

Chapter 26

Motions

IMPORTANT NOTICE: On December 4, 2012, the Department published a notice of proposed amendments to 29 C.F.R. Part 18 for comment. See 77 Fed. Reg. 72141 (Dec. 4, 2012). Final rules will be published after receipt, and consideration, of comments to the proposed regulations. In some instances, section numbers and substantive provisions in the proposed amendments have changed, and new provisions have been added. Where necessary, citations to these proposed regulatory amendments are footnoted in this chapter.

I. Generally

The regulatory bases for procedural, evidentiary, and discovery motions are commonly located at 20 C.F.R. Part 725 and 29 C.F.R. Part 18. Note, however, the evidentiary rules at 29 C.F.R. § 18.101 *et seq.*, do not apply to black lung cases. 29 C.F.R. § 18.1101.

A. Ten days to respond

Generally, parties are afforded a period of ten days to respond to a motion, unless otherwise authorized by an Administrative Law Judge. 29 C.F.R. § 18.6(b).¹ Twenty-nine C.F.R. § 18.4² sets forth procedures for computing the time for filing motions and responsive pleadings.

B. Dismissal of a claim, defense or party

Twenty C.F.R. § 725.465(c) provides, "In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal shall not be granted and afford all parties a reasonable time to respond to such order." Failure to comply with a lawful order of an Administrative Law Judge may result in dismissal of the claim, defense, or party. 20 C.F.R. § 725.465.

¹ Proposed regulatory amendment at 29 C.F.R. § 18.33.

² Proposed regulatory amendment at 29 C.F.R. § 18.32.

C. Caption

Miners' and survivors' claims will have a "BLA" case number. For other case types, the designations will be as follows: (1) "BMO" for medical benefits only claims; (2) "BTD" for medical treatment dispute claims; (3) "BLO" for overpayment claims; (4) "BMI" for medical interest claims (none of these claims should be pending before this Office, see Chapter 20); (5) "BCP" for black lung civil money penalty claims; and (6) "BLB" for Black Lung Part B claims (these are non-adversarial proceedings, see Chapter 19).

II. Remand to the District Director

A. District Director's obligation to provide complete examination

1. Generally

The District Director is obliged to provide the miner with a complete pulmonary examination in an original claim, and in subsequent claims filed under 20 C.F.R. § 725.309 of the regulations. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990)(en banc). See also *Petry v. Director, OWCP*, 14 B.L.R. 1-98 (1990)(en banc); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 B.L.R. 2-25 (8th Cir. 1984). The Department-sponsored medical evaluation must address all elements of entitlement. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

For additional discussion of the District Director's obligation to provide a complete pulmonary evaluation, see Chapter 1.

2. Report credible on one issue, 20 C.F.R. § 725.406 requirements may be satisfied

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.), Dr. Hussain, who conducted the Department of Labor-sponsored examination of the miner, did not provide a reasoned opinion regarding the presence or absence of clinical pneumoconiosis. Notwithstanding this deficiency, the Board agreed with the Director the Department's duty to provide a complete, credible pulmonary evaluation under 20 C.F.R. § 725.406 was discharged. In particular, Dr. Hussain also found Claimant was not totally disabled, and the Administrative Law Judge relied on this component of Dr. Hussain's opinion, along with other medical evidence of record, to deny benefits.

**3. Claimant provided erroneous history,
20 C.F.R. § 725.406 requirements satisfied**

In *Broughton v. C & H Mining, Inc.*, BRB No. 05-0376 BLA (Sept. 23, 2005)(unpub.), the Administrative Law Judge properly discredited the opinion of Dr. Simpao, who conducted the Department of Labor-sponsored examination of Claimant. Specifically, Dr. Simpao's diagnosis was based on 18 years of coal mine employment, where the Administrative Law Judge found 8.62 years established on the record. However, the Board denied Claimant's motion to remand the claim for another pulmonary evaluation under 20 C.F.R. § 725.406. In particular, the Board agreed with the Director the miner was provided with a pulmonary evaluation in compliance with 20 C.F.R. § 725.406, and "Dr. Simpao's reliance on an incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician."

**4. Incomplete or invalid examination,
additional examination or testing required**

If, during the pendency of a claim before this Office, the Administrative Law Judge determines the pulmonary evaluation provided to the miner by the Department of Labor under 20 C.F.R. § 725.406 is incomplete as to any issue that must be adjudicated, or fails to comply with the quality standards, the Administrative Law Judge may, in his or her discretion, remand the claim to the District Director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before termination of the hearing. 20 C.F.R. §§ 725.406 and 725.456(e).

a. Benefits Review Board

By published *Order of Dismissal* in *Miller v. Associated Electric Cooperative, Inc.*, 24 B.L.R. 1-233 (2011), the Board dismissed Employer's appeal of an Administrative Law Judge's order remanding a black lung claim for a new Department of Labor-sponsored pulmonary evaluation of Claimant. In the remand order, the Administrative Law Judge determined the 20 C.F.R. § 725.406 examination report "failed to address the issues of total disability and disability causation."

In dismissing Employer's appeal of this order, the Board concluded the Administrative Law Judge had not "made a final determination on the merits of this case" and, as a result, Employer's "appeal (was) interlocutory." The Board distinguished its holding in *R.G.B. [Blackburn] v. Southern Ohio*

Coal Co., 24 B.L.R. 1-129 (en banc), *appeal dismissed*, Case No. 09-4294 (6th Cir. Feb. 22, 2010), where the Administrative Law Judge remanded five black lung claims for complete pulmonary evaluations. The Board explained:

In *Blackburn*, the Board accepted the employers' interlocutory appeals of a series of remand orders, issued in five cases by (the Administrative Law Judge), in order to resolve the important procedural issue of whether an administrative law judge may properly exercise his or her remand authority, pursuant to 20 C.F.R. § 725.456(e), without notice to the parties and prior to the assembly of the evidentiary record at the hearing.

In *Miller*, however, the Administrative Law Judge issued an order to show cause why the claim should not be remanded for a new pulmonary evaluation prior to issuing the order of remand.

By published *en banc* decision, *R.G.B. [Blackburn] v. Southern Ohio Co.*, 24 B.L.R. 1-129 (2009)(en banc), *appeal dismissed*, Case No. 09-4294 (6th Cir. Feb. 22, 2010), the Board addressed the Administrative Law Judge's authority to remand a black lung claim for further evidentiary development. On appeal were five orders of remand issued by the Administrative Law Judge in five different claims on grounds that Department-sponsored pulmonary evaluations conducted pursuant to 20 C.F.R. § 725.406 were deficient.

Employer maintained the Administrative Law Judge exceeded his authority under 20 C.F.R. § 725.456(e) in remanding the claims prior to admission of all of the evidence at the formal hearing, and without notice to the parties. The Director, on the other hand, argued the Administrative Law Judge has authority to remand a claim "at any time prior to the termination of the hearing," if s/he determines the Department-sponsored examination is either incomplete or not credible. However, the Director asserted, with regard to two out of the five claims at issue on appeal, the Administrative Law Judge erred in finding the pulmonary evaluations incomplete.

According deference to the Director's position, the Board held the following:

[T]he administrative law judge has discretion to exercise his or her remand authority, pursuant to Section 725.456(e), at any time in the adjudicatory process, beginning when the administrative law judge assumes jurisdiction of the claim and ending with the termination of the hearing.

The Board did not define “termination” of a hearing. Under the procedural history for these claims, the Administrative Law Judge remanded the claims “prior to a hearing.” The Board held the Administrative Law Judge may review the “DOL-sponsored pulmonary evaluation *sua sponte*” and, without prior notice to the parties, may remand the claim for supplementation of the evaluation.

In determining whether the Department-sponsored evaluations were sufficient under 20 C.F.R. § 725.406, the Board concluded the Administrative Law Judge correctly found deficiencies in examinations underlying three of the claims, and remanded them for further evidentiary development. On the other hand, the Board concluded the two other claims should not have been remanded.

In one properly-remanded claim, the physician failed to address an element of entitlement, *i.e.* whether the miner was totally disabled due to a respiratory condition. In a second claim, the physician failed to address “two requisite elements of entitlement in claimant’s case, the existence of legal pneumoconiosis and total respiratory disability.” In a third claim, the Department-sponsored physician offered “contradictory” statements in his report and deposition testimony regarding whether the miner suffered from legal pneumoconiosis. For these three claims, the Board agreed the pulmonary evaluations did not satisfy the requirements of 20 C.F.R. § 725.406, and remand of the claims was proper.

In two other claims, however, the Board vacated the Administrative Law Judge’s remand orders stating the requirements of 20 C.F.R. § 725.406 were met. In the first of these claims, the Administrative Law Judge found the physician did not “provide any rationale for why he determined that tobacco smoking was the sole cause of Claimant’s pulmonary emphysema.” The Director maintained the Administrative Law Judge’s “desire for a more detailed explanation of the doctor’s conclusion” does not constitute a valid basis to remand the claim. The Board agreed and concluded, because the physician “performed all of the necessary tests and his report addressed the requisite elements of entitlement, the administrative law judge erred in concluding that claimant did not receive a complete pulmonary evaluation.” For similar reasons, the Board vacated the Administrative Law Judge’s remand order in a second claim.

b. Sixth Circuit

In *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009), the Administrative Law Judge’s denial of benefits was affirmed, and the Department of Labor-sponsored examination conducted pursuant to 20 C.F.R. § 725.406 was sufficiently reasoned and documented to meet the

Department's obligations. At issue was the Administrative Law Judge's rejection of Dr. Baker's diagnosis of coal workers' pneumoconiosis in conjunction with his Department-sponsored examination of the miner on grounds that it was "lacking adequate support." Notably, the physician's opinion was compromised, in part, by reliance on erroneous smoking and coal mine employment histories. Moreover, the opinion was based on the positive x-ray interpretation underlying the report, whereas the Administrative Law Judge concluded that the x-ray evidence on the record as a whole did not support a finding of the disease. Consequently, the Administrative Law Judge found Dr. Baker did not adequately explain how he reached his medical conclusions in light of the miner's symptoms and testing.

The Director and Claimant argued, "[I]f Dr. Baker's opinion was so poorly reasoned and documented as to justify the ALJ's refusal to rely upon it, then the case must be remanded so the DOL can provide (Claimant) with a proper evaluation." The court disagreed and stated:

In the end, DOL's duty to supply a 'complete pulmonary evaluation' does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of 'complete[ness]' is not whether the evaluation presents a winning case. The DOL meets its statutory obligation . . . when it pays for an examining physician who (1) performs all of the medical tests required by 20 C.F.R. §§ 718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion under 20 C.F.R. § 718.202(a)(4) that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Id. at 641-642.

5. Evaluation outweighed but not discredited, 20 C.F.R § 725.406 requirements satisfied

In *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-20 (2008), although the Director agreed the exam conducted under 20 C.F.R. § 725.406 was incomplete on the issue of whether the miner was totally disabled, a remand for an additional opinion by the physician was unnecessary because the Administrative Law Judge found the physician's finding of a "severe respiratory impairment" was outweighed by assessments of other physicians of record. Since any supplemental opinion by the physician would be based on this discredited premise, remand was not needed. Similarly, in *Lovins v.*

Arch Mineral Corp., BRB No. 05-0201 BLA (Sept. 30, 2005) (unpub.), the Board denied the miner's request that his claim be remanded for another Department-sponsored pulmonary evaluation where the Administrative Law Judge "did not discredit Dr. Hussain's disability opinion entirely," but found it was outweighed by a contrary opinion of record. See also *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009).

