

# Chapter 28

## Rules of Procedure and Evidence

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The procedural and evidential rules applicable to black lung claims are found at 20 C.F.R. Part 725 and 29 C.F.R. Part 18. Although 29 C.F.R. §§ 18.101 through 18.1104 set forth rules of evidence that are similar to rules applied in federal district courts, black lung proceedings are exempt from these provisions pursuant to 29 C.F.R. § 18.1101(b)(2) with the exception of 20 C.F.R. § 18.403 (excluding relevant evidence on grounds of confusion or waste of time), § 18.611(a) (exercising control over mode and order in interrogation of witnesses), and § 18.614 (examination and cross-examination of witnesses).

**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.

### I. Applicability of Federal Rules of Civil Procedure

Certain Federal Rules of Civil Procedure (FRCP) may apply to the adjudication of black lung claims pursuant to 29 C.F.R. § 18.1,<sup>1</sup> if the FRCP are not in conflict with the Act, or its implementing regulations. *Hamrick v. Eastern Associated Coal Corp.*, 12 B.L.R. 1-39 (1988).

#### A. Notice of deposition in writing

##### 1. FRCP 5(b) and 30(b)(1)

*Trump v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-1268 (1984) (applying **FRCP 5(b) and 30(b)(1)** to require that parties receive reasonable notice of a deposition in writing).

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<sup>1</sup> Under the proposed amendments, the regulatory citation is changed to 29 C.F.R. § 18.10.

## **2. Errors in notice of deposition waived, FRCP 32(d)(1)**

*Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 11 B.L.R. 2-92 (1988) (applying **FRCP 32(d)(1)** that all errors in a notice for taking a deposition are waived unless an objection is promptly served upon the party giving the notice).

### **B. Sanctions and costs**

#### **1. Questionable applicability, FRCP 11<sup>2</sup>**

In *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9<sup>th</sup> Cir. 1993), the Ninth Circuit declined to rule on whether Rule 11 sanctions are incorporated into administrative proceedings through 29 C.F.R. § 18.1 because Section 926 of the Longshore and Harbor Workers' Compensation Act provides for the assessment of costs against a party that institutes or continues a proceeding without reasonable ground. The court held this "impliedly includes a sanction for bad faith claims." Nevertheless, the court's "doubts" that Rule 11 was incorporated through § 18.1 were "increased by 20 C.F.R. § 18.29(b) which recognizes that enforcement actions against those who misbehave in proceedings before an Administrative Law Judge are to be referred to the court system." See also *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997 (5<sup>th</sup> Cir. 1995).

#### **2. Costs**

In *Crum v. Wolf Creek Collieries*, 18 B.L.R. 1-81 (1994), the Board held "only a federal court can assess a party's costs as a sanction against a claimant who institutes or continues, without reasonable ground, workers' compensation proceedings under the LHWCA," portions of which are incorporated into the Black Lung Benefits Act pursuant to 30 U.S.C. § 931.

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<sup>2</sup> The proposed regulation at 29 C.F.R. § 18.35, which is titled "Signing motions and other papers; representations to the judge; sanctions," contains similar content to Rule 11 of the FRCP.

## C. Discovery provisions of FRCP 26<sup>3</sup>

### 1. Generally inapplicable

The discovery provisions of the FRCP do not apply to black lung proceedings, unless expressly permitted by statute or regulation. In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), Claimant requested "medical information obtained by employer which employer did not intend to introduce into evidence and considered 'privileged'" during the discovery period. The Board declined to find that **FRCP 26(b)(4)(B)** applied to black lung claims. Rather, it determined the federal procedural rules "for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation." The Board directed, on remand, the "administrative law judge should reconsider his Order Denying Motion to Compel in accordance with the standard for the scope of discovery provided at 29 C.F.R. § 18.14 in conjunction with the provisions of 20 C.F.R. § 725.455" under his "discretionary authority." It further stated:

We reject, however, as overbroad, claimant's interpretation of Section 725.455 that an 'administrative law judge has an obligation to fully develop the record, develop the evidence, get all the evidence in . . . .' We also reject the position of claimant and the Director that the provision of 20 C.F.R. § 725.414, which requires the operator to submit evidence obtained to the district director and all parties, is extended to the administrative law administrative law judge.

