRB No. 08-0340 BLA (Feb. 27, 2009)(unpub.) (the Board reiterated its holding in *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008); "[b]ecause the evidentiary regulations provide for only one rebuttal reading each by claimant and employer of the Department of Labor x-ray, we reject employer's assertion that the administrative law judge erred in not permitting employer to submit a reading in rebuttal of Dr. Alexander's

positive reading, which was submitted in rebuttal (to the Department-sponsored x-ray) by claimant”).

#### **4. Rebuttal of each case-in-chief x-ray interpretation permitted**

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), the Board reiterated earlier holdings that “each party may submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in support of its affirmative case, even if the two affirmative-case interpretations are of the same x-ray.” See also *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151 (2006).

#### **5. No operator, the Director, OWCP may exercise the rights of an operator**

In a footnote in *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), the Board cited to 20 C.F.R. § 725.414(a)(3)(iii) and noted, in cases where no responsible operator has been identified as potentially liable, the Director is entitled to exercise the rights of a responsible operator, *i.e.* the right to submit two medical opinions and two sets of objective testing, as affirmative evidence. However, if there is a designated operator, then the Director is not automatically entitled to exercise the rights of the responsible operator.

### **D. On modification**

#### **1. The regulation**

The revised language at 20 C.F.R. § 725.310(b) contains limitations on the submission of medical evidence on modification and provides, in part, as follows:

Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414.

20 C.F.R. § 725.310(b).

## **2. Parties allowed to "back-fill" slots**

In *Rose v. Buffalo Mining Co.*, 23 B.L.R. 1-221 (2007), the Board adopted the Director's position that evidentiary limitations at 20 C.F.R. § 725.310(b) "supplement," rather than "supplant," the limitations at 20 C.F.R. § 725.414. The Board reasoned:

[W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

*Id.* at 1-228.

## **3. Rebuttal provisions from 20 C.F.R. § 725.414 are incorporated into 20 C.F.R. § 725.310**

In *Cumberland River Coal Co. v. Caudill*, 2006 WL 3345416, Case No. 05-3680 (6<sup>th</sup> Cir. Nov. 17, 2006) (unpub.), the court held 20 C.F.R. § 725.310(b) limits each party's submission of initial evidence "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414" (emphasis in original). The court concluded, "The portions of § 725.414 that are specifically incorporated into modification proceedings by § 725.310(b) apply only to *rebuttal* evidence, . . . ." (emphasis in original).

## **E. Hospitalization and treatment records unaffected**

### **1. The regulation**

The regulations at 20 C.F.R. § 725.414(a)(4) provide, "[n]otwithstanding the limitations of paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. § 725.414(a)(4).

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), *vacated and remanded sub. nom. on other grounds*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), the Board held treatment records, containing multiple pulmonary function and blood gas studies exceeding the limitations at 20 C.F.R.

§ 725.414, are properly admitted. This is so regardless of whether the records are offered by a claimant, or an employer. However, the Board remanded the claim, and instructed the Administrative Law Judge to "analyze each set of records and made a specific finding as to its admissibility under § 725.414(a)(4)."

## **2. Treatment records**

### **a. Rebuttal of**

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), the Board held biopsy evidence generated in the course of a miner's hospitalization or treatment does "not count against the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. § 724.414(a)(2)(i) and (ii)." Additionally, Employer is not entitled to submit "rebuttal" of treatment or hospitalization records, including biopsies generated as part of treatment or hospitalization. On the other hand, the Board noted "a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence."

By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.), the Board held the provisions at 20 C.F.R. § 725.414 do not allow for the rebuttal of treatment records. As a result, the Board vacated the Administrative Law Judge's ruling that Employer could submit a rebuttal interpretation of a chest x-ray reading contained in the miner's treatment records.

### **b. "Affirmative" evidence allowed**

In *R.L. v. Consolidation Coal Co.*, BRB No. 07-0127 BLA (Oct. 31, 2007)(unpub.), the Board held it was error to exclude Employer's re-readings of certain CT-scans found in treatment records. Here, the Administrative Law Judge excluded Employer's proffer of the evidence on grounds that rebuttal of treatment records is not permitted under *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.). However, the Board adopted the Director's position, and concluded Employer's proffer did not constitute "rebuttal" of treatment records in contravention of *Henley*. Rather, as noted by the Director, Employer was entitled to submit the CT scan re-readings as its "affirmative" evidence. The Board reiterated that the regulations do not limit the number of separate CT-scans admitted into the record, but "a party can proffer only one reading of each separate scan." The Board also directed, with regard to consideration of the CT-scan evidence on remand, the Administrative Law Judge must "initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107."

**c. "Medical report" versus treatment record**

For a discussion of the distinction between a treatment record and a "medical report," see the discussion at page 4.17 of this chapter.

**F. "Other evidence" under 20 C.F.R. § 718.107**

**1. No quality standards, evidence of reliability under 20 C.F.R. § 718.107(b) required**

The category of "other evidence" under 20 C.F.R. § 718.107 includes CT-scans and digital x-rays for which there are no quality standards.<sup>3</sup> As a result, the party proffering a piece of "other evidence" must submit expert testimony (written or oral) that the study, test, or procedure is medically acceptable and relevant.

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Administrative Law Judge did not abuse his discretion in excluding CT-scan evidence proffered by Employer based on Employer's failure to demonstrate that the CT-scan was (1) medically acceptable, and (2) relevant to establishing or refuting Claimant's entitlement to benefits. In adopting the Director's position on this issue, the Board held, because CT-scans are not covered by specific quality standards under the

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<sup>3</sup> At the time of revision of this chapter, new quality standards for conducting and interpreting digital x-rays were issued. Specifically, on September 13, 2012, the U.S. Department of Health and Human Services (HHS) issued a final rule amending 42 C.F.R. Part 37 titled, "Specifications for Medical Examinations of Underground Coal Miners." As noted by HHS in its summary:

The revised standards modify the requirements to permit the use of film-based radiography systems and add a parallel set of standards permitting use of digital radiography systems.

Currently, interpretations of analog chest x-rays are weighed under 20 C.F.R. §§ 718.202(a)(1) (simple pneumoconiosis) and 718.304(a) (complicated pneumoconiosis), whereas digital x-ray interpretations are weighed as "other evidence" under 20 C.F.R. §§ 718.107, 718.202(a)(4), and 718.304(c). *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).

As the HHS correctly notes, the impact of its rulemaking is that "[t]he U.S. Department of Labor (DOL) will likely amend its Black Lung Benefits Act (BLBA) program regulations to correspond to this final rule." However, until the black lung regulations are amended, Administrative Law Judges may wish to consider continuing to weigh digital x-rays in accordance with the Board's guidance in *Webber* and *Harris*.

regulations, the proffering party bears the burden of demonstrating that a CT-scan is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." See 20 C.F.R. § 718.107(b). See also *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc); *R.L. v. Consolidation Coal Co.*, BRB No. 07-0127 BLA (Oct. 31, 2007)(unpub.) (in considering CT-scan evidence, the Administrative Law Judge must "initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107").