6. Director, OWCP has standing to contest whether complete evaluation provided

The Director has standing to contest the issue of whether Claimant was provided a complete pulmonary examination at the Department of Labor's expense. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

B. Withdrawal of controversion or agreement to pay benefits

It is proper to accept the Director's "Motion to Remand for the Payment of Benefits" as a withdrawal of controversion of all issues. *Pendley v. Director, OWCP*, 13 B.L.R. 1-23 (1989)(en banc). On the other hand, Employer's agreement to withdraw its controversion of Claimant's eligibility for medical benefits, in return for Claimant's agreement to first submit all future medical expenses to alternative health carriers, is illegal. The agreement would deprive Claimant of protection afforded him under the regulations. 20 C.F.R. §§ 725.701-725.707. *Gerzarowski v. Lehigh Valley Anthracite, Inc.*, 12 B.L.R. 1-62 (1988).

C. Failure to timely controvert

1. Generally

If the Administrative Law Judge determines a designated employer failed to controvert the claim, then entitlement is established and the claim may be remanded for the payment of benefits. See 20 C.F.R. § 725.412(b). See Chapters 23 and 28 for further discussion of a failure to timely controvert a claim. There are differing legal standards applicable to claims filed on or before January 19, 2001, and claims filed after January 19, 2001.

2. Entitled to *de novo* consideration by Administrative Law Judge

In the pre-amendment claim, *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 B.L.R. 2-238 (6th Cir. 1989), it is within the jurisdiction of the Administrative Law Judge to determine, after *de novo* review of the issue,

whether Employer established "good cause" for its failure to timely controvert the claim. The Board adopted this holding in *Krizner v. U.S. Steel Mining Co.*, 17 B.L.R. 1-31 (1992)(en banc), and held any party dissatisfied with the District Director's determination on the issue of filing a timely controversion, or finding "good cause" for an untimely filing, is entitled to have the issued decided *de novo* by an Administrative Law Judge.

If Employer fails to timely controvert the claim, then entitlement is established. 20 C.F.R. § 725.413(b)(3) (2000). Note, however, 20 C.F.R. § 725.413 has been deleted under the amended regulations. Instead, for claims filed after January 19, 2001, the amended regulations, at 20 C.F.R. § 725.412(b), provide the following:

If the operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to § 725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement.

20 C.F.R. § 725.412(b).

3. Employer thought Fund would be liable, no "good cause" established

In *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997), Employer could not be relieved of its liability for failure to timely controvert because it relied on Claimant's mistaken representation that the Black Lung Disability Trust Fund would be held liable for benefits. As a result, the court concluded Employer failed to demonstrate "good cause" for its failure to timely controvert both the claim, and its designation as the responsible operator. The court then upheld an order directing Employer to secure the payment of \$150,000.00 in benefits pursuant to 20 C.F.R. § 725.606.

D. Inability to locate the claimant or abandonment of the claim

If the claimant dies or cannot be located, and it is unclear who has authority to proceed with the claim, or if the widow wishes to file a separate survivor's claim, remand may be appropriate. Within the Administrative Law Judge's discretion, the claim may also be dismissed on the basis of abandonment. 20 C.F.R. §§ 725.409, 725.465, and 725.466. However, the regulations require an order to show cause be issued prior to an order of dismissal.

E. Consolidation of claims

A party may file a motion to consolidate claims where the issues to be resolved are identical. 29 C.F.R. § 18.11. Typical motions to consolidate involve a survivor who seeks to consolidate his or her claim with the deceased miner's claim. 20 C.F.R. § 725.460. Although remand is not required to consolidate claims, for practical reasons, it may be necessary.

For claims adjudicated under the amended regulations at 20 C.F.R. Parts 718 and 725, the evidentiary limitations at 20 C.F.R. § 725.414 must be considered when consolidating the living miner's and survivor's claims. Notably, evidence must be specifically designated in accordance with the limitations set forth at 20 C.F.R. § 725.414 for any claim filed after January 19, 2001.

F. Determination of responsible operator (or motion to dismiss as a party)

1. For claims filed on or before January 19, 2001

a. Generally

The District Director must make the initial determination of the proper responsible operator. 20 C.F.R. § 725.412. A remand may be appropriate where the District Director has not properly named the responsible operator. Before a responsible operator is dismissed as a party to a claim, the Administrative Law Judge should issue an order to show cause. 20 C.F.R. §§ 725.465 and 725.466.

Occasionally, the District Director transfers a case with more than one putative responsible operator named. A responsible operator should not be dismissed if there are contested issues concerning qualifying coal mine employment, or the operator's ability to assume liability. If a *de novo* hearing is necessary for these issues, dismissing a potentially responsible operator would be premature.

The District Director has the burden to investigate and assess liability against the proper operator. *England v. Island Creek Coal Co*, 17 B.L.R. 1-141, 1-444 (1993). However, if the operator is financially incapable of assuming liability, the ruling in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4th Cir. 1995), *rev'g. in part sub. nom.*, 17 B.L.R. 1-145 (1993), allows the District Director to reach back and name an earlier operator. However, *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984) mandates that the responsible operator issue be resolved in a

preliminary proceeding, or the Director must proceed against all potential operators at every stage of adjudication. Failure to do so precludes the designation of another responsible operator, and exposes the Trust Fund to liability.

b. Remand prior to hearing

In *Director, OWCP v. Oglebay Norton Co.*, 12 B.L.R. 2-357 (6th Cir. 1989), the court upheld remand of a claim to the District Director for determination of the responsible operator. Although the claim was referred to the Administrative Law Judge, a hearing had not been held. The court noted, once the claim is heard, other potential operators cannot be identified by the District Director. However, prior to hearing, the District Director may name potential responsible operators as long as the operator(s) is/are not unduly prejudiced. See *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1991); *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990).

c. Criteria for remands

The Board delineated restrictions on remands for the determination of a responsible operator. In *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984), the Board held a claim should not be remanded if: (1) the remand would either jeopardize a claimant's case; or (2) the remand would be incompatible with the efficient administration of the Act. The District Director must resolve the responsible operator issue, or proceed against all putative operators at every stage of the claim's adjudication. Otherwise, an employer, which should have been designated, is prejudiced by not having notice and an opportunity to be heard at the District Director level and before the Administrative Law Judge. *Id.* at 1-357. See also *England v. Island Creek Coal Co.*, 17 B.L.R. 1-141 (1993) (the District Director has the burden of naming the appropriate responsible operator); *Shepherd v. Arch of West Virginia*, 15 B.L.R. 3-134 (1991) (presenting a good example of the application of *Crabtree*, and addressing the definition of piecemeal litigation). Therefore, a motion to remand for a determination of the proper responsible operator is most often granted where the record supports a finding that the correct responsible operator was not named.

In *Baughman v. R. Turner Clay Co.*, 15 B.L.R. 3-697 (1991), the Administrative Law Judge remanded the claim for a determination of responsible operator on Employer's motion because new issues were presented for consideration. 20 C.F.R. § 725.463. The new issues were not reasonably ascertainable by Employer's counsel while the claim was before the District Director due to counsel's illness and his unfamiliarity with the procedures.

2. For claims filed after January 19, 2001

Under the amended regulations, a claim is forwarded with only one operator listed as responsible for the payment of any benefits. This is a significant departure from pre-amendment practices where District Directors would name multiple operators. Subsection 725.418(d) provides the following:

The proposed decision and order shall reflect the district director's final designation of the responsible operator liable for the payment of benefits. No operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410. The district director shall dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407 and that were not previously dismissed pursuant to § 725.410(a)(3).

20 C.F.R. § 725.418(d). In addition, 20 C.F.R. § 725.465(b) provides the following:

The administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon motion or written agreement of the Director.

20 C.F.R. § 725.465(b). And, the amended regulations do not authorize the Administrative Law Judge to remand a claim on grounds that the District Director designated the wrong operator; rather, the Black Lung Disability Trust Fund would be held liable for the payment of benefits. For further discussion of this issue, see Chapters 4 and 7.

G. Remand for evidentiary development permitted only if record is incomplete

Before the Administrative Law Judge orders further development of the record, s/he must make a determination that the record is incomplete as to one or more of the contested issues. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

It is error to remand a claim for further evidentiary development where "the administrative law judge did not find the evidence to be incomplete on any issue before him but rather required the development of cumulative evidence." The Board determined, "[U]nless mutually consented

to by the parties . . . , further development of the evidence by the administrative law judge is precluded." *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

But see King v. Cannelton Industries, Inc., 8 B.L.R. 1-146, 1-148 (1985) (development of additional medical evidence is proper when the Administrative Law Judge, questioning the validity of blood gas studies, and seeking to learn more about Claimant's condition, permitted Employer the opportunity to obtain a post-hearing blood gas study and permitted Claimant 30 days to respond); *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983) (admission of post-hearing examination of Claimant under 20 C.F.R. § 725.456(e) was proper where the Administrative Law Judge wanted to learn more about the effects of Claimant's back injury).

III. Transfer of liability to the Black Lung Disability Trust Fund

Under limited circumstances, the "transfer of liability" provisions in the regulations assessed liability against the Trust Fund to shield employers from unexpected liability resulting from amendments to the Black Lung Benefits Act. The 1977 Amendments provide for reconsideration of claims previously dismissed. The Trust Fund is deemed liable in such cases so employers do not suffer liability in claims that they reasonably expected were finally adjudicated. 20 C.F.R. § 727.101 *et seq.* See Chapter 22 for a discussion of the transfer of liability provisions.

IV. Amending the Form CM-1025 (list of contested issues)

A. Generally

Every claim file referred to the Office of Administrative Law Judges for adjudication should contain a Form CM-1025. This form sets forth the issues contested by the party or parties opposing entitlement (*i.e.* Employer and/or Director, OWCP). The hearing is confined to the issues included on the Form CM-1025. 20 C.F.R. § 725.463. Prior to the scheduled hearing, the Director, OWCP, or Employer, may move to amend the list of contested issues. This motion is only granted where the additional issues were raised in writing at the District Director's level. 20 C.F.R. § 725.463(a).

When new issues are raised before the Administrative Law Judge, s/he has the discretion under 20 C.F.R. § 725.463(b) to (1) remand the case to the District Director, (2) hear and resolve the new issue, or (3) refuse to consider the new issue. See *Callor v. American Coal Co.*, B.L.R. 1-687 (1982), *aff'd sub nom.*, *American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 B.L.R. 2-81 (10th Cir. 1984).

An issue not previously considered by the District Director may be adjudicated if the parties consent. Such consent may be inferred where the parties develop evidence, and are aware of each other's intent to litigate the issue. See *Carpenter v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-784 (1984).

B. Limits scope of litigation, issues ascertainable at District Director level, but not noted on Form CM-1025

The regulatory provisions at 20 C.F.R. § 725.463(b) permit new issues to be raised before the Administrative Law Judge if they were not "reasonably ascertainable" while the claim was pending at the District Director's level.

The Administrative Law Judge erred in permitting the Director, without reason, to litigate issues that were easily ascertainable while the case was pending before the District Director, but were not checked as contested on referral (the Form CM-1025) by the District Director. *Thorton v. Director, OWCP*, 8 B.L.R. 1-277, 1-280 (1985). See 20 C.F.R. § 725.463(b).

It is error for an Administrative Law Judge to conduct a hearing where the issues are not specified by the District Director on referral of the claim. Indeed, under these circumstances, it is proper to remand a claim in accordance with 20 C.F.R. § 725.456(e) to develop the evidence, and identify contested issues prior to referral. *Stidham v. Cabot Coal Co.*, 7 B.L.R. 1-97, 1-101 (1984).