*Id.* at 1-76.

### 2. "Undue hardship" and "substantial need," FRCP 26(b)(3)

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board upheld the Administrative Law Judge's denial of Claimant's motion to compel discovery from Employer. In particular, Claimant sought certain medical evidence generated by Employer in the claim. The Administrative Law Judge applied 29 C.F.R. § 18.14 to find, while information sought by Claimant was not "privileged,"

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<sup>3</sup> The proposed regulations at 29 C.F.R. § 18.50 contain much of the content of Rule 26 of the FRCP. The black lung procedural regulations at 20 C.F.R. Part 725 remain controlling, but certain provisions of the amended version of 29 C.F.R. Part 18 may apply to the extent that they are not in conflict with 20 C.F.R. Part 725.

Claimant had not demonstrated "substantial need of the materials," or that he would be "unable without undue hardship to obtain a substantial equivalent of the materials by other means" as required by 29 C.F.R. § 18.14<sup>4</sup> of the regulations. The Board further noted Claimant "had well-prosecuted his claim," and the evidence sought would not be "admissible given the evidentiary limitations and the quantity of evidence already submitted."

### 3. Protective order, FRCP 26(c)

*Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-648 (1985) (applying **FRCP 26(c)** to issue a protective order for Claimant, an Ohio resident, from the undue expense of attending Employer's physician's examination in New York).

#### D. Physical examination may be discovered, FRCP 35(b)<sup>5</sup>

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Administrative Law Judge properly declined to grant Claimant's motion to compel under **FRCP 35(b)**. The Board agreed **FRCP 35(b)** provides that evidence related to a physical examination of the miner is discoverable without the need to establish "undue hardship" or "substantial need." However, the Board noted Employer "has asserted that all documents resulting from the physical examination of the miner (had) already been duly exchanged" such that **FRCP 35(b)** was inapplicable. As a result, the Board affirmed the Administrative Law Judge's denial of Claimant's motion to compel on this ground as well.

#### E. Docket management, FRCP 41(b)

*Howell v. Director, OWCP*, 7 B.L.R. 1-259 (1984) (**FRCP 41(b)**) is similar to 20 C.F.R. § 725.461(b) in the management of an Administrative Law Judge's docket).

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<sup>4</sup> Under the proposed amendments, the regulatory citation is changed to 29 C.F.R. § 18.51.

<sup>5</sup> The proposed regulations at 29 C.F.R. § 18.62 contain content similar to Rule 35 of the FRCP.

**F. Summary decision, FRCP 56<sup>6</sup>**

*Hamrick v. Eastern Associated Coal Corp.*, 12 B.L.R. 1-39 (1988) (applying **FRCP 56** permitting an Administrative Law Judge to issue summary decision *sua sponte*); *Montoya v. National King Coal Co.*, 10 B.L.R. 1-56, 1-61 (1986) (applying **FRCP 56** and noting summary decision is only appropriate when no genuine issue of material fact exists).

**G. Correction of a clerical error, FRCP 60**

*Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993) (applying **FRCP 60** to correct misidentification of a party liable for the payment of a representative's fees).

**H. "Fraud on the court," FRCP 60 (d)(3) applies**

By unpublished decision in *Fox v. Elk Run Coal Co.*, BRB No. 11-0793 BLA (Sept. 18, 2012)(J. Hall, concurring and dissenting) (unpub.), the Board held **FRCP 60(d)(3)** is applicable to black lung adjudications:

As both the administrative law judge and the Director note, a 'decision produced by fraud on the court is not in essence a decision at all and never becomes final.' (citation omitted). And here, the issue of whether claimant's prior denial ever became final relates to a relevant issue the administrative law judge must determine in this subsequent claim, namely, the date for the commencement of benefits. 20 C.F.R. § 725.309(d)(5). We, therefore, agree with the Director that an administrative law judge possesses the authority to consider whether an otherwise final decision was procured by fraud on the court.