## **2. Limitations on admission of**

### **a. Limited to one case-in-chief report for each scan, study, or procedure**

In *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (*en banc on recon.*), the Board noted the amended regulatory provisions at 20 C.F.R. § 725.414 do not provide specific limitations to the admission of evidence under 20 C.F.R. § 718.107. Nevertheless, in *Webber*, the Board adopted the Director's position and held "the use of singular phrasing in 20 C.F.R. § 718.107" requires "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." The Board noted the Director argued as follows:

[L]imiting the affirmative evidence under 20 C.F.R. § 725.107 (sic) is consistent with the Secretary of Labor's goal of limiting evidence in order to avoid repetition, reduce the costs of litigation, focus attention on quality rather than quantity, and level the playing field between employers and claimants.

*Webber*, 23 B.L.R. at 1-134. As a result, the Administrative Law Judge was instructed on remand to require each party to select one CT-scan reading and one interpretation of each digital x-ray in support of its case-in-chief. Further, the proffering party must provide evidence to support a finding under 20 C.F.R. § 718.107(b) that the test or procedure is "medically acceptable and relevant to entitlement." See also *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc).

### **b. Rebuttal of case-in-chief report allowed**

By unpublished decision in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board addressed the

issue of admitting rebuttal to "other evidence" under 20 C.F.R. § 718.107. Citing to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (en banc), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (en banc), the Board held "the regulations do not limit the number of separate CT scans that may be admitted into the record; rather, the parties are limited only to one affirmative reading of each separate scan." Moreover, the Board noted that each party is entitled to "one rebuttal reading (of each CT-scan), as necessary to respond to the opposing party's affirmative reading."

By another unpublished decision, *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007) (unpub.), the Board issued instructive holdings regarding application of certain evidentiary limitation provisions at 20 C.F.R. § 725.414. Citing to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (en banc) (J. Boggs, concurring), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (en banc on recon.), the Board addressed the admissibility of multiple interpretations of a single CT-scan. Under the facts of the case, four readings of an April 2, 2001 CT-scan were proffered as evidence. The Administrative Law Judge admitted (1) one reading as a "treatment" record under 20 C.F.R. § 725.414(a)(4), (2) one reading offered by Claimant as his case-in-chief reading under 20 C.F.R. § 725.414(a)(2)(i), and (3) one reading offered by Employer as its rebuttal to Claimant's case-in-chief reading. The Administrative Law Judge then excluded a second reading of the CT-scan proffered by Employer on grounds that it exceeded the evidentiary limitations because rebuttal of a "treatment" record is not permitted.

While the Board concluded the Administrative Law Judge properly admitted three readings of the CT-scan, it was error to exclude the Employer's second reading. The Board held, "Contrary to the administrative law judge's ruling, . . . employer was entitled to submit, in addition to its rebuttal reading, one affirmative CT scan reading."

### **3. "Other evidence" in treatment records; criteria at 20 C.F.R. § 718.107(b) must be met**

In *B.S. v. Itmann Coal Co.*, BRB No. 08-0309 BLA (Jan. 29, 2009) (unpub.), the Board concluded, prior to considering digital x-rays as evidence of the presence or absence of pneumoconiosis, the Administrative Law Judge must determine whether "the proponent of the evidence has established that digital x-rays are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' as provided in 20 C.F.R. § 718.107(b)." From this, the Board held it was error for the Administrative Law Judge to "determine[] that because the digital x-ray readings in the treatment records were performed for diagnostic purposes, they are implicitly medically acceptable," while discrediting the digital x-ray

readings developed for purposes of litigation based on a party's failure to "satisfy the requirements of 20 C.F.R. § 718.107(b)." The Board reasoned:

. . . the relevant inquiry concerns the medical acceptability and relevance of digital x-ray technology as it pertains to the diagnosis of pneumoconiosis. It does not concern the identity of the reader or the purpose for which the digital x-ray reading was performed.

*Slip op.* at 6.

## **G. Medical reports under 20 C.F.R. § 725.414**

### **1. Defined in the regulation**

The regulations at 20 C.F.R. § 725.414(a)(1) provide the following definition of a "medical report":

For purposes of this section, a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section.

20 C.F.R. § 725.414(a)(1).

### **2. Separate physical examination by same physician, may be deemed two separate reports**

In *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), the Administrative Law Judge properly concluded Dr. Broudy's 2001 and 2002 physical examination reports constituted two separate medical reports for purposes of Employer's affirmative evidence under 20 C.F.R. § 725.414. The Board stated:

Where a physician's reports constitute two separate written assessments of the claimant's pulmonary condition at two different times, an administrative law judge may properly decline

to construe them as a single medical report under the evidentiary limitations.

*Id.* at 1-146 and 1-147. See also *Rice v. Bledsoe Coal Corp.*, BRB No. 09-0650 BLA (July 30, 2010)(unpub.) (the Administrative Law Judge properly held two reports from the same physician, who conducted two physical examinations of the miner over time, constituted Employer's two affirmative reports under 20 C.F.R. § 725.414).

### **3. Distinction between treatment note and medical report**

By unpublished decision in *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub.), the Board upheld the Administrative Law Judge's finding that Dr. Baker's October 2000 report was a "supplemental opinion, in that it simply expounds on Dr. Baker's May 29, 1997 examination and report, which was admitted as one of claimant's affirmative medical reports pursuant to 20 C.F.R. § 725.414(a)(2)(i)." However, the Board held it was error to consider a particular physician's letter as a "treatment" note under 20 C.F.R. § 725.414(a)(4):

Dr. Ducu's letter summarizes claimant's condition as it has developed since she began treating the miner in 1999, it contains her rationale for her diagnosis of black lung disease, and attempts to explain to the reader why she believes claimant is 100% totally and permanently disabled due to pneumoconiosis. As such, Dr. Ducu's letter constitutes a 'physician's written assessment of the miner's respiratory and pulmonary condition,' and not a simple record of the miner's 'medical treatment for a respiratory or pulmonary or related disease' as contemplated by 20 C.F.R. § 725.414(a)(4).

In another unpublished decision, *Presley v. Clinchfield Coal Co.*, BRB No. 06-0761 BLA (Apr. 30, 2007) (unpub.), the Board adopted the Director's position, and held a letter from the miner's treating physician, Dr. Robinette, constituted a "medical report" as defined at 20 C.F.R. § 725.414(a)(1) as opposed to a "treatment" record. The Director observed that Dr. Robinette's letter was provided to the miner's counsel in anticipation of litigation, and it contained a "written assessment of claimant's respiratory condition based on a review of his treatment records and test results" such that it was subject to the evidentiary limitations at 20 C.F.R.

§ 725.414(a)(2)(i) of the regulations. In agreeing the letter was a "medical report" under the regulations, the Board found:

In his January 10, 2005 letter to claimant's attorney, Dr. Robinette stated that he had been claimant's treating physician for several years, and reported claimant's symptoms, the medications he was taking, and the results from a chest x-ray and CAT scan. (citation omitted). Dr. Robinette concluded that the claimant is disabled from his usual coal mine employment, and has complicated coal workers' pneumoconiosis based on his chest x-ray abnormalities and CAT scan findings.

The Board concluded the tenor and structure of Dr. Robinette's letter resulted in its classification as a "medical report" subject to the evidentiary limitations. By the same token, the Board concluded the letter was not a "treatment note," the admission of which would not have been limited under the amended regulations.