C. Parties bound by "clerical error" on CM-1025

In *Chaffins v. Director, OWCP*, 7 B.L.R. 1-431 (1984), the Administrative Law Judge properly declined to consider the issue of length of coal mine employment. Counsel for the Director argued, because of a "clerical error," the issue was not "checked" on the Form CM-1025. Director's counsel further stated the issue had been raised in writing before the District Director on prior occasions. The Board held:

[W]e squarely reject the implication of the Director's position on appeal; that he has no duty with respect to identifying the issues to be heard and that the administrative law judge and claimant must look behind the statement of contested issues in the chance that a clerical error was made in its preparation.

Id. at 1-434.

Similarly, in *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983), the Administrative Law Judge erred in considering whether Claimant suffered

from pneumoconiosis, as the issue was not listed as contested. *See also Perry v. Director, OWCP*, 5 B.L.R. 1-527 (1982)(pneumoconiosis not listed as contested); *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992) (error to deny benefits on grounds that Claimant failed to establish coal workers' pneumoconiosis where the issue was not listed as contested on the Form CM-1025); *Mullins v. Director, OWCP*, 11 B.L.R. 1-132 (1988)(en banc) (eligibility of survivor conceded if reasonably ascertainable at District Director's level, but not raised at that level by the opposing party).

In an unpublished decision, *Linton v. Director, OWCP*, Case No. 85-3547 (3rd Cir. June 10, 1986)(unpub.), the Third Circuit held Claimant could not raise the issue of Employer's failure to timely controvert the claim at the hearing because the issue was reasonably ascertainable while the case was pending before the District Director, but not listed on the Form CM-1025.

D. Waiver of objection to new issue, failure to object

In *Grant v. Director, OWCP*, 6 B.L.R. 1-619 (1983), Claimant waived his right to challenge litigation of issues not marked as contested because Claimant failed to object when the Administrative Law Judge expressly presented the issues as contested at the formal hearing. *See also Prater v. Director, OWCP*, 87 B.L.R. 1-461 (1986) (Claimant's counsel failed to object to Employer's motion to enlarge issues at the hearing).

In *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784 (1984), the Administrative Law Judge properly decided certain medical issues, which were not listed as contested on the Form CM-1025, because the record supported a finding that each party (1) developed medical evidence on the issues, and (2) was aware of the opposing party's intent to litigate the issues.

E. Parties agree not to litigate issue, error to consider

Fundamental fairness was violated, which resulted in prejudicial error, when the Administrative Law Judge considered an issue that the parties agreed not to litigate. Specifically, the Board reversed the Administrative Law Judge's decision to consider length of coal mine employment where the issue was not (1) listed as an issue on the Form CM-1025, and (2) submitted as an issue in writing to the District Director. As a result, the Board concluded that Claimant was denied due process. *Derry v. Director, OWCP*, 6 B.L.R. 1-553, 1-555 (1983) (the parties stipulated to ten years of coal mine employment).

In *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992), the Administrative Law Judge erred in determining that Claimant did not suffer from pneumoconiosis arising out of coal mine employment. The issue was not marked as contested on the Form CM-1025, or raised in writing before the District Director. As a result, the Board concluded the Director conceded the presence of pneumoconiosis related to coal mine employment, and it was error for the Administrative Law Judge to adjudicate the issue.

V. Motions for discovery and proffers of evidence

In responding to motions to compel discovery, the primary consideration is to guarantee the right of every party to a full and fair hearing. The regulations at 20 C.F.R. § 725.455 set forth the hearing procedures in general terms, and give the Administrative Law Judge the authority to inquire into the facts and evidence. This section also exempts the hearing before the Administrative Law Judge from the common law or the Federal Rules of Evidence, thus giving the Administrative Law Judge greater latitude in determining the facts and merits of a claim.

Prior to a hearing, any party may submit a motion to compel discovery. 29 C.F.R. § 18.6. Motions to compel discovery can be used to request physical examinations, answers to interrogatories, depositions, medical reports, and medical release forms. Twenty C.F.R. § 725.450 guarantees the right of all parties to a full and fair hearing. Thus, the parties have a right to develop evidence relevant to the claim.

Twenty-nine C.F.R. § 18.21(a) provides, "[I]f . . . a party upon whom a request is made pursuant to §§ 18.18 through 18.20 . . . fails to respond adequately or objects to the request, or any part thereof . . . , the discovering party may move the administrative law judge for an order compelling a response" And, pursuant to 20 C.F.R. § 725.465, a claim may be dismissed upon failure of the claimant to comply with a lawful order of the Administrative Law Judge, or failure to attend a scheduled hearing. 20 C.F.R. § 725.465.

For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28.

VI. Medical examinations

For issues related to medical examinations and testing on modification, see Chapter 23.

A. Multiple examinations permitted

1. For claims filed on or before January 19, 2001

a. Generally

Twenty C.F.R. § 725.414 allows the putative responsible operator to require that Claimant submit to a physical examination by a doctor of the operator's choice. See also 20 C.F.R. §§ 725.413 and 725.414(a) (2000). These regulations do not limit the number of examinations of the miner, *Horn v. Jewell Ridge Coal Co.*, 6 B.L.R. 1-933 (1984), and Employer may have Claimant examined more than one time. *King v. Cannelton Indus., Inc.*, 8 B.L.R. 1-146 (1985), *aff'd.*, Case No. 85-1878 (4th Cir. Jan. 30, 1987)(unpub.).

b. Motion to compel examination, factors to consider

If a miner has undergone one or more medical examinations at Employer's request, and Employer submits a motion seeking to compel an additional examination, the motion should be granted only if (1) the miner submitted evidence indicating a substantial change in condition from the time of the last submitted evidence, (2) Employer has not previously submitted reasonably contemporaneous evidence, or (3) the record is incomplete as to an issue requiring adjudication. *Harlan Coal Co. v. Lemar*, 904 F.2d 1042 (6th Cir. 1990); *Marx v. Director, OWCP*, 870 F.2d 114 (3rd Cir. 1989); *North American Coal Co. v. Miller*, 870 F.2d 948 (3rd Cir. 1989); and *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).

In addition, before granting a motion to compel a medical examination, consideration should be given to hardship on the miner. See *Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-68 (1985); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984). In response to Employer's motion to compel a medical examination, Claimant may file a motion for protective order pursuant to 29 C.F.R. § 18.15. To prevail, Claimant must demonstrate good cause by setting forth facts demonstrating the examination is annoying, embarrassing, oppressive, or unduly burdensome. Further, a miner cannot be required to travel more than 100 miles for an examination unless authorized by the District Director. 20 C.F.R.

§ 725.414(a). Employer does have alternatives in developing evidence including interrogatories, depositions, consultative reviews of the medical evidence, and rereading x-rays. See 20 C.F.R. § 725.414(a) and 29 C.F.R. § 18.15.³

c. Failure to cooperate

Employer has a right to request a physical examination of the miner in order to ensure a "full and fair hearing." Here, the Board noted Employer is not limited to only one examination, or to an examination by the same physician. Thus, where the record revealed a pulmonary function study could not be interpreted by Employer's physician due to poor effort, it was proper for the Administrative Law Judge to order a second examination. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27, 1-29 (1987).

As previously noted, Employer may have the miner examined more than once, either by the same physician, or by different physicians of Employer's choosing. It is within the Administrative Law Judge's discretion to compel the miner to submit to a second Employer-procured examination. *King v. Cannelton Industries, Inc.*, 8 B.L.R. 1-146 (1985), *aff'd. mem.*, 811 F.2d 1505 (4th Cir. 1987) (it was proper to order the miner to submit to further blood gas testing, where the validity of testing already conducted was questioned; the Administrative Law Judge properly left the record open to allow the miner an opportunity to respond to the post-hearing blood gas study results).

d. Evidentiary development before District Director required

Twenty C.F.R. § 725.414(e)(2) requires that Employer make a "good faith" attempt to develop its evidence while the claim is pending before the District Director. Failure to make such an effort may constitute a waiver of the right to an examination of the miner, or to have the miner's evidence evaluated by a physician of the operator's choice. See *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986).

On the other hand, if it is determined the miner unreasonably refused to submit to a medical examination, all evidentiary development of the claim should be suspended, and the claim may be denied by reason of abandonment or dismissed (as appropriate). 20 C.F.R. § 725.408. However, before a claim can be denied by reason of abandonment, or

³ Proposed regulatory amendment at 29 C.F.R. § 18.52.

dismissed for failure to submit to a medical examination, the miner must be notified of the reasons for the potential denial or dismissal and of any action that needs to be taken to avoid the denial or dismissal. 20 C.F.R. § 725.409; *Couch v. Betty B Coal Co.*, BRB No. 88-4067 BLA (June 29, 1992)(unpub.).

In *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984), the Administrative Law Judge erred in requiring the miner to submit to a post-hearing examination conducted by a physician of Employer's choice after determining that, while the claim was pending before the District Director, Employer failed "to undertake a good faith effort to develop its evidence and, consequently, had waived its right to have . . . Claimant examined by a physician of its choice." See 20 C.F.R. § 725.414(e)(2). The Board stated:

The administrative law judge initially determined that the employer had failed to proffer any good reason why it had delayed for almost a year after being apprised of its potential benefits liability to schedule claimant for an examination.

. . .

Furthermore, while the fact that the employer did not intentionally obstruct the expedient processing and adjudication of (the) claim is certainly relevant to the issue of whether the employer had made a 'good faith' effort to develop its evidence, that determination, in and of itself, is not sufficient to compel the claimant to submit to a physical exam conducted by employer's physician post-hearing.

Id. at 1-764.

In *Pruitt v. USX Corp.*, 14 B.L.R. 1-129 (1990), the Board held Employer's failure to engage in "good faith" development of the evidence at the District Director's level may result in a waiver of its right to have the miner examined by a physician of its choice, or to have a miner's evidence reviewed by a physician of its choice. See also *Hardisty v. Director, OWCP*, 7 B.L.R. 1-322 (1984), *aff'd.*, 776 F.2d 129, 8 B.L.R. 2-72 (7th Cir. 1985); *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

In *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986), the Board held, because Employer failed to contest the District Director's denial of its request to have the miner examined, and took no further action in the two years prior to the hearing, the Administrative Law Judge properly concluded Employer waived its right to have the miner examined.

e. Response to medical reports

A party must be provided an opportunity to respond to medical reports submitted into the record by the opposing party, or to cross-examine the physicians who prepared the reports. *North American Coal Co. v. Miller*, 870 F.2d 98 (3rd Cir. 1989); *Pruitt v. USX Corp.*, 14 B.L.R. 1-129 (1990); *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986); *Chancey v. Consolidation Coal Co.*, 7 B.L.R. 1-240 (1984). However, in dealing with the rebuttal of Claimant's evidence in claims filed on or before January 19, 2001, there is no requirement that Employer be allowed to submit an equal number of medical reports as Claimant. See *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987); *King v. Cannelton Indus., Inc.*, 8 B.L.R. 1-146 (1985); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984).

f. Physician may consider evidence not admitted

It is proper for the Administrative Law Judge to consider a medical opinion that reviews medical evidence not formally admitted into the record. *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th Cir. 1999).