*Slip op.* at 6. However, the Board declined to affirm the Administrative Law Judge's finding of "fraud on the court" in this claim because the noted behavior "falls short" of "undisputed perjury and outright

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<sup>6</sup> The proposed regulations at 29 C.F.R. § 18.72 contain content similar to Rule 56 of the FRCP.

fabrication of evidence" such that it was not "sufficiently egregious to constitute fraud on the court." *Slip op.* at 9. Under the facts of the case, the Administrative Law Judge ordered the Employer to produce certain pathology reports to Claimant and, on review of evidence produced, he concluded Employer "committed fraud on the court by concealing pathology reports diagnosing claimant with complicated pneumoconiosis" in a prior claim. As a result, the Administrative Law Judge concluded the denial of benefits in the prior claim was "ineffective."

## **II. Authority of the Administrative Law Judge**

The conduct of the hearing is within the sound discretion of the Administrative Law Judge. The Administrative Law Judge is not bound by formal rules of evidence or procedure, except as provided at 5 U.S.C. § 501 *et seq.*, 20 C.F.R. Part 725, and 29 C.F.R. Part 18. Moreover, the Board reviews an Administrative Law Judge's procedural rulings under the "abuse of discretion" standard. *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc).<sup>7</sup>

### **A. Issues of constitutionality**

The Administrative Law Judge is without authority to decide issues of constitutionality. *Kosh v. Director, OWCP*, 8 B.L.R. 1-168, 1-169 (1985).

### **B. Determination of insurance coverage**

The Administrative Law Judge has jurisdiction to decide whether an insurance fund is liable under contract for the payment of benefits; however, this jurisdiction does not extend to matters outside the insurance contract. *Gilbert v. Williamson Coal Co.*, 7 B.L.R. 1-289, 1-291 and 1-292 (1984).

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<sup>7</sup> An Administrative Law Judge's discretionary finding on a procedural matter is not subject to modification. By unpublished decision in *Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.), the Board held the Administrative Law Judge's "discretionary determination that the Director established good cause for the untimely submission of Dr. Green's report is not subject to modification because (the Administrative Law Judge) was resolving a procedural matter that is not within the scope of issues that are subject to modification, *i.e.*, issues of entitlement." The Board further stated the "proper recourse for correction of error, if any, would have been a timely appeal or motion for reconsideration, neither of which were timely pursued."

For additional discussion on proper designation of an operator and/or carrier, see Chapter 7.

### **C. Overpayment and repayment**

In *Kieffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held an Administrative Law Judge has authority to determine whether an overpayment exists and, if so, whether the miner is liable for its repayment. However, an Administrative Law Judge does not have authority to determine a repayment schedule.

For additional discussion on overpayments, see Chapter 18.

### **D. Reconsideration**

An Administrative Law Judge has authority to rule on a motion for reconsideration that is filed within 30 days of the "effective" date of the Administrative Law Judge's decision. An Administrative Law Judge's decision is considered "effective" as of the date it is filed with the District Director's office. 20 C.F.R. § 725.478. The Administrative Law Judge does not, however, have authority to consider "consecutive" or "multiple" motions for reconsideration in the same claim.

For additional discussion for handling motions for reconsideration and evidence filed with such motions, see Chapters 25 and 26.

### **E. Interest and penalties**

An Administrative Law Judge does not have authority to decide issues involving the computation of interest or penalties assessed against an employer for reimbursements owed to the Black Lung Disability Trust Fund for medical benefits paid by the Fund.

For a discussion of the case law on the issue of assessing penalties and interest, see Chapter 21.

As an aside, in *Nowlin v. Eastern Associated Coal Corp.*, 331 F.Supp.2d 465 (N.D. W. Va. 2004), a widow was entitled to a 20 percent penalty on unpaid benefits from Employer, despite the fact that she received timely payments of benefits from the Black Lung Disability Trust Fund.

## F. Summary decision

### 1. *Sua sponte* authority

The Administrative Law Judge has authority to issue orders of summary decision *sua sponte*, where the parties have been given notice and an opportunity to respond. In this vein, the Board concluded **FRCP 56**, permitting *sua sponte* summary decision orders applies to black lung proceedings because it is "not inconsistent" with 20 C.F.R. § 725.452(c) of the regulations. Under the facts of the case, the Administrative Law Judge provided 100 days' notice of the hearings to be conducted, and requested that the parties exchange evidence 40 days prior to the hearing. Thirty days before the hearing, the Administrative Law Judge, *sua sponte*, issued an order to show cause why the claims should not be denied based on the evidence received. The Board held the Administrative Law Judge had authority to issue the order. However, it warned that such deviation from standard procedures was "strongly discouraged" because of the "negative" affect on the process. *Smith v. Westmoreland Coal Co.*, 12 B.L.R. 1-39, 1-43 (1988), *aff'd. sub nom., Henshaw v. Royal Coal Co.*, 871 F.2d 417 (4<sup>th</sup> Cir. 1989)(table).