#### **4. Expert's consideration of inadmissible evidence, consequences of**

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board emphasized a medical opinion must be based on evidence that is "properly admitted" in a claim. If a report is based on evidence not admitted in the claim, then the Administrative Law Judge must "address the impact of Section 725.414(a)(2)(i), (a)(3)(i)." The Board noted the Administrative Law Judge has options for handling a report based, in part or in whole, on evidence not admitted in the claim such as (1) excluding the report, (2) redacting the objectionable content, (3) asking the physician to submit a new report, or (4) "factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled." The Board specifically stated, however, that "exclusion is not a favored option, because it may result in the loss of probative evidence developed in compliance with the evidentiary limitations."

In *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), a case arising in the Seventh Circuit, the Board held a physician's medical opinion must be based on evidence admitted into the record in accordance with 20 C.F.R. § 725.414. In this vein, the Board concluded the Seventh Circuit's decision in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7<sup>th</sup> Cir. 1999), was not applicable to a claim filed under the amended regulations. In *Durbin*, the Seventh Circuit held a medical opinion could be fully credited even if the physician refers to

evidence that is not in the record. Because *Durbin* was decided prior to promulgation of the amended regulations, the Board concluded it was not controlling. Rather, the Board stated, "Within this new regulatory framework, requiring an administrative law judge to fully credit an expert opinion based upon inadmissible evidence could allow the parties to evade both the letter and the spirit of the new regulations by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."

Importantly, the Board held "an administrative law judge is granted broad discretion in resolving procedural issues, particularly where the statute and the regulations do not provide explicit guidance as to the sanction that should result when the requirements of a regulation are not satisfied." Consequently, the Board stated "a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion."

The Board noted, when an Administrative Law Judge is confronted with a medical expert who considers evidence not admitted into the formal record, then he or she may (1) exclude the report, (2) redact the objectionable content, (3) ask the physician to submit a revised report, or (4) consider the physician's reliance on inadmissible evidence in deciding the probative value to accord their opinions. In *Harris*, the Administrative Law Judge "appropriately indicated that exclusion is not a favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations."

The Board affirmed these holdings on reconsideration in *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc). The Board reiterated it would not apply the Seventh Circuit's holding in *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7<sup>th</sup> Cir. 1999) to a claim filed after January 19, 2001. The Board reasoned, "Requiring an administrative law judge to fully credit an expert opinion based on inadmissible evidence could allow the parties to evade the limitations set forth in the new regulations (at 20 C.F.R. § 725.414), by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."

## **H. Autopsy and biopsy reports**

### **1. Report of autopsy, defined**

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board adopted the Director's position that "a report by a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the Section 718.106 quality standards and . . . can constitute a report of an autopsy for the purposes of Section 725.414(a)(2)(i) and (a)(3)(i)." In adopting the position of the Director, the Board stated, "[S]ince only claimant is likely to produce an autopsy prosector's report, this interpretation of the regulations is the most practical approach to satisfying the inclusive nature of Section 725.414(a)(2)(i), (a)(3)(i), which allows for both parties to submit an affirmative report of an autopsy."

### **2. Rebuttal of report of autopsy**

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board adopted the position of the Director, and held "rebuttal" of a report of autopsy must be limited to consideration of the pathological evidence (autopsy report and slides). The "rebuttal" opinion cannot take into consideration clinical evidence beyond the prosector's report and tissue slides, such as medical opinions and CT-scan interpretations.

Notably, in defining "rebuttal" evidence, the Board cited to the Department's comments to the regulations at 65 Fed. Reg. 79990 (Dec. 20, 2000) providing the "regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive." In this vein, the Board held any portion of Dr. Bush's "rebuttal" autopsy opinion, which is based on "materials beyond the scope of Dr. Plata's autopsy," should be redacted. Thus, on remand, the Board directed that the Administrative Law Judge review the "rebuttal opinion and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant."

### **3. Report of biopsy, defined**

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), where Employer offered the opinion of Dr. Bush under 20 C.F.R. § 725.414(a)(3)(i) as a "biopsy" report, the Administrative Law Judge properly admitted the report only to the extent that Dr. Bush did not refer to inadmissible evidence, and the report was considered only to the

extent it offered "an assessment of claimant's biopsy tissue for the existence of pneumoconiosis." The report could not be considered a "medical report" under 20 C.F.R. § 725.414(a)(1) because Employer designated the reports of two other physicians under this category. As a result, Dr. Bush's opinion on disability causation was inadmissible.

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), the Board held that biopsy evidence generated in the course of a miner's hospitalization or treatment does "not count against the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. § 724.414(a)(2)(i) and (ii)." Additionally, Employer is not entitled to submit "rebuttal" of treatment or hospitalization records, including biopsies generated as part of treatment or hospitalization. On the other hand, the Board held "a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence."

In addition, the Board adopted the Director's position, and extended its holdings pertaining to autopsy evidence in *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc) to biopsy evidence; *to wit*, "a biopsy slide review can be in substantial compliance with 20 C.F.R. § 718.106 even if it does not include a gross macroscopic description of the tissue samples."

## **I. "Good cause" standard for admitting evidence over limitations**

The provisions at 20 C.F.R. § 725.456 state, "Medical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. § 725.456(b)(1).

### **1. The regulatory amendments**

#### **a. Introduction**

Two central features of the Department of Labor's amended black lung regulations<sup>4</sup> are that cases referred to the Administrative Law Judge for hearing will (1) have one named responsible operator<sup>5</sup>, and (2) be subject to

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<sup>4</sup> After three years of rule-making, the amended regulations were finally promulgated on December 20, 2000, and became effective on January 19, 2001. 20 C.F.R. Parts 718, 725, and 726.

<sup>5</sup> 20 C.F.R. § 725.418(d). Evidence related to identification of the responsible operator, which was not presented to the District Director, may be admitted by the Administrative Law Judge only on demonstrating "extraordinary circumstances." 20 C.F.R.

limits on the submission of evidence.<sup>6</sup> The only exception allowing a party to exceed the evidentiary limitation is when "good cause" is demonstrated.<sup>7</sup> Unfortunately, there is no regulatory guidance in applying this critical standard.

In a law review article<sup>8</sup> addressing the amendments, the critical role of Administrative Law Judges in implementing the new regulations was emphasized:

The Department's rules will not be self-executing. Their ultimate content will be a function of how ALJs interpret and apply them, and how courts carry out the function of review. ALJs and federal judges thus will be crucial determinants of whether the Department realizes the goal of greater equity in the claims process.

The impact of the ALJs will be enormous. One question is whether ALJs who are accustomed to the content and operation of the old rules will have difficulty assessing black lung claims through the prism of the new.

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§ 725.456(b)(1). In its comments to the regulations, the Department provides an example of "extraordinary circumstances" as presenting a previously unidentified witness whose testimony is relevant to the issue of operator liability when the witness originally identified by the party is no longer available to testify. 65 Fed. Reg. 80,001 (2000).

<sup>6</sup> 20 C.F.R. § 725.414. Physicians rendering medical opinions may not consider evidence not admitted in the record. 20 C.F.R. §§ 725.457(d) and 725.458; *National Mining Ass'n. v. Chao*, 292 F.3d 849, 873-74 (D.C. Cir. 2002). In its comments, the Department states, "Because the Department has now limited the amount of documentary medical evidence in the record, it cannot allow the parties to avoid that limitation by presenting an expert witness who will be free to examine additional material that may not be admitted into the record." 65 Fed. Reg. 80,001 (Dec. 20, 2000).