2. For claims filed after January 19, 2001

a. Generally

Under the amended regulations at 20 C.F.R. § 725.414, a claimant and employer each may submit two medical opinions based on examinations of the miner and/or review of the medical evidence of record in originally filed claims as well as claims filed under 20 C.F.R. § 725.309. On modification, each party is permitted to submit one additional medical opinion based on examination of the miner. 20 C.F.R. § 725.310. See Chapter 4 for further discussion of the evidentiary limitations under the amended regulations (including limitations pertaining to petitions for modification). See Chapter 23 for further discussion of petitions for modification. See Chapter 24 for further discussion of subsequent claims.

b. Rebuttal of medical opinion

The amended regulations do not provide for "rebuttal" of a medical opinion; rather, a physician preparing a "medical report" may submit supplemental reports, and may testify by deposition or at the hearing to address additional evidence as it comes into the record. For a discussion of

the limitations on "rebuttal" of a medical report under the amended regulations, see Chapter 4.

c. Physician may consider only admitted evidence

For claims filed after January 19, 2001, the evidentiary limitations at 20 C.F.R. § 725.414 apply. Under these regulations, medical reports and expert medical testimony are limited to evidence properly admitted into the record (unlike the law applicable to claims filed on or before January 19, 2001). 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i), 725.457(d), and 725.458. For a discussion of the application of the amended regulations, see Chapters 3 and 4.

d. Failure to cooperate

Under the pre-amendment regulations, the provisions at 20 C.F.R. § 725.408 (2000), "Refusal to submit to medical examinations or tests," read as follows:

If an adjudication officer determines that a miner has unreasonably refused to submit to medical examinations or tests scheduled under §§ 725.406 or 725.407(a), all evidentiary development of the claim shall be suspended and the adjudication officer shall proceed to deny the claim by reason of abandonment (§ 725.409) or by dismissal (§ 725.465) as is appropriate.

20 C.F.R. § 725.408 (2000). Under the December 2000 amendments to the Part 725 regulations, the foregoing regulatory provisions were dropped.

Moreover, under the pre-amendment regulations, in cases where the Administrative Law Judge ordered the miner to attend an examination or undergo testing, s/he had authority to dismiss the claim under 20 C.F.R. § 725.465(a)(2) (2000) for "failure of the claimant to comply with a lawful order of the administrative law judge" The Administrative Law Judge retains this authority under the amended regulations, see 20 C.F.R. § 725.465(a)(2). However, the amended regulations provide, "No claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director."

Therefore, without the Director's consent, the Administrative Law Judge cannot dismiss a claim because of a miner's failure to cooperate. Alternatively, where a claimant refuses to undergo testing, or attend a

medical examination as ordered by the Administrative Law Judge, then the claim may be "denied" as abandoned. However, 20 C.F.R. § 725.409 provides, in part, the following:

(a) A claim may be denied at any time *by the district director* by reason of abandonment where the claimant fails:

(1) To undergo a required medical examination without good cause

20 C.F.R. § 725.409(a)(1) (*italics added*).

Although the regulation addresses the authority of the District Director to deny a claim by reason of abandonment, the Board upheld an Administrative Law Judge's use of 20 C.F.R. § 725.409 to deny a claim. Notably, in *Bianco v. Director, OWCP*, 12 B.L.R. 1-94 (1989), the Administrative Law Judge found the miner's claim abandoned pursuant to 20 C.F.R. § 725.409, and denied it. The Board stated, "[W]e hold that the administrative law judge properly found the living miner's claim to have been abandoned."

B. Failure or refusal to attend medical evaluation

1. Physical examination not contraindicated, dismissal proper

The Administrative Law Judge may order a miner to submit to a post-hearing physical examination, and may dismiss a claim where the miner unreasonably fails to attend. In *Goines v. Director, OWCP*, 6 B.L.R. 1-897 (1984), the miners refused to attend physical examinations, which were scheduled by the District Director, and ordered by the Administrative Law Judge. In support of their refusal, the miners submitted two physicians' opinions stating, due to the miners' poor health, further stress-testing, including x-ray studies and pulmonary function and blood gas studies, "would be hazardous to the claimants and should be avoided." The Board affirmed the Administrative Law Judge's orders that the miners undergo physical examinations, which did not include stress testing or x-ray studies, and it upheld the Administrative Law Judge's dismissal of the claims based upon the miners' failure to comply with his lawful orders.

2. Blood gas testing contraindicated, dismissal improper

Dismissal was improper where testimony supported a treating physician's opinion that further blood gas testing was contraindicated. Thus,

where the miner's physician stated further blood gas testing was not advisable due to the miner's history of phlebitis and thrombosis, it was proper for the Administrative Law Judge: (1) to decline to require Claimant to undergo such testing; and (2) to deny Employer's motion to dismiss for Claimant's failure to attend the examination. *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

C. Questionable test results; lack of cooperation

The Board remanded a claim where the Administrative Law Judge failed to discuss Claimant's refusal to attend a medical examination at Employer's request. The Board reversed the Administrative Law Judge's finding that the issue was moot after concluding the named Employer was not responsible for the payment of benefits. Consequently, the Administrative Law Judge was required to address the issue on remand. *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. 1-109 (1986).

In a pre-amendment claim, it was proper under 20 C.F.R. § 725.456(e) (2000) for the Administrative Law Judge to order the miner undergo a second Employer-procured examination where the pulmonary function study conducted as part of the first examination could not be interpreted due to Claimant's poor effort. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).

On the other hand, Employer received a full and fair hearing despite the fact that the Administrative Law Judge denied its Motion to Require Claimant's Cooperation on a Pulmonary Function Study. Employer argued the record contained "ample evidence" that the miner did not cooperate during a prior pulmonary function study. The Board held Employer did not establish "substantial prejudice" as a result of the ruling because a non-qualifying study, even if valid, could not demonstrate "substantial prejudice" to Employer. *Lafferty v. Cannelton Industries, Inc.*, 12 B.L.R. 1-190, 1-192 and 1-193 (1989).

D. District Director's failure to act on request for medical examination, remedy for

The Administrative Law Judge properly resolved confusion caused by the District Director's failure to act on a request for a medical examination of the miner by permitting the development of additional evidence. *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579, 1-580 and 1-581 (1983).

E. Notice of examination provided to claimant's representative

The miner's due process rights were violated where his representative was not served with notice, in contravention of 20 C.F.R. § 725.364, of the Director's request that the miner undergo a medical examination. As a result, the Board struck the physician's report. *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-444 (1983).

Similarly, the Administrative Law Judge properly refused to admit a non-qualifying blood gas study offered by Employer because the study was scheduled by Employer's insurance carrier without notifying Claimant's counsel. Although Employer provided more than 20 days' notice of its intent to proffer the evidence at the hearing, the Administrative Law Judge concluded "that the procuring of the blood gas study without first notifying claimant's attorney effectively circumvented claimant's right to legal representation" in contravention of 20 C.F.R. § 725.364. Further, it was proper for the Administrative Law Judge to deny Employer the opportunity to acquire another blood gas study because, under 20 C.F.R. § 725.455, the Administrative Law Judge is under no affirmative duty to seek out and receive all relevant evidence. *McFarland v. Peabody Coal Co.*, 8 B.L.R. 1-163, 1-165 (1985).

F. Limitations on requiring miner to travel for examination

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), because Claimant was a Florida resident, the Board held Employer was not entitled to have him examined in Virginia despite Employer's argument that Claimant "travels regularly to Virginia and was examined by physicians in Virginia in connection with all three of his claims. . . ." The Board held 20 C.F.R. § 725.414(a)(3)(i) mandates that Employer "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" under 20 C.F.R. § 725.406. Here, Claimant was a resident of Florida, and his pulmonary evaluation, developed pursuant to 20 C.F.R. § 725.406, was conducted within 100 miles of his residence.

VII. Interrogatories

Under 29 C.F.R. § 18.29,⁴ an Administrative Law Judge has authority to compel answers to interrogatories. Before the motion to compel answers to interrogatories may be granted, however, a party must make a proper request for the answers pursuant to 29 C.F.R. § 18.18(b).⁵ The possible result Claimant's failure to comply with an order to compel is dismissal of the claim for failure to comply with a lawful order of an Administrative Law Judge pursuant to 20 C.F.R. § 725.465(a)(2).

VIII. Excluding evidence

A. Motion to exclude evidence

A motion to exclude evidence may be filed by any party. 20 C.F.R. § 725.456. The common contention is that the evidence was improperly submitted so as to deny the opposing party a chance to rebut the evidence. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042 (6th Cir. 1990); *North American Coal Co. v. Miller*, 870 F.2d 948 (3rd Cir. 1989).

B. The 20-day rule

For a discussion of the 20-day rule, and admission of post-hearing evidence, see Chapter 28.

1. Generally

Twenty C.F.R. § 725.456(b) states no documentary evidence, including medical reports, shall be admitted at the hearing if the evidence was not provided to all other parties at least 20 days before the hearing. However, 20 C.F.R. § 725.456(b)(3)⁶ allows the Administrative Law Judge, at his or her discretion, to admit "late" documentary evidence if (1) the parties agree, or (2) "good cause" is shown. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

2. Allowing responsive evidence

If the Administrative Law Judge admits evidence not exchanged in compliance with the 20-day rule, the record is kept open for at least 30 days

⁴ Proposed regulatory amendment at 29 C.F.R. § 18.12.

⁵ Proposed regulatory amendment at 29 C.F.R. § 18.60.

⁶ Formerly 20 C.F.R. § 725.456(b)(2) (2000).

to allow for submission of "responsive" evidence pursuant to 20 C.F.R. § 725.456(b)(4). See also *Cabral v. Eastern Associated Coal Corp.* 18 B.L.R. 1-25 (1993) (the exchange of evidence on the eve of the 20-day deadline does not constitute unfair surprise where the evidence "at issue contains conclusions that are no different from conclusions contained within reports already exchanged with the other parties").

3. Post-hearing examination of the miner

Properly denied

By unpublished decision in *Thomas J. Smith, Inc. v. Director, OWCP [Kough]*, 2012 WL 1764223 (3rd Cir. May 18, 2012)(unpub.), the Third Circuit affirmed the Administrative Law Judge's denial of Employer TSI's request to have the miner examined post-hearing. Specifically, Claimant exchanged his two affirmative medical reports 25 days prior to the hearing in compliance with the 20-day rule at 20 C.F.R. § 725.456(b)(2). Asserting this was "surprise" evidence, TSI sought a post-hearing examination of the miner by its medical expert. The circuit court affirmed the Administrative Law Judge's denial of TSI's request, and noted the following:

Although the ALJ denied TSI's request for a post-hearing examination, TSI was given alternative avenues to present rebuttal evidence in the form of a supplemental report by Dr. Fino or the submission of a new report by Dr. Kaplan based on a review of the evidence of record. TSI availed itself of this opportunity by submitting a post-hearing medical report, which the ALJ admitted and weighed in its decision-making process.

In sum, the ALJ afforded TSI a meaningful opportunity to present evidence at every juncture of the proceeding. Neither the APA, the relevant regulations, nor our precedent dictates that TSI had the additional right to conduct a post-hearing physical examination.

See also *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990) (en banc) (an employer need only "be given some opportunity to respond to evidence submitted immediately prior to the 20 day deadline" at 20 C.F.R. § 725.456(b)(2), but this does not require the employer be allowed to conduct a post-hearing examination of the miner).

For further discussion of the "good cause" standard, see Chapter 4.

C. Due process

1. Generally

In adjudicating claims under the Act, the employer has a due process right to have all relevant evidence made available for its examination. *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249, 1-258 to -259 (1979).

2. Lost x-ray evidence

If an x-ray film is lost or no longer available, due process may be satisfied either by (1) examination of the x-ray film from which an interpretation was made, or (2) cross-examination of the interpreting physician. *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846, 1-848 (1985). Thus, if an x-ray film is no longer available, and a party moves for the exclusion of the an interpretation of that x-ray, the motion should be granted only where it is established (1) the x-ray film itself is unavailable for meaningful interpretation, and (2) the interpreting physician is no longer available.

D. Depositions

The regulations at 20 C.F.R. § 725.458 provide any party may depose a witness as long as the other parties have 30 days' notice of the intended deposition. For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28. For a discussion of the admission of deposition testimony in claims filed after January 19, 2001, see Chapter 4.