### 2. No *sua sponte* authority

In *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6<sup>th</sup> Cir. 1998), the Sixth Circuit held an Administrative Law Judge may issue a decision without holding a hearing only if the parties agree to (1) a waiver of the hearing, or (2) a party moves for summary decision. The court noted the following:

A hearing is not necessary if all parties give written waiver of their rights to a hearing and request a decision on the documentary record. (citation and footnote omitted). The only other instance in the regulations which permits a decision without holding a requested hearing is when a party moves for summary judgment, and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See 20 C.F.R. § 725.452(c). As the Director points out, '[t]here is no regulatory provision which would permit an administrative law administrative law judge to initiate summary judgment proceedings *sua sponte*.' (citation omitted).

### **3. Factual issues in dispute, summary decision improper**

Pursuant to **FRCP 56**, the Administrative Law Judge must deny a motion for summary decision if there are unresolved factual issues. Specifically, the Administrative Law Judge may not decide whether a prior or successor operator is the responsible operator where there is a factual issue of whether the successor operator actually gained control of the mine. *Montoya v. National King Coal Co.*, 10 B.L.R. 1-59, 1-61 (1986).

#### **G. Failure to file timely controversion**

The consequences of failing to file a timely controversion differ for claims filed on or before January 19, 2001, as compared to claims filed after January 19, 2001. See Chapter 26 for a discussion of this issue.

#### **H. Remand for further evidentiary development, authority limited**

It was error for the Administrative Law Judge to remand a claim to the District Director 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 held, "unless mutually consented to by the parties under 20 C.F.R. § 725.456(b)(2), 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).

For further discussion of an Administrative Law Judge's authority to remand a claim under a variety of circumstances, see Chapters 1 and 26.

#### **I. Recusal**

##### **1. Comments insufficient to demonstrate bias**

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4<sup>th</sup> Cir. 2006), *cert. denied* (Mar. 19, 2007), the court affirmed the Administrative Law Judge's decision not to recuse himself. Employer argued the Administrative Law Judge's comments at the hearing, and in a discovery order, demonstrated bias against coal

companies. The court reasoned, however, "the tone and tenor of frustration expressed in the ALJ's comments do not, in and of themselves, establish bias against Consolidation" and, "given counsel's behavior, it is not surprising that the ALJ became annoyed." The court further denied Employer's challenge to a discovery order as indicative of bias, reasoning that "judicial rulings alone almost never constitute a valid basis for a bias or partiality ruling."

## **2. Referral of attorney for disciplinary action, recusal not required**

By unpublished decision in *Fox v. Elk Run Coal Co.*, BRB No. 11-0793 BLA (Sept. 18, 2012)(J. Hall, concurring and dissenting) (unpub.), referral of an attorney for disciplinary review by a state licensing board based on alleged violations of rules of professional conduct does not, standing alone, constitute grounds for disqualification of the Administrative Law Judge from adjudicating the claim on the merits. The Board noted the Administrative Law Judge relied only on the record before him in referring counsel for disciplinary review, and he sent counsel a copy of the referral.

Similarly, by unpublished decision in *Neace v. Adena Processing Corp.*, BRB No. 11-0798 BLA (Aug. 29, 2012)(unpub.), the Board held the Administrative Law Judge properly declined to recuse herself from adjudication of a black lung claim on the merits. Notably, the Administrative Law Judge convened a conference call with the parties to discuss a letter written by Employer's counsel to a treating physician questioning the physician's coding of treatments for the miner. In the letter, counsel stated, "We also wish to point out to you that intentionally miscoding a bill to obtain payment from the United States may be a federal crime."