<sup>7</sup> The provisions at 20 C.F.R. § 725.456(b)(1) provide, in part, "[m]edical evidence in excess of the limitations contained in 20 C.F.R. § 725.414 shall not be admitted into the hearing record in the absence of good cause." See also 20 C.F.R. §§ 725.414(a)(1)(i) and 725.414(a)(3)(i). Also, the parties may not agree to waive the evidentiary limitations. Rather, the regulation at 20 C.F.R. § 725.414 provides the evidentiary limitations may be exceeded only if the Administrative Law Judge determines that "good cause" is established. Compare the regulatory language at 20 C.F.R. § 725.456(b)(3), which allows documentary evidence not exchanged at least 20 days prior to the hearing, to be admitted on finding "good cause," or on "the written consent of the parties or on the record at the hearing."

<sup>8</sup> Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 Admin. Law 1025, 1117 (Summer 2002).

**b. National Mining Association**

Employers and carriers lost their challenge to the validity of regulations limiting the submission of medical evidence in *National Mining Ass'n. v. Chao*.<sup>9</sup> The circuit court concluded:

[R]ecord evidence . . . indicates that the new evidentiary limits are not at all 'artificial,' but - as the Secretary explained - will enable ALJs to focus their attention 'on the quality of the medical evidence in the record before [them].' 64 Fed. Reg. at 54,994. The record also makes clear the need for evidence limitations; in their absence, lawyers often waste ALJs' time and resources with excessive evidence - in one case, a mine operator's lawyer submitted eighty-nine separate X-ray re-readings from fourteen different experts. (citation omitted). At oral argument, moreover, NMA conceded that ALJs have always had discretion to exclude evidence in precisely the manner outlined by the new evidence-limiting rules; it would be strange indeed to conclude that the Secretary acted arbitrarily and capriciously by codifying evidentiary limits that ALJs have always had the discretion to impose.

Thus, as noted by the circuit court, the limitations on evidence are not "arbitrary and capricious"; rather, the limitations will enable the parties and adjudicators to focus on the quality of the evidence submitted.

**c. "Good cause" and *Shedlock***

Because the "good cause" standard at 20 C.F.R § 725.414 to exceed the evidentiary limitations continues to be relatively untested, a review of "good cause" standards that have developed in other areas of the law, such as failure to timely controvert a claim,<sup>10</sup> failure to comply with the 20-day rule,<sup>11</sup> and reopening the record on remand,<sup>12</sup> may assist in developing a workable standard to apply under 20 C.F.R. § 725.414. It is noted, however, the Board's interpretation of "good cause" to allow documentary evidence not exchanged in compliance with the 20-day rule at 20 C.F.R

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<sup>9</sup> 292 F.3d at 873-74.

<sup>10</sup> *Krizner v. U.S. Steel Mining Co.*, 17 B.L.R. 1-31 (1992)(en banc).

<sup>11</sup> 20 C.F.R. § 725.456(b)(3).

<sup>12</sup> *Borgeson v. Kaiser Steel Coal Co.*, 12 B.L.R. 1-169 (1989)(en banc).

§ 725.456 is more lenient than the standard it has developed to allow evidence in excess of the evidentiary standards at 20 C.F.R. § 725.414 (as discussed *infra*). As an example of the lenient standard applied in conjunction with the 20-day rule, in *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc), Claimant submitted an x-ray reading that was exchanged timely under 20 C.F.R. § 725.456 by "only a few days" and, therefore, the Administrative Law Judge properly found "fairness" required the post-hearing admission of x-ray reports by the opposing parties. The Board held the Administrative Law Judge implicitly found "good cause" existed to admit the evidence.

A lenient interpretation of "good cause" was first applied in *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986), *aff'd. on recon.*, 9 B.L.R. 1-236 (1987)(en banc), one of the most often-cited Board decisions on the "good cause" standard. Under the facts of *Shedlock*, a case involving application of the 20-day rule, the Board noted:

[C]laimant's submission of Dr. Mastrine's report just prior to the deadline imposed by the 20-day rule for submitting documentary evidence into the record, coupled with the administrative law judge's refusal to allow employer the opportunity to respond to claimant's introduction of this 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing. On remand, the administrative law judge is, therefore, instructed to admit Dr. McQuillan's report into evidence and to weigh this report along with the other relevant evidence at Section 718.204(c), and in the event the issue of rebuttal is reached, at Section 718.305(d). In so holding, we note that claimant will not suffer unfair prejudice from the admission of Dr. McQuillan's report because Dr. Mastrine's report is contemporaneous in time with that of Dr. McQuillan's report.<sup>13</sup>

As a result, under the facts of *Shedlock*, "good cause" was established for submission of evidence less than 20 days prior to the hearing where (1) one party submitted "surprise" evidence on the eve of the 20-day deadline,<sup>14</sup> and (2) the opposing party submitted a "contemporaneously" generated report less than 20 days prior to the hearing in response.

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<sup>13</sup> *Id.* at 1-200.

<sup>14</sup> In *White v. Douglas Van Dyke Coal Co.*, 6 B.L.R. 1-905, 1-907 and 1-908 (1984), the Board held the fact that Claimant would not be "surprised" by the contents of an affidavit does not satisfy the "good cause" standard so as to excuse Employer from exchanging the affidavit in compliance with the 20-day rule.

In *Bethlehem Mines Corp. v. Henderson*,<sup>15</sup> the Fourth Circuit expressed its concern with the lenient "due process aspect" of the Board's *Shedlock* decision:

That decision appears to hold that whenever a claimant submits evidence just prior to the twenty-day deadline, such evidence constitutes a 'surprise' to which the employer must be permitted to respond, even though the evidence was timely and the deadline for submissions has passed. (citations omitted). At the same time, however, we agree that under certain narrow circumstances not present here, due process considerations may override the twenty-day rule. (citation omitted). Broadly construed, however, *Shedlock* would eviscerate the twenty-day rule. The Board itself may have recognized this problem by suggesting in its opinion in this case that *Shedlock* did not set forth a specific holding regarding 20 C.F.R. § 725.456(b)(2), but simply propounded a decision based on the particular facts of that case. (citation omitted).

Under the facts of *Henderson*, Claimant submitted two medical reports more than 20 days prior to the hearing. Employer sought a continuance, and requested that Claimant be examined by a physician of its choice. In the alternative, Employer requested post-hearing examinations of Claimant as well as post-hearing depositions of the physicians. The Administrative Law Judge denied Employer's requests. At the hearing, Employer offered two letters from Dr. Zaldivar (both of which had been exchanged in compliance with the 20-day rule), and it offered two additional exhibits, which had not been timely exchanged. Citing to *Shedlock*, the Administrative Law Judge admitted the untimely evidence, and allowed Claimant an opportunity to submit rebuttal evidence.

The Fourth Circuit stated it would not have applied *Shedlock* to admit Employer's untimely evidence.<sup>16</sup> The court held, "Absent the parties' consent or a showing of good cause, the tardy submissions (by the

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<sup>15</sup> *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 147 n. 2 (4<sup>th</sup> Cir. 1991).