E. Claimant's refusal to consent to release of records

It is imperative that due process (notice and an opportunity to be heard) be observed. In *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249 (1979), an Administrative Law Judge improperly considered evidence that Employer could not review because the miner would not give his consent to a release of medical records.

IX. Submission of post-hearing evidence and leaving the record open

For a discussion of the admission of pre- and post-hearing deposition testimony, see Chapter 28.

A. Curing a violation of the 20-day rule

An Administrative Law Judge may keep the record open to allow for the submission of post-hearing evidence in response to evidence submitted in violation of the 20-day rule. 20 C.F.R. § 725.456(b)(2); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991). However, 20 C.F.R. § 725.458 provides, in pertinent part, "No post-hearing deposition or interrogatory shall be permitted unless authorized by the judge upon a motion of the party to the claim." Due process may require the development of post-hearing evidence in certain circumstances where a party has not had the opportunity to respond to evidence, which the Administrative Law Judge finds dispositive.

In *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984), Claimant contended the Administrative Law Judge improperly permitted Employer the opportunity to conduct a post-hearing examination. The Administrative Law Judge admitted an x-ray interpretation offered by Claimant at the hearing, which was not exchanged in accordance with the 20-day rule. As a result, the Board concluded the Administrative Law Judge properly left the record open for 60 days to permit Employer the opportunity to submit rebuttal evidence. The Board further determined Employer had the right to have Claimant re-examined during this period, and to submit the post-hearing report before the record closed.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990)(en banc), the Board concluded Employer's opportunity to respond to evidence not exchanged in accordance with the 20-day rule does not automatically include having Claimant re-examined.

B. Lack of due diligence, no post-hearing submission

Notions of due process, however, do not require leave to develop post-hearing evidence to overcome a party's own lack of due diligence. See *Richardson v. Perales*, 402 F.2d U.S. 389, 404-05 (1971) (due process satisfied where opposing party had the opportunity to confront and cross-examine reporting physicians, but failed to request subpoenas). The Board set forth the parameters for approving a request for post-hearing deposition in *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983): (1) the proffered evidence should be probative, and not merely cumulative; (2) the proponent must establish reasonable steps were taken to secure the evidence; and (3) the evidence must be reasonably necessary to ensure the opportunity for a fair hearing. *Id.* at 1-547 and 1-548.

1. Delay in obtaining the evidence

Refusal to reopen the record is proper where Claimant did not establish "good cause" for failure to obtain a physician's affidavit earlier, or to make a timely request that the record remain open. In applying the principles of *Lee* to admission of post-hearing documentary evidence, the Board held the Administrative Law Judge properly excluded a post-hearing affidavit from consideration where Claimant did not request the record be left open for submission of the affidavit. The evidence was neither obtained, nor submitted, before the Administrative Law Judge issued a decision denying benefits. *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984).

2. Failure to timely request extension of time

Haer v. Penn Pocahontas Coal Co., 1 B.L.R. 1-579 (1978) (the Administrative Law Judge properly denied an untimely written request for extension of time to submit post-hearing evidence). See also *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984); *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984).

C. Post-hearing medical evaluation

1. Factors to consider

a. Benefits Review Board

In *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984), the Board cited to the factors set forth in *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983) (admission of post-hearing depositions) as instructive on the issue of admission of post-hearing medical evaluations. Under *Lee*, post-hearing depositions may be obtained with the permission, and in the discretion, of the Administrative Law Judge pursuant to 20 C.F.R. § 725.458 of the regulations.

The party taking the deposition "bears the burden of establishing the necessity of such evidence." Among the factors to consider in determining whether to admit post-hearing depositions are the following: (1) whether the proffered deposition would be probative, and not merely cumulative; (2) whether the party seeking the deposition took reasonable steps to secure the evidence before the hearing, or the evidence was unknown or unavailable at any earlier time; and (3) whether the evidence is reasonably necessary to ensure a fair hearing.

Under the facts of *Lee*, the Administrative Law Judge properly refused to permit a post-hearing deposition of a physician for the purpose of

clarifying his earlier report. On the other hand, it was an abuse of discretion for the Administrative Law Judge to refuse the physician's post-hearing deposition, where the physician commented on additional medical evidence that was unknown prior to the hearing because the opposing party failed to fully answer interrogatories. Due process would be satisfied in permitting the post-hearing deposition as the opposing party would have an opportunity to cross-examine the physician during the deposition.

See also Owens v. Jewell Smokeless Coal Corp., 14 B.L.R. 1-47 (1990)(en banc) (Employer only need “be given some opportunity to respond to evidence submitted immediately prior to the 20-day deadline” at 20 C.F.R. § 725.456(b)(2), but this does not require Employer be allowed to conduct a post-hearing examination of the miner).

b. Third Circuit

By unpublished decision in *Thomas J. Smith, Inc. v. Director, OWCP [Kough]*, 2012 WL 1764223 (3rd Cir. May 18, 2012)(unpub.), the Third Circuit affirmed the Administrative Law Judge's denial of Employer TSI's request to have the miner examined post-hearing. Specifically, Claimant exchanged his two affirmative medical reports 25 days prior to the hearing in compliance with the 20-day rule at 20 C.F.R. § 725.456(b)(2). Asserting this was “surprise” evidence, TSI sought a post-hearing examination of the miner by its medical expert. The circuit court affirmed the Administrative Law Judge's denial of TSI's request and noted the following:

Although the ALJ denied TSI's request for a post-hearing examination, TSI was given alternative avenues to present rebuttal evidence in the form of a supplemental report by Dr. Fino or the submission of a new report by Dr. Kaplan based on a review of the evidence of record. TSI availed itself of this opportunity by submitting a post-hearing medical report, which the ALJ admitted and weighed in its decision-making process.

In sum, the ALJ afforded TSI a meaningful opportunity to present evidence at every juncture of the proceeding. Neither the APA, the relevant regulations, or our precedent dictates that TSI had the additional right to conduct a post-hearing physical examination.

2. Post-hearing report based on pre-hearing examination

Submission of a post-hearing report based on a pre-hearing medical examination should not be automatically excluded as a violation of the

20-day rule. The Board held, where Claimant was examined shortly before the 20-day deadline commenced to run, but the report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted, "Because employer never received a copy of the report and because the Administrative Law Judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

3. Post-hearing evidence responsive to evidence filed on eve of 20-day deadline

After the hearing, the Administrative Law Judge properly admitted re-readings of x-rays by both the Director and Employer "in fairness" to the parties where Claimant's original reading was submitted in compliance with the 20-day rule by only a few days. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). See also *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990)(en banc) (Employer need only "be given some opportunity to respond to evidence submitted immediately prior to the 20 day deadline" at 20 C.F.R. § 725.456(b)(2), but this does not require that Employer be allowed to conduct a post-hearing examination of the miner).

X. Reopening the record on remand

A. Submission of additional evidence, change in legal standard

After the time specified for submission of evidence has expired, a party may submit a motion to reopen the record. Typically, the grounds offered for such motions are: (1) a party inadvertently failed to meet a deadline, or (2) the legal standards (in place at the time of the hearing) subsequently changed. In *Shrewsberry v. Itmann Coal Co.*, BRB No. 89-2927 (Aug. 27, 1992)(unpub.), the Board stated "the administrative law judge has broad discretion in resolving procedural issues, and absent compelling circumstances or a showing of good cause, is not required to open the record for submission of post-hearing evidence." However, in *Toler v. Associated Coal Co.*, 12 B.L.R. 1-49 (1989)(en banc on recon.) the Board concluded an Administrative Law Judge may reopen the record on remand to accept evidence addressing a new legal standard.

When a party fails to meet a deadline, the decision to reopen the record is discretionary. Factors to take into account are: (1) the reasonableness of the request and its grounds; (2) whether the

opposing party objects to the motion; and (3) whether the opposing party would be prejudiced by the grant of an extension.

A *significant* change in the legal standards in effect at the time of the hearing may constitute grounds for reopening the record:⁷

1. Third Circuit

Marx v. Director, OWCP, 870 F.2d 114 (3rd Cir. 1989). *But see Williams v. Bishop Coal Co.*, Case No. 88- 672 BLA, 1992 U.S. App. LEXIS 32679 (3d Cir. Dec. 16, 1992)(unpub.) (the new standard under 20 C.F.R. § 727.203(b)(2), *i.e.* the miner is disabled for *any* reason, is not significant enough to warrant reopening the record on remand to permit additional evidence to be considered under (b)(3)).

2. Fourth Circuit

In *Robinson v. Pickands Mather & Co.*, 914 F.2d 1144 (4th Cir. 1990), reopening the record was permissible because the court modified the legal standard for determining the cause of total disability. It placed a heavier

⁷ In its comments to the amended regulations, the Department states the following:

With respect to rules that clarify the Department's interpretation of former regulations, the Department quoted *Pope v. Shalala*, 998 F.2d 473 (7th Cir. 1993), *overruled on other grounds*, *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to rules of substantive law, may be given retroactive effect.

. . .

The Department's rulemaking includes a number of such clarifications. For example, the revised versions of §§ 718.201 (definition of pneumoconiosis), 718.204 (criteria for establishing total disability due to pneumoconiosis) and 718.205 (criteria for establishing death due to pneumoconiosis) each represent a consensus of the federal courts of appeals that have considered how to interpret former regulations.

. . .

Moreover, none of the appellate decisions with respect to these regulations represents a change from prior administrative practice. Thus, a party litigating a case in which the court applied such an interpretation would not be entitled to have the case remanded to allow that party an opportunity to develop additional evidence.

65 Fed. Reg. 79,955 (Dec. 20, 2000).

burden on Employer than the previous standard set forth in *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

However, in *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.), the Administrative Law Judge properly refused to reopen the record on remand where Employer was on notice of the standard for establishing subsection (b)(2) rebuttal, *i.e.* the miner was not disabled for any reason, from the plain language of the regulation, which required Employer establish "that the individual is able to do his usual coal mine work or comparable and gainful work." See 20 C.F.R. § 727.203(b)(2). The court reasoned Board decisions, which held that subsection (b)(2) rebuttal requires that Employer demonstrate the miner is not totally disabled for any pulmonary or respiratory reason, were inconsistent with the language of the regulations. As a result, the court determined the fact that Employer "chose to restrict its evidence to the lesser standard . . . does not allow it to avoid the fact that it was on notice of the higher standard."

3. Sixth Circuit

Harlan Bell Coal Co. v. Lemar, 904 F.2d 1042 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986). In *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6th Cir. 1998), the Administrative Law Judge erred in failing to consider evidence submitted by Employer on remand regarding rebuttal under 20 C.F.R. § 727.203(b)(3). Specifically, the Administrative Law Judge declined to reopen the record and reconsider his findings under subsection (b)(3) on remand because the Board "explicitly affirmed (his) finding that there was no rebuttal under § 727.203(b)(3) of the regulations." The court, however, held otherwise and reasoned a change in the legal standard under subsection (b)(2) after the hearing, requiring that Employer establish the miner was not totally disabled for *any* reason, shifted emphasis to subsection (b)(3) rebuttal. The court noted subsection (b)(3) became the less stringent rebuttal provision of the two subsections. The court then stated:

In the case at hand, Peabody presented new evidence as to (b)(2) and (b)(3), however, the ALJ refused to consider the new evidence as to (b)(3), and thus, only considered (b)(2) rebuttal. This was error. It is clear that Peabody was entitled to reconsideration as to both (b)(2) and (b)(3). (footnote omitted). Thus, in accord with (*Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 832 (6th Cir. 1997)), the Board committed a manifest injustice by denying Peabody full consideration.