The Administrative Law Judge afforded the parties an opportunity to brief the issue regarding the propriety of counsel's statement to the physician in the letter. Ultimately, the Administrative Law Judge "agreed with claimant's counsel that employer's counsel did not commit a reportable offense." In affirming the Administrative Law Judge's denial of Employer's motion to recuse, the Board held "judicial recusal must be predicated on extrajudicial conduct rather than on judicial conduct, and on a personal bias arising out of the judge's background and association, and 'not from the judge's view of the law.'" The Board held Employer did not present evidence sufficient to demonstrate bias or prejudice from extrajudicial sources in this claim.

**J. Failure to comply with order, adverse inferences**

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4<sup>th</sup> Cir. 2006), *cert. denied* (Mar. 19, 2007), the Administrative Law Judge properly applied an adverse inference of bias to the reports of Employer's medical experts because of Employer's refusal to comply with the Administrative Law Judge's discovery orders. Specifically, Employer refused to respond to interrogatories, including an interrogatory regarding how often its medical expert diagnosed pneumoconiosis. Because Employer failed to comply with the Administrative Law Judge's discovery order, the court found the Administrative Law Judge properly treated Employer's expert medical reports "as if Consolidation had complied with discovery and as if its responses to that discovery had demonstrated significant bias by both witnesses toward employers as a class and [it's law firm's clients as a class]."

**K. Certification of facts under 29 C.F.R. § 18.29**

By unpublished decision in *Itmann Coal Co. v. Scalf*, Civil Action No. 5:07-cv-00940 (S.D. W.Va. July 10, 2008) (unpub.), the district court dismissed Employer's motion for default judgment in an action "seeking enforcement of an order by the District Director for the Office of Workers' Compensation awarding (Employer) recoupment of an overpayment of black lung benefits to (Claimant)." In support of this opinion, the district court determined it lacked subject matter jurisdiction over the action.

Citing to 33 U.S.C. § 921(d), which is incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), the court noted these statutory provisions allow beneficiaries of compensation awards to enforce the awards in federal district court. These provisions do not, on the other hand, "authorize employers to bring an action in federal district court to recover alleged overpayment of benefits."

The court did note it would have jurisdiction to enforce an order directing recovery of an overpayment under 33 U.S.C. § 927(b), which requires the Administrative Law Judge to certify the facts to the district court:

For a court to retain jurisdiction under (§ 927(b)), a person must first 'disobey[] or resist[] any lawful order or

process' of the ALJ, and the ALJ must certify the facts to the district court regarding the alleged violation of the order. § 927(b). Although (Employer) here seeks to enforce a lawful order of the ALJ that was allegedly breached by (Claimant), . . . nowhere in the Complaint or any other filings does (Employer) present a certification of facts from the ALJ. Without a certification of facts from the ALJ, the requirements of § 927(b) are not met and the Court may not retain jurisdiction.

*Slip op.* at 2.

### **III. Closing the record**

#### **A. Decision on the record, discretion to consider briefs**

Where Employer consented to a decision on the record without a hearing, and "requested" 30 days to submit a written memorandum, the Administrative Law Judge did not violate Employer's due process rights by issuing a decision without considering Employer's memorandum. The court noted that 29 C.F.R. § 18.53<sup>8</sup> and 20 C.F.R. § 725.459A (1992)<sup>9</sup> "demonstrate that the Administrative Law Judge had discretion to accept legal memoranda, and was not required to accept [Employer's] memorandum." Because Employer's consent to a decision on the record was not contingent upon the Administrative Law Judge's consideration of its memorandum, Employer's due process rights were not violated. *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443 (7<sup>th</sup> Cir. 1992).

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<sup>8</sup> The proposed regulations at 29 C.F.R. § 18.62 contain content similar to Rule 35 of the FRCP.

<sup>9</sup> The regulation at 20 C.F.R. § 725.459A has since been deleted, but the following language is now found at 20 C.F.R. § 725.455(d):

The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

20 C.F.R. § 725.455(d).

**B. Evidence rulings must be made prior to issuing decision on merits**

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

Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude that consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

*Id.* at 1-63.