<sup>16</sup> The Administrative Law Judge awarded benefits to Claimant, but Employer filed appeals with the Board and Fourth Circuit, and argued its due process rights were violated because the Administrative Law Judge did not permit Employer an opportunity to further examine Claimant.

employer) should have been excluded pursuant to the second sentence of § 725.456(b)(2)."<sup>17</sup> The court reasoned as follows:

An obvious purpose of the twenty-day rule is to prevent unfair surprise. Rigidly enforced without exception, however, the twenty-day rule itself would invite abuse by encouraging parties to withhold evidence until just before the deadline. Yet we caution that neither the APA nor considerations of due process should be understood as providing a license for a dilatory party to delay preparation and timely submission of its affirmative case. The APA makes clear that a party is only entitled to such rebuttal 'as may be required for a full and true disclosure of the facts.' Similarly, in *North American Coal*<sup>18</sup> the Third Circuit explained that due process 'requires an opportunity for rebuttal *where it is necessary to the full presentation of a case.*' 870 F.2d at 952 (emphasis added). Put differently, submissions timely under the twenty-day rule should not, in the vast majority of cases, give rise to claims of unfair surprise and requests for further discovery, testimony, and time to respond. In this respect, the Third Circuit noted that under the APA, the ALJ is always free to exclude irrelevant, immaterial or unduly repetitious evidence. See 870 F.2d at 952; 5 U.S.C. § 556(d).

The court concluded Employer's due process rights were satisfied, and "[r]ebuttal by means of post-hearing depositions of physicians who already submitted medical reports was not necessary to the full presentation of Bethlehem's case."<sup>19</sup> The court further noted, "Any disadvantage Bethlehem faced at the time of the hearing was at best a self-inflicted wound."<sup>20</sup>

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<sup>17</sup> The second sentence states, "Subject to the limitations in paragraph (b)(1) of this section, any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before the hearing is held in connection with the claim." 20 C.F.R. § 725.456(b)(2).

<sup>18</sup> *North American Coal Co. v. Miller*, 870 F.2d 948 (3d Cir. 1989). In this case, the Claimant's physician's report was sent 20 days prior to the hearing, which deprived Employer of the opportunity to submit rebuttal in compliance with the 20-day rule. The court held it was incumbent on the Administrative Law Judge to permit Employer the opportunity to submit a post-hearing rebuttal opinion, and to cross-examine Claimant's physician. The court further determined that permitting rebuttal evidence would not result in the "specter of a never ending series of rebuttals" because, pursuant to 5 U.S.C. § 556(d), the Administrative Law Judge may exclude "irrelevant, immaterial or unduly repetitious evidence."

<sup>19</sup> *Henderson*, 939 F.2d at 149.

<sup>20</sup> *Id.* at 147.

The court stated that Employer had six years from the date of Claimant's first examination to have him re-examined, and "a prudent employer would have taken timely steps to arrange a new examination, rather than gamble that Henderson would not develop any evidence."<sup>21</sup> Moreover, the court held Employer would not have been denied a fair hearing if the Administrative Law Judge had refused to permit it to conduct post-hearing depositions of its physicians "whose opinions (were) the subject of the employer's untimely evidence."<sup>22</sup>

To give proper effect to the purpose of the amended regulations, allowing parties to exceed the evidentiary limitations should be a last resort. Moreover, there is no regulatory authority for the parties to agree that the restrictions at 20 C.F.R § 725.414 be lifted. In cases involving a responsible operator, up to five complete pulmonary evaluations may be admitted<sup>23</sup> as well as rebuttal and rehabilitative evidence with regard to each objective test result. This structured presentation of the evidence gives both parties to a claim the opportunity to fully present their evidence and challenge an opponent's evidence to establish a "true disclosure of the facts." Administrative Law Judges are empowered to exclude irrelevant, immaterial, and unduly repetitious evidence. The evidentiary limitations at 20 C.F.R § 725.414 will serve this function, and reduce the need to weigh excessive evidence, which may be duplicitous and of variable quality.

**d. Applying "good cause" under  
20 C.F.R. § 725.456(b)(1), an overview**

In its comments to the amended regulations, the Department "suggests" that "the progressive nature of the disease might justify an Administrative Law Judge's finding of good cause to admit documentary medical evidence in excess of the 20 C.F.R § 725.414 limitations when both parties had fully developed their evidence prior to the hearing but the hearing had to be rescheduled due to weather conditions."<sup>24</sup> However, the Department cautioned the following:

The example provided by the Department (to demonstrate good cause) was not intended to provide an automatic right to submit

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<sup>21</sup> *Id.* at 147.

<sup>22</sup> *Id.* at 148.

<sup>23</sup> If the case involves only the Director, OWCP, then a total of four pulmonary evaluations may be submitted.

<sup>24</sup> 65 Fed. Reg. 79,993 (2000).

documentary medical evidence in excess of the limitations in any particular case.<sup>25</sup>

On the other hand, the Department rejected an argument that "a claim of bare 'regression' should entitle a coal mine operator to exceed the 20 C.F.R § 725.414 evidentiary limitations."<sup>26</sup> The Department further commented:

. . . fully expects that administrative law judges will be able to fashion a remedy in all cases that both permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim, and retains the principle inherent in these regulations that the fairest adjudication of a claimant's entitlement will occur when the fact-finder's attention is focused on the quality of the medical evidence submitted by the parties rather than on its quantity.<sup>27</sup>

- "Good cause" not established in other contexts, examples of

After a review of cases addressing "good cause" in other areas of black lung law, it is proposed that some examples where "good cause" to exceed the evidentiary limitations would not be demonstrated are:<sup>28</sup>

- evidence sought to be admitted is cumulative,

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<sup>25</sup> 65 Fed. Reg. 79,993 (2000). In *White v. Director, OWCP*, 7 B.L.R. 1-348, 1-351 (1981), the Board held "good cause" to reopen the record on remand was not established based on evidence, which Claimant argued demonstrated his "worsening condition." The Board noted the Administrative Law Judge was not bound to accept the evidence. However, the Board also noted Claimant could submit the evidence on modification before the District Director.

<sup>26</sup> 65 Fed. Reg. 79, 993 (2000).

<sup>27</sup> *Id.*

<sup>28</sup> Some other examples of a failure to demonstrate "good cause" for submitting untimely evidence included attempts to submit evidence, which was available but not timely submitted, and a delay in obtaining readily available evidence. *Carroll*, 619 F.2d at 1162 ("if a consideration of newly submitted evidence would not result in a reasonable chance that the Secretary would reach a different conclusion, good cause for a remand has not been shown"; evidence which party sought to submit was not "new"); *Newland v. Consolidated Coal Co.*, 6 B.L.R. 1-1286 (1984); *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984) (the Administrative Law Judge properly denied Employer's request for continuance to obtain autopsy slides for review where Employer had access to the slides for one year, but failed to secure them).

- immaterial, or unduly repetitious<sup>29</sup>;
  - the proponent of the evidence argues only that it is relevant<sup>30</sup>;
  - the evidence sought to be admitted is "vague and unreliable"<sup>31</sup>;
  - the party offering the evidence merely argues that it is offered for a "true disclosure of the facts" or is "necessary for a full presentation" of its case.<sup>32</sup>
- "Good cause" established in other contexts, examples of

Again, looking at other contexts in black lung litigation where the "good cause" standard has been explored, some examples where "good cause" was demonstrated are<sup>33</sup>:

- evidence is needed to address a change in legal standards since submission of prior evidence<sup>34</sup>;
- a party failed to cooperate during discovery, which compromised the opponent's ability to present expert evidence.<sup>35</sup>

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<sup>29</sup> *Henderson*, 939 F.2d at 149; *Carroll v. Califano*, 619 F.2d 1157 (6<sup>th</sup> Cir. 1980) (black lung decision under 20 C.F.R. § 410.490; "where the issue in question has already been fully considered, further evidence on that point is merely cumulative").