Similarly, in *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827 (6th Cir. 1997), the court reiterated the Administrative Law Judge must reopen the record to permit the introduction of evidence where there is a change in legal standards. Specifically, the court held, "[W]hen an employer rebuts the interim presumption under the pre-*York* standard applicable to § 727.203(b)(2), but not under the post-*York* standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-*York* standards applicable to § 727.203(b)(2) or another regulatory subsection." (emphasis added). See also *Peabody Coal Co. v. Director, OWCP [Ferguson]*, 140 F.3d 634 (6th Cir. 1998).

4. Seventh Circuit

In *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th Cir. 1999), an Administrative Law Judge improperly excluded an autopsy report of Dr. Naeye on grounds that no good cause was established for its late submission on remand. Moreover, the Administrative Law Judge improperly discredited a reviewing physician's report, which was based partly on the excluded autopsy report. In the Administrative Law Judge's decision on remand, he stated the following:

Dr. Naeye's review of the autopsy was submitted on April 1, 1994, well after the deadline for submission of evidence. No good cause was shown for the lateness of the submission—only a confession of inadvertence. Inadvertence may serve as a reason for failure to meet a deadline; it will not do as an excuse. Dr. Naeye's report is rejected. That being the case, to the extent that Dr. Fino's appraisal of the extent of Claimant's pneumoconiosis is based on Dr. Naeye's report, that appraisal is flawed.

The Seventh Circuit held a medical expert may base his or her opinion on evidence that has not been made part of the record in administrative proceedings.⁸ The court stated, "The reason these rules are not applicable to agencies is that being staffed by specialists the agencies are assumed to be less in need of evidentiary blinders than lay jurors or even professional, though usually unspecialized, judges." It stated, "Naeye's report may have been put into evidence late, but there is no suggestion that it was too late to enable the claimant to prepare a rebuttal or that Fino was irresponsible in relying on the report in formulating his own opinion about the causality of

⁸ This does not apply to claims filed after January 19, 2001 because the amended regulations at 20 C.F.R. § 725.414 limits the evidence considered by medical experts in a claim.

(the miner's) disability." As a result, the Seventh Circuit vacated the Administrative Law Judge's award of benefits, and remanded the case to the Administrative Law Judge for consideration of Dr. Fino's opinion.

Notably, claims filed after January 19, 2001 must be based on evidence properly admitted into the record. 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i), 725.457(d), and 725.458 require that a medical opinion consider only evidence formally admitted into the record.

B. On remand

1. Within the Administrative Law Judge's discretion

The Board holds, where its remand decision did not require reopening the record for additional evidence, the decision whether to admit new evidence is a matter within the discretion of the Administrative Law Judge. *Meecke v. I.S.O. Personnel Support Dep't*, 14 B.R.B.S. 270 (1981). This is true even when the party seeks to submit evidence not available at the time of the original hearing. *White v. Director, OWCP*, 7 B.L.R. 1-348 (1984). As previously discussed in this chapter, an Administrative Law Judge is required to reopen the record on remand only when there has been a significant change in law subsequent to the formal hearing.

It is within the Administrative Law Judge's discretion to reopen the record for the submission of evidence. 20 C.F.R. § 725.456(e). See also *Lynn v. Island Creek Coal Co.*, 12 B.L.R. 1-146 (1988), *aff'd on recon.*, 13 B.L.R. 1-57 (1989)(en banc); *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). In particular, the Administrative Law Judge must determine whether "manifest injustice" will result against either party in refusing to admit evidence on remand. *Cochran v. Consolidation Coal Co.*, 16 B.L.R. 1-101 (1992).

2. Evidence is vague or unreliable, no "good cause" to reopen

"Good cause" to reopen the record is not established where the proffered evidence is "vague and unreliable." *Borgeson v. Kaiser Steel Coal Co.*, 12 B.L.R. 1-169 (1989)(en banc).

3. Miner's condition worsening, no "good cause" to reopen

"Good cause" is not established because the miner's condition is worsening. *White v. Director, OWCP*, 7 B.L.R. 1-348, 1-351 (1988)

(although the miner offered evidence on remand to demonstrate a worsening of his pulmonary condition, the Administrative Law Judge was not bound to accept it, and the Administrative Law Judge provided reasons for not doing so; the Board noted the evidence could be submitted on modification before the District Director).

C. A de novo hearing

A *de novo* hearing is required, where the Administrative Law Judge who originally heard the case is no longer available to consider the case, and the substituted fact-finder's decision is dependent on a credibility evaluation. In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board stated, "[T]he object [of the procedural guarantee of a *de novo*] hearing is to provide for a credibility evaluation on a direct basis, based on appearance and demeanor on the part of the testifying witness." *Id.* at 1-432. A *de novo* hearing is "required where the credibility of witnesses is an important, crucial, or controlling factor in resolving a factual dispute." *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-60 (1985)(citing 5 U.S.C. §554(d); *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954); *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973)). And, a *de novo* hearing is required on modification. *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000) (see Chapter 23 for additional discussion regarding modification).

The amended regulations at 20 C.F.R. § 725.452(d) provide the following regarding the requirement of an oral hearing:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. § 725.452(d). For an Administrative Law Judge's authority to *sua sponte* issue summary decision, see Chapter 28.

XI. "Good cause" generally

A. The 20-day rule and violations of the rule

The regulations at 20 C.F.R. § 725.456(b)(3) direct that waiver or "good cause" be established prior to admitting evidence not exchanged at least 20 days prior to hearing. Specifically, the Administrative Law Judge is required to make a finding that "good cause" exists under 20 C.F.R.

§ 725.456(b)(3) before admitting late evidence. *Jennings v. Brown Badgett, Inc.*, 9 B.L.R. 1-94 (1986), *rev'd on other grounds sub. nom., Brown Badgett, Inc. v. Jennings*, 842 F.2d 899 (6th Cir. 1988).

The Board similarly held 20 C.F.R. § 725.456(b)(3) requires a preliminary determination of whether "good cause" exists for a party's failure to comply with the 20-day rule. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984) (the Administrative Law Judge improperly admitted a medical report and deposition not exchanged in accordance with the 20-day rule; error not corrected by offering to leave the record open where opposing party continued to object to admission of report and did not accept alternative of leaving the record open).

If there is no waiver and "good cause" is not established, the Administrative Law Judge may either exclude the evidence from the record, *Farber v. Island Creek Coal Co.*, 7 B.L.R. 1-428 (1984), or remand the case to the District Director for further development of the evidence. *Trull v. Director, OWCP*, 7 B.L.R. 1-615 (1984).

Finally, in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-53 (2004) (en banc), *vacated and remanded on other grounds sub. nom.*, 523 F.3d 257 (4th Cir. 2008), a case decided under the amended regulations, the Board concluded it was proper for the Administrative Law Judge to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted the Administrative Law Judge left the record open for 45 days for Employer to respond, and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

1. "Good cause" not established

a. Unreasonable delay

Delay in obtaining evidence that was readily available does not support a finding of "good cause" to allow the untimely evidence.

A medical report was properly excluded where Employer failed to explain why it waited more than two and one-half years to secure a review of a pulmonary function study. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

It was proper to disregard a medical opinion not exchanged in accordance with the 20-day rule, where counsel failed to submit the opinion while the record was kept open. *Kuchwara v. Director, OWCP*, 7 B.L.R. 1-167 (1984).

Employer's request for a continuance to obtain autopsy slides for an independent review was properly denied on grounds that it had access to the slides for one year, but failed to secure them. *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984).

b. Knowledge of contents of late evidence not relevant

A case was remanded for a determination of whether Employer established "good cause" as to why an affidavit had not been timely exchanged pursuant to the 20-day rule at 20 C.F.R. § 725.456. The fact that Claimant would not be surprised by the contents of the affidavit does not satisfy the "good cause" standard. *White v. Douglas Van Dyke Coal Co.*, 6 B.L.R. 1-905, 1-907 and 1-908 (1984).

c. Relevancy of evidence not determinative

"Good cause" is not established by mere reference to relevancy of the evidence. Thus, the Administrative Law Judge erred in admitting evidence, which was mailed to the opposing party less than 20 days before the hearing, on grounds that it was his intention "to consider all relevant medical evidence." While the Administrative Law Judge acknowledged the opposing party's objection was "technically correct," he erroneously overruled it. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

2. "Good cause" established

a. Evidence exchanged in earlier state claim

"Good cause" for admission of evidence was established where the evidence, not exchanged 20 days prior to the hearing, was sent to the opposing party "three years earlier in connection with a state claim (which) gave claimant's counsel reason to believe that employer's counsel already had a copy of the report." The Administrative Law Judge properly left the record open for 30 days, but the opposing party failed to respond to admission of the report. The Board held it was proper to admit the report, but it cautioned:

Affirmance of the administrative law administrative law judge's exercise of discretion in this case . . . should not be construed as an endorsement of the view that documents exchanged in connection with an earlier state claim uniformly satisfy the 20-day rule. Documents, generally speaking, must be exchanged during the course of proceedings before the Department of Labor in order to satisfy the 20-day rule . . .

Buttermore v. Duquesne Light Co., 7 B.L.R. 1-604, 1-607 (1984), *modified on recon.*, 8 B.L.R. 1-36 (1985).

b. Evidence used for impeachment

The Board remanded a case for the Administrative Law Judge to consider whether a tape recording, which was not exchanged at least 20 days prior to the hearing, was admissible for impeachment purposes. Claimant argued the recording was of his conversation with a physician who stated Claimant had "black lung," contrary to the diagnosis contained in the physician's written report. *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991).

c. Examination more than 20 days before hearing, report available after hearing

Where Claimant was examined shortly before the 20-day deadline, and the medical report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted, "Because employer never received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days." *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

B. Admission of late evidence; must allow response

If late evidence is admitted, the regulatory provisions at 20 C.F.R. § 725.456(b)(4) require the record be left open for 30 days to permit the filing of responsive evidence.

The Administrative Law Judge has broad discretion in procedural matters, and may refuse to admit medical evidence submitted post-hearing, *Itell v. Ritchey Trucking Co.*, 8 B.L.R. 1-356 (1985) (the Administrative Law Judge properly refused to reopen the record for post-hearing evidence "absent compelling circumstances or a showing of good cause"). However, the Administrative Law Judge must provide

rationale for accepting or rejecting post-hearing evidence *prior to* issuance of the decision. *Covert v. Westmoreland Coal Co.*, 6 B.L.R. 1-1111 (1984).

Where evidence is admitted post-hearing, then the Administrative Law Judge must allow submission of responsive evidence. In *Coughlin v. Director, OWCP*, 757 F.2d 966, 7 B.L.R. 2-177 (8th Cir. 1983), it was error for the Administrative Law Judge to permit the Director to obtain a post-hearing re-reading of an x-ray study without providing Claimant a copy of the re-reading, or permitting him the opportunity to rebut the new reading. The court held, "[F]undamental concepts of fairness require that litigants be given equal opportunities to present their respective positions." *Id.* at 969.

Similarly, the Board concluded, if the Administrative Law Judge determines a post-hearing affidavit regarding Claimant's work history was properly admitted, then Employer must be given an opportunity to "depose and cross-examine the affiant." *Lane v. Harmon Mining Corp.*, 5 B.L.R. 1-87, 1-89 (1982).

The Administrative Law Judge reasonably concluded "fairness" required the post-hearing admission of x-ray evidence, and "good cause" was implicitly found to exist. Specifically, Claimant's reading of an x-ray study was submitted in compliance with the 20-day rule "by only a few days" such that Employer was properly permitted to submit responsive evidence post-hearing. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-153 (1989)(en banc).