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

Under the facts of the claim, the treatment records at Claimant's Exhibit 9 were originally offered by Claimant's counsel at the hearing, and then withdrawn when the exhibits could not be located in the record. In his decision on the claim, however, the Administrative Law Judge advised he had located the treatment records at issue, and

found they had been exchanged between the parties. Thus, *sua sponte*, the Administrative Law Judge proceeded to admit the treatment records in his decision. The Board noted:

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

*Slip op.* at 5-6.

### **C. Submission of evidence post-hearing**

This subsection contains a very basic summary of issues surrounding the admission of post-hearing evidence and late evidence as well as the applicability of the "good cause" standard. For a more detailed discussion of the "good cause" standard, see Chapter 4. For further discussion of admission or exclusion of post-hearing evidence, and remands for further development of the record, see Chapter 26.

#### **1. Untimely**

##### **a. Evidence excluded**

Closing the record was not an abuse of discretion because the record had been held open for ten months to allow the Director to submit an x-ray re-reading, and the Director failed to do so. *Amorose v. Director, OWCP*, 7 B.L.R. 1-899, 1-900 (1985).

##### **b. Evidence admitted**

In *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815, 1-819 n. 4 (1984), it was proper for the Administrative Law Judge to accept a physician's report submitted two days after the record closed where Claimant's attorney "explained that the report was forwarded to the administrative law judge on the date [the report] was received [by the attorney]."

## **2. Permitting responsive evidence where "late" evidence admitted**

When late evidence is admitted, such as a medical report, the opposing party must be provided an opportunity to respond to the medical report, or to cross-examine the physician who prepared the report. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 B.L.R. 2-222 (3d Cir. 1989); *Fowler v. Freeman United Coal Mining Co.*, 7 B.L.R. 1-495 (1984), *aff'd sub. nom.*, *Freeman United Coal Mining Co. v. Director, OWCP*, No. 85-1013 (7<sup>th</sup> Cir. Jan. 24, 1986)(unpub.).

## **3. Incomplete pulmonary evaluation under 20 C.F.R. § 725.406**

Twenty-nine C.F.R. § 18.54,<sup>10</sup> which addresses the procedure for closing the record, does not preclude submission of a complete pulmonary examination by the Department of Labor where the record is incomplete as to any medical entitlement issue. *Hodges v. BethEnergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

For further discussion of Department-sponsored examinations, see Chapters 1 and 26.

## **4. Failure to provide copy of evidence offered at hearing to opposing party**

Due process required a remand for the Administrative Law Judge to reopen the record where Employer never received a copy of a report admitted at hearing, and "the administrative law judge appears to have been unaware of this fact when employer moved to close the record." *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815, 1-819 (1985).

### **D. Issuance of decision before record closes constitutes error**

The Administrative Law Judge violated the parties' rights to a "full and fair" hearing by prematurely issuing a decision on the merits. Specifically, the Administrative Law Judge left the record open for a party to file responsive evidence, but erred when she issued a decision

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<sup>10</sup> Under the proposed amendments, the regulatory citation is changed to 29 C.F.R. § 18.90.

two weeks prior to the date the record closed. *Lane v. Harman Mining Corp.*, 5 B.L.R. 1-87, 1-90 (1982).

#### **IV. Continuances**

##### **A. Denial proper**

##### **1. Untimely continuance request**

It is within the Administrative Law Judge's discretion to proceed with a hearing despite the absence of Claimant's counsel. The Administrative Law Judge acted properly in a case where Claimant was present at the hearing without counsel. The Administrative Law Judge inquired whether Claimant wished to proceed after fully informing Claimant of his rights with respect to the presentation of his case. The Administrative Law Judge also left the record open for the submission of post-hearing evidence by counsel.

Under the circumstances, the Board concluded, pursuant to 20 C.F.R. § 725.454(d), counsel failed to provide ten days' notice of his request for continuance, and his "scheduling conflict" did not constitute "good cause" to grant a continuance. In particular, counsel notified the Administrative Law Judge of a scheduling conflict 20 minutes after the hearing was to start. In denying the continuance, the Administrative Law Judge noted Claimant traveled 400 miles to the hearing location, waited five years for the hearing to commence, and chose to proceed without counsel when asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121 (1989).