<sup>30</sup> *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984) ("good cause" for submitting evidence less than 20 days prior to the hearing is not established by mere reference to the relevancy of the evidence).

<sup>31</sup> *Borgeson v. Kaiser Steel Coal Co.*, 12 B.L.R. 1-169 (1989)(en banc) ("good cause" to reopen the record was not established where the Administrative Law Judge found the proffered evidence was "vague and unreliable").

<sup>32</sup> *Henderson*, 939 F.2d at 147-149.

<sup>33</sup> The evidentiary limitations would not apply to evidence which is submitted for impeachment purposes. See *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991) ("good cause" may be found to admit tape recording exchanged less than 20 days prior to the hearing, where Claimant argued that the recording was of his conversation with a physician who stated that Claimant had "black lung," contrary to the diagnosis contained in the physician's written report); *Middlecreek Coal Co. v. Director, OWCP*, 91 F.3d 132 (4<sup>th</sup> Cir. 1996) (criminal conviction of a physician may be considered in determining the probative value of the physician's opinion).

<sup>34</sup> *Henderson*, 939 F.2d at 149 n. 3; *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048-49 (6<sup>th</sup> Cir. 1990) (evidence submitted under an old standard was of little relevance, but under the new standard it became outcome determinative).

<sup>35</sup> *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983) (it was an abuse of discretion for the Administrative Law Judge to refuse a post-hearing deposition by Employer, where the

**e. "Good cause" under  
20 C.F.R. §§ 725.414 and 725.456(b)(1)**

- The burden for demonstrating "good cause"

By unpublished decision in *Owen v. Midwest Coal Co.*, BRB No. 09-0326 BLA (Jan. 28, 2010) (unpub.), Employer did not demonstrate "good cause" to exceed the evidentiary limitations at 20 C.F.R. § 725.414. Adopting the Director's position, the Board stated "employer must make a particularized showing that the evidence submitted in compliance with the evidence-limiting rules was insufficient for determining entitlement to benefits." As Employer failed to meet this standard, the Administrative Law Judge did not "abuse her discretion" in excluding the excess evidence.

- Waiver of challenge to the Administrative Law Judge's ruling

In *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), it was improper for the Administrative Law Judge to strike all of a party's evidence in a category on grounds that it exceeded the limitations at 20 C.F.R. § 725.414. The Board stated:

Although Section 725.456(b)(1) provides that medical evidence in excess of the limitations contained in Section 725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. § 725.414.

In its appeal brief, Employer argued the excess evidence should be admitted on grounds of "good cause." However, the Board agreed with the Administrative Law Judge in finding Employer

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Administrative Law Judge commented on additional evidence that was unknown prior to the hearing because Claimant failed to fully answer interrogatories).

waived this argument when it did not argue "good cause" at the time it sought admission of the excess evidence at the hearing.

- Evidence is "relevant"; no good cause

By unpublished decision in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board upheld an Administrative Law Judge's exclusion of x-ray interpretations offered by Employer, which exceeded the evidentiary limitations. The Board also upheld the Administrative Law Judge's redaction of a physician's opinion, which referenced the inadmissible x-ray interpretations. The Board determined "good cause" to exceed the evidentiary limitations was not established based on Employer's assertion that the "excess films are relevant" to the issue of whether Claimant suffered from complicated pneumoconiosis. Moreover, the fact that the physician "specifically requested to review additional x-rays in order to provide a reasoned opinion as to the presence or absence of complicated pneumoconiosis" did not compel a finding of "good cause." In this vein, the Board held the Administrative Law Judge "fashioned a permissible remedy for (the physician's) review of inadmissible evidence . . . by determining to redact only those portions of (the physician's) opinion that relied on the excluded x-ray readings." See also *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.).

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), *vacated and remanded sub. nom. on other grounds*, 523 F.3d 257 (4<sup>th</sup> Cir. 2008), the Board held "good cause" was not established solely on grounds that "the excess evidence was relevant." Specifically, Employer "did not explain why the admitted evidence of record was insufficient to distinguish IPS from coal workers' pneumoconiosis, or indicate how (additional medical evidence) would assist the physicians."

- Evidence generated by opposing party; no good cause

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (2008), the Board declined to find "good cause" for Claimant to submit a positive x-ray interpretation obtained by Employer based on Claimant's argument that the "x-ray interpretation was generated by employer and the result was against employer's interest."

- Evidence is "probative"; no good cause

In *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.), Employer failed to demonstrate "good cause" for exceeding the evidentiary limitations at 20 C.F.R. § 725.414. As an initial matter, the Board rejected application of the Fourth Circuit's decision in *Underwood v. Elkay Mining*, 105 F.3d 946 (4<sup>th</sup> Cir. 1997) on grounds that (1) *Teague* arose in the Sixth Circuit, and (2) *Underwood* was decided under the pre-amendment regulations, which did not include the evidentiary limitations at 20 C.F.R. § 725.414. The Board concluded Employer failed to carry its burden to demonstrate "good cause" in support of admitting evidence in excess of the 20 C.F.R. § 725.414 limitations. In this vein, the Board held Employer's arguments that the excess evidence was (1) developed in conjunction with the state workers' compensation claim, (2) relevant and probative, and (3) equally available to the parties, were not sufficient to establish "good cause." In rejecting Employer's arguments, the Board cited to the published comments underlying the amended regulations that the purpose of 20 C.F.R. § 725.414 "was to enable administrative law judges to focus on the quality, rather than the quantity, of evidence."

- Evidence "equally available to both parties"; no good cause

See *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.).

- Evidence developed with state worker's compensation claim; no good cause

See *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.).

#### **J. Referral of claim by District Director; not required to include all medical evidence**

Former proposed regulatory amendments at 20 C.F.R. § 725.414(a)(6) required that the District Director transmit all medical evidence submitted in the claim. The final rules, however, dispense with this requirement, and

permit the District Director to exclude certain medical evidence from referral to the Office. In its comments, the Department states the following:

[T]he Department has deleted subsection (a)(6) (of § 725.414). As proposed, subsection (a)(6) would have required the District Director to admit into the record all of the evidence submitted while the case was pending before him. As revised, however, the regulation may require the exclusion of some evidence submitted to the District Director. In the more than 90 percent of operator cases in which there is no substantial dispute over the identity of the responsible operator, most of the evidence available to the District Director will be the medical and liability evidence submitted pursuant to the schedule for the submission of additional evidence, § 725.410. In the remaining cases, however, the District Director may alter his designation of the responsible operator after reviewing the liability evidence submitted by the previously designated responsible operator.

. . .

At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the District Director will not be able to determine which medical evidence belongs in the records until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(b)(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations. Accordingly, the Department has deleted the requirement in § 725.414(a)(6) that the District Director admit into the record all of the medical evidence that the parties submit.