In *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-200 (1986), Claimant submitted the report of his physician immediately prior to the 20-day deadline, and objected to admission of a rebuttal report based upon an examination conducted 18 days prior to the hearing. The Board held the Administrative Law Judge generally has broad discretion in dealing with the conduct of the hearing, but remanded the case stating:

Claimant's submission of Dr. Mastine'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 the 'surprise' evidence, constituted a denial of employer's due process right to a fair hearing.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990) (en banc), the Board concluded Employer's opportunity to respond does not automatically include having Claimant re-examined.

1. Record left open for both parties

In *Baggett v. Island Creek Coal Co.*, 6 B.L.R. 1-1311 (1984), the Administrative Law Judge admitted an x-ray re-reading by Employer on the grounds that Employer established "good cause" as to why the reading was not exchanged in compliance with the 20-day rule. The Administrative Law Judge left the record open to permit the parties an opportunity to submit any further evidence. Claimant was subsequently granted two extensions of time to submit evidence, but Employer was denied an extension of time. The Board concluded this was error because 20 C.F.R. § 725.456(b)(4) requires that the record be left open for both parties.

2. Failure to timely submit response, waiver of right of cross-examination

Employer was afforded due process where the Administrative Law Judge reopened the record to admit an autopsy report, provided Employer with a copy, and waited more than 30 days for Employer to respond before issuing a decision. In failing to submit rebuttal evidence while the record was left open, Employer "waived" its right to cross-examination. *Gladden v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-577, 1-579 (1984).

The Director, who was absent at a hearing, was precluded from objecting to admission of new evidence at the hearing. The Administrative Law Judge properly left the record open for 30 days after the hearing pursuant to 20 C.F.R. § 725.456 for the Director to respond. However, the Director: (1) did not request notification of the newly submitted evidence; (2) made no attempt to ascertain what had transpired during the hearing; and (3) did not submit rebuttal during the 30 days in which the record was left open. *DeLara v. Director, OWCP*, 7 B.L.R. 1-110 (1984).

XII. Dispose of a claim

A. Withdrawal

Pursuant to 20 C.F.R. § 725.306, the Administrative Law Judge may grant a motion to withdraw a claim if it is *in the best interests of the claimant*, and certain requirements set forth below are met.

1. Threshold requirements

a. No decision on the merits issued

In *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc) and *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc), the Board held, once a decision on the merits issued by an adjudication officer⁹ becomes effective pursuant to 20 C.F.R. §§ 725.419, 725.479, and 725.502,¹⁰ there no longer exists an "appropriate" adjudication officer authorized to approve a withdrawal request under 20 C.F.R. § 725.306.

In *Keene v. Dominion Coal Co.*, BRB No. 05-0384 BLA (Sept. 30, 2005) (unpub.), the Board held the Administrative Law Judge had authority to grant Claimant's request to withdraw his claim, where the written request was submitted after the District Director issued a schedule for the submission of additional evidence, but prior to issuance of a decision on the merits.

b. Request is in writing

A motion for withdrawal must be submitted in writing the proper adjudication officer, and it must set forth the reasons for seeking withdrawal. 20 C.F.R. § 725.306(a).

c. Withdrawal is in "best interests" of claimant

The motion for withdrawal may be granted only if it is in the best interests of the claimant. 20 C.F.R. § 725.306(a)(2); *Rodman v. Bethlehem Steel Corp.*, 16 B.L.R. 123 (1984); *Matthews v. Mid-States Stevedoring Corp.*, 11 B.R.B.S. 139 (1979).

Claimant is permitted to withdraw his or her request to withdraw at any time prior to the approval of such request. When a claim has been withdrawn pursuant to 20 C.F.R. § 725.306(a), "the claim will be considered not to have been filed." 20 C.F.R. § 725.306(b).

⁹ The Board noted, pursuant to 20 C.F.R. § 725.350, "adjudication officers" are District Directors and Administrative Law Judges.

¹⁰ A District Director's proposed decision and order becomes "effective" 30 days after the date of its issuance, unless a party requests a revision or hearing. An Administrative Law Judge's decision and order on the merits becomes "effective" on the date it is filed in the office of the District Director. See 20 C.F.R. §§ 725.419, 725.479, and 725.502(a)(2).

Notably, if a withdrawal is granted, it is as if the miner or survivor never filed the claim. Therefore, the Administrative Law Judge must consider the impact, if any, of the three-year statute of limitations at 20 C.F.R. § 725.308 in determining whether withdrawal is in a claimant's best interests. For further discussion of the statute of limitations, see Chapter 11.

d. Claimant not receive interim benefits

If a claimant has been receiving benefits, and then decides to withdraw the claim, s/he must agree to repay the benefits received. See 20 C.F.R. § 725.306(a)(3). Before any motion to withdraw is granted, a show cause order should be issued to afford opposing parties the opportunity to object to the withdrawal, which Employer or Director may do if interim benefits are being, or have been, paid.

e. Withdrawal of petition for modification

Under *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-20 (2008), a petition for modification may be withdrawn pursuant to 20 C.F.R. § 725.306 at any time before a decision becomes "effective." Here, the miner filed a petition for modification in 2001, after the Board affirmed the denial of benefits in his first claim on October 18, 2000. Subsequently, the miner sought withdrawal of the petition. Adopting the Director's position, the Board held the modification petition could be withdrawn as there was no "effective" decision on the petition:

Although the Director agrees that the August 2001 application constituted a modification request, the Director also asserts that the modification request was properly withdrawn by claimant. The Director contends that a withdrawn modification request is treated in a manner similar to a withdrawn claim, insofar as it must be considered never to have been filed. See 20 C.F.R. § 725.306(b).

Citing to *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002) (a claim may be withdrawn before a denial becomes "effective"), the Board held, since the District Director in this case had not issued a decision regarding the 2001 modification petition prior to receiving a letter from Claimant seeking its withdrawal, it was proper to allow withdrawal of the petition for modification. The Board concluded the 2001 modification petition would be "treated as if it were never filed."

With regard to evidence submitted in conjunction with the 2001 petition, Employer argued that such evidence should automatically be part of the record for consideration in any subsequent proceeding. The Board disagreed, and held, "[E]vidence developed in conjunction with the August 2001 application must be treated as if it had never been filed, and is not part of the record unless the parties choose to specifically designate that evidence under Section 725.414."

2. Withdrawal improper, example of

It was not in the miner's best interests to allow withdrawal of his claim in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997). Under the facts of *Jonida Trucking*, Claimant was found entitled to benefits, but refused payments from Employer, who was Claimant's long-time friend. Instead, Claimant sought payments from the Trust Fund. Employer stated it failed to contest the claim "because it had relied on information from (Claimant) that any award would run against the Trust Fund and not against (Employer)." When Claimant was informed he could not receive benefits from the Trust Fund, he requested a withdrawal of his claim, which was denied by the Board.

Because Claimant did not join Employer in its appeal of the Board's denial of withdrawal of the claim, the court held Employer did not have "standing to appeal the withdrawal issue." The court stated, "[I]t is clear that an employer is not the proper party to argue that its employee's best interests are served by allowing him to forfeit payments from the employer." The court then upheld an order directing that Employer, a trucking company, secure the payment of \$150,000 in benefits pursuant to 20 C.F.R. § 725.606 (2000).

3. Employer's interests not considered

In *Bailey v. Dominion Coal Corp.*, 23 B.L.R. 1-85 (2005), the Board affirmed the Administrative Law Judge's granting of Claimant's request to withdraw his claim. Under the facts of the case, Claimant submitted a request to withdraw his claim with the District Director after receiving an unfavorable opinion from the physician conducting the Department-sponsored examination. Claimant's representative asserted, "It is impossible to win his claim because he does not meet the disability standards," and it would result in "great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time." The District Director granted Claimant's request to withdraw on grounds that it was in his best interests and the Administrative Law Judge agreed. Pursuant to 20 C.F.R. § 725.306(b), the claim was considered not

to have been filed, and the Administrative Law Judge declined to require automatic admission of medical evidence generated in conjunction with the withdrawn claim if Claimant should file another claim.

On appeal to the Board, Employer argued it was not in its best interests to have the claim withdrawn as it "paid to have claimant examined twice, thereby developing evidence that will not be included in the record, because of claimant's request for withdrawal." Moreover, Employer posited this is a "waste of employer's financial resources and will hamper employer's ability to defend itself in any future claim."

The Board disagreed. It adopted the Director's position that 20 C.F.R. § 725.306(a)(2) allows for withdrawal of a claim, if it is in the best interests of a claimant, prior to issuance of an effective decision. The Board concluded the adjudicator is not required to consider Employer's interests. In addition, the Board stated, "[E]mployer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case."

The Board then rejected Employer's argument that evidence generated in conjunction with the withdrawn claim should be automatically included in the record of any subsequent filing without being counted under the evidentiary limitations at 20 C.F.R. § 725.414 of the regulations. Employer reasoned, in any future claim, it "risks showing the new examining physician too much relevant evidence" unless a ruling is made to specifically include evidence underlying the withdrawn claim. The Administrative Law Judge declined to rule on the issue because she determined, once the request to withdraw a claim is granted, the claim is considered not to have been filed under 20 C.F.R. § 725.306(b). As a result, she was without authority to order the automatic inclusion of evidence into the record of any future claim. The Board agreed.

4. Medical evidence generated in withdrawn claim excluded

In *Anderson v. Kiah Creek Mining Co.*, BRB No. 03-0828 BLA (May 24, 2004) (unpub.), the Board affirmed the Administrative Law Judge's order granting withdrawal of the miner's claim under 20 C.F.R. § 725.306 as interpreted in *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc) and *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc). With regard to medical evidence developed in connection with the withdrawn claim, the Board held such evidence would not be included with the filing of any additional claims by the miner. However, a party would not be "precluded from submitting the evidence developed in (the withdrawn) claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion." *See also Feltner v. Whitaker*

Coal Corp., BRB No. 04-0823 BLA (Apr. 27, 2005); *Sizemore v. LEECO, Inc.*, BRB No. 04-0514 BLA (Feb. 7, 2005) (unpub.); *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub) (in a footnote, the Board cited to *Bailey v. Dominion Coal Corp.*, 23 B.L.R. 1-85 (2005) and 20 C.F.R. § 725.306(b) to state, if a prior claim is withdrawn, "[t]he effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim").

See also *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-20 (2008) (medical evidence generated in conjunction with withdrawn petition for modification excluded).

B. Dismissal/abandonment

1. For claims filed on or before January 19, 2001

Any party may file a motion to dismiss the claim. A dismissal operates as a final disposition of the claim and, therefore, is subject to *res judicata*, unless the Administrative Law Judge specifies in the order that the dismissal is without prejudice. See 20 C.F.R. § 725.465. A claim may be dismissed for the failure of the claimant (or claimant's representative) to appear at a scheduled hearing, or based on the claimant's failure to comply with an order issued by an Administrative Law Judge. See 20 C.F.R. § 725.465 (2000); *Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985).

Twenty C.F.R. § 725.465 requires the order of dismissal be preceded by an order to show cause. This allows the claimant an opportunity to explain his or her actions, and to take necessary steps to avoid dismissal of the claim. An order to show cause should explain the steps necessary to avoid dismissal, and provide the claimant an ample opportunity to answer the order. If the claimant answers the show cause order within the allotted time, sets forth a reasonable explanation of earlier defects, and takes the steps set forth in the show cause order, then the claim should not be dismissed, and an order denying the motion to dismiss should be issued.