65 Fed. Reg. 79,990-991 (Dec. 20, 2000).

## **II. Responsible operator designation**

### **A. Limitations on testimony**

The regulations restrict any testimony related to the designation of the responsible operator, and provide as follows:

In accordance with the schedule issued by the District Director, all parties shall notify the District Director of the name and current address of any potential witness whose testimony

pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. § 725.414(c). Moreover, subsection (d) states the following:

Except to the extent permitted by 20 C.F.R §§ 725.456 and 725.310(b), the limitations set forth in this section shall apply to all proceedings conducted with respect to a claim, and no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the District Director in accordance with this section.

20 C.F.R. § 725.414(d).

**B. Evidence related to responsible operator excluded absent "extraordinary circumstances"**

**1. The regulation**

Twenty C.F.R § 725.456(b)(1) provides, "Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the District Director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. § 725.456(b)(1). For example, in its comments, the Department "intends that a party will have shown extraordinary circumstances to present the testimony of a previously unidentified witness whose testimony is relevant to the issue of operator liability when the witness originally identified by the party is no longer available to testify." 65 Fed. Reg. 80,001 (Dec. 20, 2000). See 20 C.F.R. § 725.456(c)(1).

**2. Case law interpreting "extraordinary circumstances"**

**a. Medical records cannot be offered absent showing of "extraordinary circumstances"**

In *Weis v. Marfork Coal Co.*, 23 B.L.R. 1-182 (2006) (en banc) (J. McGranery and J. Boggs, dissenting), it was undisputed that Claimant

suffered from complicated pneumoconiosis, and was entitled to benefits under the Act. Employer, however, challenged its designation as the operator responsible by submitting x-ray evidence demonstrating that Claimant suffered from complicated pneumoconiosis prior to the time of his employment with Employer.

A majority of the Board agreed with the Administrative Law Judge's finding that Employer waived its right to contest liability by not doing so in a timely fashion before the District Director as required at 20 C.F.R. § 725.412(a)(2). Moreover, the Board upheld exclusion of the x-ray evidence at the formal hearing. Here, the Board agreed with the Administrative Law Judge's finding that Employer failed to demonstrate "extraordinary circumstances" pursuant to 20 C.F.R. § 725.456(b)(1), which provides, "Documentary evidence pertaining to the liability of a potentially liable operator . . . which was not submitted to the District Director shall not be admitted into the hearing record in the absence of extraordinary circumstances."

Citing to this regulation, and the Department's comments underlying its promulgation, a majority of the Board held 20 C.F.R. § 725.456(b)(1) applies to the x-ray evidence offered by Employer to the Administrative Law Judge. The majority found the comments to the regulation, at 65 Fed. Reg. 79,999 to 80,000 (Dec. 20, 2000), do not "explicitly address the submission of 'medical records' as a means of escaping liability for the payment of benefits," but "the comments reveal the Department's intent that operators be required to submit 'any evidence' relevant to the liability of another party while the case is before the District Director." As a result, the majority held "x-ray interpretations and other medical records are included in the term 'documentary evidence' referenced in 20 C.F.R. § 725.456(b)(1)."<sup>36</sup>

On appeal, in *Marfolk Coal Co. v. Weis*, 251 Fed. Appx. 229, 2007 WL 3033966 (4<sup>th</sup> Cir. 2007) (unpub.) (C.J. Williams, dissenting), the circuit court agreed with the Board, and held medical evidence establishing the miner contracted complicated pneumoconiosis while employed by another operator could not be presented to the Administrative Law Judge for the sole purpose of disproving liability absent a showing of "extraordinary circumstances" under 20 C.F.R. § 725.456(b)(1). Here, the court noted the Administrative Law Judge adopted the position of the Director, OWCP to hold that the named operator was required to present all evidence "bearing on liability to

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<sup>36</sup> The Board held, if evidence is excluded under 20 C.F.R. § 725.456(b)(1) (requiring documentary evidence pertaining to designation of an operator not be admitted at the formal hearing in the absence of "extraordinary circumstances"), then it cannot be admitted under 20 C.F.R. § 725.456(b)(2) (providing, subject to the limitations at 20 C.F.R. § 725.456(b)(1), evidence not submitted to the District Director may be received at the hearing if it is exchanged with all parties at least 20 days prior to the hearing).

the district director." The court cited to the preamble, and found the Director, OWCP's position was supported by this regulatory history. The court held "extraordinary circumstances" was not established as the named operator failed to demonstrate the medical evidence at issue was "hidden or could not have been located at the district director stage."

**b. Carrier bound by same standard as employer**

By unpublished decision in *J.H.B. v. Peres Processing, Inc.*, BRB No. 08-0625 BLA (June 30, 2009)(unpub.), the Board concluded a carrier is bound by the same evidence-limiting rules as an employer, including the prohibition against submitting evidence pertaining to its liability for the first time before the Administrative Law Judge without demonstrating "extraordinary circumstances." The Board further held the carrier was barred from utilizing modification proceedings to "circumvent the requirements of Section 725.456(b)(1) or Section 725.414(d), in order to have evidence considered on the responsible carrier issue that was not timely submitted to the district director."

**C. Dismissal by Administrative Law Judge not permitted**

Finally, it is noted that 20 C.F.R § 725.465(b) provides, "The administrative law judge shall not dismiss the operator designated as the responsible operator by the District Director, except upon the motion or written agreement of the Director." 20 C.F.R. § 725.465(b). In its comments, the Department states the following:

The revised regulation is intended to . . . ensure that the designated responsible operator and the Director have the opportunity to fully litigate the liability issue at all levels. Moreover, the regulation does not create any undue hardships. If, after considering all of the evidence relevant to the responsible operator issue, the ALJ finds that the designated responsible operator is not liable for the payment of benefits, but concludes that the claimant is entitled to benefits, the operator merely has to wait until the Director, on behalf of the Trust Fund, files an appeal with the BRB. The operator may then participate in that appeal in defense of the ALJ's liability determination if it wishes. If the Director does not petition for review of the ALJ's liability decision, the operator need not participate in any further adjudication of the case, regardless of whether it is formally included as a party.

65 Fed. Reg. 80,005 (Dec. 20, 2000).

If multiple operators are listed on referral from the District Director, the Administrative Law Judge would be permitted to dismiss the operators at any time. 65 Fed. Reg. 80,004 (Dec. 20, 2000). The plain language of 20 C.F.R. § 725.418(d), however, requires that the Director consent to such dismissals. 20 C.F.R. § 725.418(d).

#### **D. Remand by Administrative Law Judge**

In its comments to the amended regulations, the Department asserts the Administrative Law Judge is not empowered to remand a claim for designation of an operator:

Once all of (the) evidence is forwarded to the Office of Administrative Law Judges for a formal hearing, the administrative law judge assigned to the case will determine, in light of the evidentiary burdens imposed by section 725.495, whether the District Director designated the proper responsible operator. If the administrative law judge determines that the District Director did not designate the proper responsible operator, liability will fall on the Trust Fund. No remand for further development of the responsible operator issue is permissible.

65 Fed. Reg. 80,008 (Dec. 20, 2000).

#### **E. On modification**

With regard to identification of the proper responsible operator on modification, the Departments states the following in its comments to the amended regulations:

The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.

The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the District Director with all of the documentary evidence relevant to the determination of the

responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) documentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by §§ 725.414 and 725.456(b)(1).

. . .

The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.

That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the District Director.