If the claimant is acting *pro se*, more leeway should be given with regard to time limits in show cause orders, and attempts may be made to resolve the problem without having to issue the show cause order. However, if attempts to contact the claimant are not successful, or if the failure to follow an Administrative Law Judge's order is ongoing, a claim may be denied by reason of abandonment pursuant to 20 C.F.R. §§ 725.408 and 725.409. Abandonment occurs when the claimant fails to pursue the claim with reasonable diligence, fails to submit evidence, or refuses to

undergo a required medical examination without good cause. *Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985).

2. For claims filed after January 19, 2001

The amended regulations retain the requirement that an order to show cause should be issued prior to an order of dismissal. 20 C.F.R. § 725.465(b). However, the abandonment provisions at 20 C.F.R. § 725.409 have been altered considerably, and will result in a new type of adjudication by Administrative Law Judges. Denial by reason of abandonment may be proper where the miner fails to undergo a medical examination without good cause, or a claimant fails to (1) submit evidence sufficient to make a determination of the claim, (2) pursue the claim with reasonable diligence, or (3) attend the informal conference without good cause. 20 C.F.R. § 725.409(a). New provisions at 20 C.F.R. § 725.409(b)(2) and (c) state, in relevant part, the following:

(b)(2) In any case in which a claimant has failed to attend an informal conference and has not provided the district director with his reasons for failing to attend, the district director shall ask the claimant to explain his absence.

. . .

If the claimant does not supply the district director with his reasons for failing to attend the conference within 30 days of the date of the district director's request, or the district director concludes that the reasons supplied by the claimant do not establish good cause, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(c) The denial of a claim by reason of abandonment shall become effective and final unless, within 30 days after the denial is issued, the claimant requests a hearing.

. . .

For purposes of § 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement. If the claimant timely requests a hearing, the district director shall refer the case to the Office of Administrative Law Judges in accordance with § 725.421. Except upon the motion or written agreement of the Director, the hearing will be limited to the issue of abandonment

and, if the administrative law judge determines that the claim was not properly denied by reason of abandonment, he shall remand the claim to the district director for the completion of administrative processing.

20 C.F.R. § 725.409(b) and (c).

C. Summary decision

Under 29 C.F.R. § 18.40,¹¹ a motion for summary decision may be filed by any party at least 20 days before the date of a scheduled hearing. Here, the Administrative Law Judge renders a decision without a formal hearing, and summary decision is appropriate only when no genuine issue of material fact remains in dispute. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3rd Cir. 1990). Summary decision may be limited to specific issues (such as length of coal mine employment), or may go to the merits of the claim for benefits. 20 C.F.R. § 725.465.

D. Subject matter jurisdiction

Neither the Office of Administrative Law Judges, nor the Benefits Review Board, has subject-matter jurisdiction over cases involving reimbursement and interest payable to the Black Lung Disability Trust Fund. The United States Court of Appeals for the Sixth Circuit held, in *Youghioghney & Ohio Coal Co. v. Vahalik*, 970 F.2d 161 (6th Cir. 1992), jurisdiction in such cases properly lies in the federal district courts. For further discussion of medical interest cases, see Chapter 21.

XIII. Representation issues

A. Appointment of a representative

Twenty C.F.R. § 725.362(a) provides for the representation of parties in any black lung proceeding. Under 20 C.F.R. § 725.363, a representative (lay or attorney) may represent the claimant provided an entry of appearance, or written notice of such appearance, is in the record. See also 29 C.F.R. § 18.35(g).¹² Also, a claimant may elect to appear *pro se* at the hearing.

¹¹ The proposed regulation is at 29 C.F.R. § 18.72.

¹² The proposed regulation is at 29 C.F.R. § 18.17.

B. Withdrawal as a representative

Twenty-nine C.F.R. § 18.34(g)(1)¹³ states that an attorney of record must provide prior written notice of intent to withdraw as counsel. In such cases, the affected party may be allowed time to obtain representation.

C. Sanctions

Twenty-nine C.F.R. § 18.6(d)(2)(i-v)¹⁴ provides for the imposition of sanctions if a party or its representative fails to comply with an order of the Administrative Law Judge.

XIV. Miscellaneous procedural motions and orders

A. Extension of time

At the hearing, the Administrative Law Judge may permit the record to remain open for a specified amount of time to allow for the submission of post-hearing briefs or evidence. Granting or denying a motion for an extension of time is discretionary, and any decision in this regard should take into account the reasonableness of the request, circumstances giving rise to the request, the opposing party's view on the matter, and whether any party is prejudiced by the extension. See 29 C.F.R. §§ 18.54 and 18.55.¹⁵

Normally, extensions should not be granted to allow for the submission of new evidence, which was not addressed at the hearing. In dealing with the regular submission of evidence in a black lung claim, 20 C.F.R. § 725.456 provides that all documents transmitted to the Administrative Law Judge by the District Director will be placed into evidence (but this is subject to the evidentiary limitations at 20 C.F.R. § 725.414). If the evidence was not placed in the record at the District Director's level, it shall be admitted at the Administrative Law Judge's level as long as it is sent to all other parties at least twenty days prior to a hearing in connection to the claim and it complies with the evidentiary restrictions at 20 C.F.R. § 725.414. See 20 C.F.R. § 725.456(b)(1); *Cochran v. Consolidation Coal Co.*, 12 B.L.R. 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-236 (1987).

¹³ The proposed regulation is at 29 C.F.R. § 18.22.

¹⁴ The proposed regulation is at 29 C.F.R. § 18.33.

¹⁵ The proposed regulation is at 29 C.F.R. § 18.90.

For further discussion of the 20-day rule, see this chapter, *supra*, and Chapter 4.

B. Continuance/postponement of hearing

After a hearing is scheduled, and the notice of hearing is issued, any party may request a continuance. Typical reasons for requesting a continuance are as follows: health problems, scheduling conflicts, unpreparedness for hearing, new counsel retained, claimant attempting to obtain counsel, and ongoing attempts to resolve an issue prior to hearing. Deciding whether to grant a motion for continuance is discretionary; no single regulation governs whether such a motion should be granted. The following factors should be considered: whether there have been prior continuances, whether any party would be prejudiced by a continuance, whether the grounds for the request are reasonable, and whether the opposing party has objected to the continuance. 29 C.F.R. § 18.28.¹⁶ For further discussion of continuances, see Chapter 28.

C. Decision on the record

Pursuant to 20 C.F.R. § 725.461, any party may waive its right to a formal hearing. The waiver must be made in writing and can be withdrawn for good cause at any time prior to the mailing of the decision in the claim. However, even if all of the parties agree to waive the hearing, an Administrative Law Judge may still conduct a hearing if s/he believes the "personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue. . . ." 20 C.F.R. § 725.461(a). If the waiver is granted, the Administrative Law Judge should consider all the documents and stipulations that comprise the record in the case.

In addition, the unexcused failure of any party to attend a hearing shall constitute a waiver of that party's right to present evidence at a hearing, and may result in dismissal of the claim. 20 C.F.R. § 725.461(b). For further discussion of dismissal of a claim for claimant's failure to attend the hearing, see this chapter, *supra*.

D. Reconsideration

Any party may request reconsideration of an Administrative Law Judge's decision and order, if such request is made within 30 days after such decision and order is filed. 20 C.F.R. § 725.479(b). The Administrative Law

¹⁶ The proposed regulation is at 29 C.F.R. § 18.41.

Judge determines the procedures to be followed on reconsideration. During consideration of a timely request for reconsideration, the time for appeal to the Benefits Review Board is suspended. 20 C.F.R. § 725.479(c).

And, the amended regulations contain a new provision at 20 C.F.R. § 725.479(d), "Regardless of any defect in service, actual receipt of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision." 20 C.F.R. § 725.479(d).

1. Consecutive motions not permitted

In *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558 (7th Cir. 1998), an Administrative Law Judge has jurisdiction to adjudicate a motion for reconsideration, if it is filed within 30 days of the date of filing of his or her decision. The Administrative Law Judge is not empowered, however, to entertain subsequent motions for reconsideration filed outside the 30-day time period.

In *Knight v. Director, OWCP*, 14 B.L.R. 1-166 (1991), the Board held a second motion for reconsideration, filed within 30 days of the decision on reconsideration but not within 30 days of the original decision and order, was untimely. Moreover, the Board concluded, even if the second motion was timely, it improperly raised issues which were not raised in the first motion.

2. Submission of evidence on reconsideration

In *Hensley v. Grays Knob Coal Co.*, 10 B.L.R. 1-88, 1-91 (1987), the Administrative Law Judge has jurisdiction to consider a motion for reconsideration, which was filed within 30 days of the date the decision and order became "effective" pursuant to 20 C.F.R. §§ 725.479 and 725.480. Further, the Administrative Law Judge may, but is not required to, accept new evidence on reconsideration. Prior to admitting such evidence, however, the Administrative Law Judge must find "good cause" existed for failure to obtain and exchange the evidence in compliance with 20 C.F.R. § 725.456(b)(3) of the regulations.

3. Benefits Review Board's jurisdiction

In *J.L.S. v. Eastern Associated Coal Co.*, BRB No. 08-0146 BLA (Oct. 24, 2008) (unpub.), the Board held it had jurisdiction to consider Claimant's appeal, which was filed within 30 days of the Administrative Law Judge's denial of his *second* motion for reconsideration. In so holding, the Board rejected Employer's argument that the second motion for

reconsideration did not toll the time for filing an appeal with the Board. Citing to *Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 11 B.L.R. 2-150 (7th Cir. 1988) and *Tucker v. Thames Valley Steel*, 41 B.R.B.S. 62 (2007), the Board held, for "internal administrative appeals within an agency," the 30-day time period for Claimant to file an appeal did not commence to run until the Administrative Law Judge finally disposed of the claim which, in this case, was upon denial of Claimant's second motion for reconsideration.

E. Petitions for modification

Any party may request a modification of a final adjudication, if such request is filed within one year of the prior denial or last payment of benefits, whichever is later. See 20 C.F.R. §§ 725.310 and 725.480. If an Administrative Law Judge is assigned a petition for modification, s/he must hold a hearing unless all parties of record waive this right in writing. See 20 C.F.R. § 725.310; *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000). See Chapter 23 for a further discussion of modification petitions.

F. Remand to organize or reconstruct the record

If a record received from the District Director's office is improperly numbered, documents are missing, or documents are out of sequence in such a manner that makes processing the claim impractical, an Administrative Law Judge may order the file returned to the District Director to reorganize the record. Also, when files are lost or otherwise misplaced, an Administrative Law Judge may order the District Director to reconstruct the record, and return it to this Office. A sample order may appear as follows:

The record in the above-captioned matter received in this Office from the District Director is disorganized in that the exhibits are not consecutively paginated. Accordingly, IT IS HEREBY ORDERED that this case be REMANDED to the District Director of the _____, _____ office so that an accurate and organized copy of the record may be forwarded to all parties in this matter. As this case is scheduled for hearing on XXXXX XX, XXXX, the District Director is hereby ORDERED to return the case file to this Office and to provide copies to all parties no later than XXXXX XX, XXXX.

G. Correcting a clerical mistake

An Administrative Law Judge may issue an order correcting a clerical mistake of a previous decision and order. Rule 60 of the Federal Rules of Civil Procedure provides relief with respect to clerical errors and states, "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from such oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. . . ."

In *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993), the Board applied Rule 60(a) of the Federal Rules of Civil Procedure to hold a clerical mistake may be corrected at any time before an appeal, if any, is docketed or, if an appeal is pending, such a correction may be made with leave of the appellate court. If no appeal is filed, there is no time limit regarding correction of a clerical mistake. The Board was careful to note, however, a clerical error is "one which is a mistake or omission mechanical in nature which does not involve a legal decision or judgment by an attorney and which is apparent on the record." For further discussion of clerical errors, see Chapter 25.