65 Fed. Reg. 79,976 (Dec. 20, 2000).

**F. Filing a subsequent claim under  
20 C.F.R. § 725.309**

In its comments to the amended regulations, the Department states the following with regard to naming a new operator in a claim filed under 20 C.F.R. § 725.309:

To the extent that a denied claimant files a subsequent claim pursuant to § 725.309, of course, the Department's ability to identify another operator would be limited only by the principles of issue preclusion. For example, where the operator designated as the responsible operator by the District Director in a prior claim is no longer financially capable of paying benefits, the

District Director may designate a different responsible operator. In such a case, where the claimant will have to re-litigate his entitlement anyway, the District Director should be permitted to reconsider his designation of the responsible operator liable for the payment of the claimant's benefits.

65 Fed. Reg. 79,990 (Dec. 20, 2000).

### **III. Witness testimony**

For further discussion of expert witness testimony by deposition, or at the hearing, see Chapters 26 and 28.

#### **A. Limitations on expert medical testimony**

The amended regulations contain restrictions on expert testimony, both in terms of scope and content. Twenty C.F.R. § 725.414(c) addresses expert testimony, and it provides the following:

(c) Testimony. A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided in this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of § 725.456 of this part.

20 C.F.R. § 725.414(c). See also the discussion on medical reports, *supra*.

#### **1. Must provide one of two "medical reports"**

By unpublished decision in *Rice v. Bledsoe Coal Corp.*, BRB No. 09-0650 BLA (July 30, 2010)(unpub.), Employer was not permitted to proffer Dr. Repsher's deposition testimony under 20 C.F.R. § 725.457(c) as "rebuttal of the Department-sponsored blood gas study only." Under the facts of the case, Employer designated "two affirmative-case medical reports, namely, Dr. Broudy's physical examination reports from 2001 and 2004," such that Dr. Repsher's deposition testimony was inadmissible.

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Administrative Law Judge properly excluded the deposition testimony of Dr. Jerome Wiot, a radiologist, based on the provisions at 20 C.F.R. § 725.414(c), which provide "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." Because Dr. Wiot offered only chest x-ray interpretations, and did not provide a medical report as defined under the regulations, his deposition testimony was not admissible.

## **2. Testimony of radiologist inadmissible except as related to 20 C.F.R. § 718.107(b)**

In *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (*en banc*) (J. Boggs, concurring), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (*en banc on recon.*), the Board upheld the Administrative Law Judge's consideration of Dr. Wiot's deposition testimony under 20 C.F.R. § 718.107(b) with regard to the medical acceptability and relevance of CT-scans and digital x-rays. The Board concluded the "administrative law judge further acted within his discretion in severing and separately considering Dr. Wiot's additional testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis . . . ." In so holding, the Board stated the following:

We agree with the Director that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. § 718.107(b) also contains additional discussion, if the additional comments are not admissible pursuant to 20 C.F.R. §§ 725.414 or 725.456(b)(1), the administrative law judge need not exclude the deposition or statement in its entirety, but may sever and consider separately those portions relevant to 20 C.F.R. § 718.107(b).

## **3. Testimony of treating physician, special considerations**

In *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005) (unpub.), the Board reiterated the evidentiary limitations set forth at 20 C.F.R. § 725.414 are mandatory and, absent a finding of "good cause," it was proper for the Administrative Law Judge to exclude the deposition testimony offered by Employer of Claimant's treating physician, Dr. Altmeyer. First, Employer already had medical opinions from two other physicians offered as evidence. Second, the Board rejected Employer's argument that Claimant waived his right to object to

admissibility of the deposition because he participated in the deposition. The Board noted 20 C.F.R. § 725.456(b)(1) did not "include a waiver provision for evidence submitted under Section 725.414." Finally, although Dr. Altmeyer's treatment records were admitted as evidence under 20 C.F.R. § 725.414(a)(4), the record did not contain a "medical report prepared by Dr. Altmeyer pursuant to 20 C.F.R. § 725.414(a)(3)(i)" such that his deposition was inadmissible under these provisions as well.

However, in *L.P. v. Amherst Coal Co.*, 24 B.L.R. 1-55 (2008) (on recon. en banc), the Board adopted the Director's position, and held a party has the right to cross-examine a physician whose report is admissible under 20 C.F.R. § 718.104(d), regardless of whether the physician prepared one of the two affirmative "medical reports" for a party. In so holding, the Board stated Employer's cross-examination of the miner's treating physician was necessary "to ensure the integrity and fundamental fairness of the adjudication of the survivor's claim *and* for a full and true disclosure of the facts." However, the Board circumscribed its decision as follows:

In rendering this holding, we have recognized only a right to cross-examine a physician whose report is admissible under Section 725.414(a)(4), if the physician's report is material and cross-examination is necessary to ensure the integrity and fundamental fairness of the adjudication of the claim and for a full and true disclosure of the facts. We decline to address the question of whether there is a general right to rebut the evidence admitted under Section 725.414(a)(4) because the circumstances of this case do not squarely present the issue.

*Id.* at 1-63.

## **B. Must be based on admissible evidence**

Medical reports and expert medical testimony must be based on evidence admitted into the record. A review of case law on this issue is set forth, *supra*, in this chapter.

## **C. At the hearing**

The amended regulations at 20 C.F.R. § 725.457(a) provide, "Any party who intends to present the testimony of an expert witness at a hearing, *including any physician, regardless of whether the physician has previously prepared a medical report*, shall so notify all other parties to the claim at

least 10 days before the hearing." 20 C.F.R. § 725.457(a) (emphasis added). The regulations also contain the following additional restrictions:

(c) No person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory under § 725.458, unless that person meets the requirements of § 725.414(c).

(1) In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the District Director.

(2) In the case of a physician offering testimony relevant to the physical condition of the miner, such physician must have prepared a medical report. Alternatively, in the absence of a showing of good cause under § 725.456(b)(1) of this part, a physician may offer testimony relevant to the physical condition of the miner only to the extent that the party offering the physician's testimony has submitted fewer medical reports than permitted by § 725.414. Such physician's opinion shall be considered a medical report subject to the limitations of § 725.414.

(d) A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible.

20 C.F.R. § 725.457.

In its comments, the Department noted inclusion of subsection (d) was necessary to ensure the parties adherence to the evidentiary limitations. 65 Fed. Reg. 80,002 (Dec. 20, 2000).

#### **D. By deposition**

Under 20 C.F.R § 725.458, "The testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of testimony contained in § 725.457(d)." 20 C.F.R. § 725.458.

### **E. Notice to opposing party**

The regulations continue to require that adequate notice be given to the opposing party of any expert witness testifying at the hearing, or by deposition. 20 C.F.R. § 725.458 (30 days' notice of a deposition must be provided); 20 C.F.R. § 725.457(a) (10 days' notice required for witness called to testify at the hearing).

### **F. Expert witness fees, apportionment of**

Expert witness fees continue to be based on fees and mileage received by witnesses "before the courts of the United States." 20 C.F.R. § 725.459(a). However, 20 C.F.R. § 725.459(b) provides, in part, as follows:

If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. The fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

20 C.F.R. § 725.459(b). And, 20 C.F.R. § 725.459(c) provides:

If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, or the fund, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator or the fund as attorney's fees, of costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

20 C.F.R. § 725.459(c).