##### **2. Party failed to timely obtain evidence**

Denial of a continuance requested by Employer was proper where Employer wanted to obtain autopsy slides for an independent review, but had access to the slides and failed to secure them for one year. As noted by the Board, Claimant consented to release of the autopsy slides, but "Employer simply failed to secure the evidence in a timely fashion." *Witt v. Dean Jones Coal Co.*, 7 B.L.R. 1-21 (1984).

##### **3. Third continuance request, claimant failed to appear**

The Administrative Law Judge acted within his discretion in proceeding with a hearing despite Claimant's absence. Claimant's right to participate fully at the hearing was adequately protected

where the Administrative Law Judge allowed Claimant an opportunity to submit a sworn statement in lieu of live testimony within 30 days of the hearing. The Board further concluded the Administrative Law Judge did not abuse his discretion in denying Claimant's third request for a continuance. See 20 C.F.R. § 725.452(b); *Wagner v. Beltrami Enterprises*, 16 B.L.R. 1-65 (1990).

## **B. Denial improper**

### **Statutory right to representation; first continuance request**

The Board vacated an Administrative Law Judge's denial of benefits, and remanded the claim for a *de novo* hearing on grounds that the Administrative Law Judge abused his discretion in denying Claimant's request for a continuance. Claimant was entitled to be represented by counsel, but could not retain one by the date of the initial hearing. Moreover, Claimant did not waive his "statutory" right to counsel, the Director did not oppose the continuance, and this was the first request for a continuance submitted in the case. *Johnson v. Director, OWCP*, 9 B.L.R. 1-218, 1-220 (1986).

For additional discussion of continuances, see Chapter 26.

## **V. Decision of the Administrative Law Judge**

### **A. Compliance with APA's requirements**

The requirements of the APA at 5 U.S.C. §§ 554, 556, and 557 direct the Administrative Law Judge issue a decision containing findings of fact and conclusions of law with supporting rationale. *Arjonov v. Interport Maintenance Co.*, 34 B.R.B.S. 15 (2000) ("The APA requires an administrative law judge to adequately detail that rationale behind her decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for her acceptance or rejection of such evidence"); *Boggs v. Falcon Coal Co.*, 17 B.L.R. 1-62 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 B.L.R. 1-162 (1989).

#### **1. Adopting party's brief constitutes error**

The Board remanded a case, and directed that the Administrative Law Judge independently evaluate the evidence of record instead of adopting the Director's post-hearing brief in its

entirety. The Board concluded, "If a decision cannot withstand scrutiny on the four corners of the document, parties are compelled to rely on a document with which they may be unfamiliar, and which may not be easily accessible." The Board further noted the Director's brief contained factual errors. *Hall v. Director, OWCP*, 12 B.L.R. 1-80 (1988).

## **2. Correction of clerical error**

The Administrative Law Judge is allowed to correct the misidentification of a party liable for attorney's fees pursuant to **FRCP 60(a)**, where the misidentification constitutes a mere clerical error. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). See also *Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224, 226 (10<sup>th</sup> Cir. 1980).

## **3. Delay in issuance of decision and order**

### **a. Intervening case law**

Delay in the issuance of a decision by the Administrative Law Judge did not constitute prejudicial error where intervening case law did not substantively affect the claim. *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-162 (1985) (the Administrative Law Judge found 20 C.F.R. § 727.203(b)(2) rebuttal, whereas the change in law addressed only subsection (b)(3) rebuttal; other intervening law requiring that more weight be given to examining physicians' opinions did not affect the Administrative Law Judge's decision since both parties submitted such reports).

### **b. Not filed within 20 days of the date the record closed**

An Administrative Law Judge's decision is not invalid merely because it is not filed within 20 days of the date the record is closed. A delay of more than 20 days in issuing a decision does not warrant a remand for a new hearing, unless the aggrieved party establishes prejudice due to the delay. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983).

#### **4. Evidence generated by adverse, dismissed party**

For claims filed on or before January 19, 2001, an Administrative Law Judge may properly admit evidence obtained by an adverse party, which is later dismissed prior to the hearing. *York v. Benefits Review Board*, 819 F.2d 134, 10 B.L.R. 2-99 (6<sup>th</sup> Cir. 1987). See also *Hardisty v. Director, OWCP*, 7 B.L.R. 1-322, *aff'd* 776 F.2d 129, 8 B.L.R. 2-72 (7<sup>th</sup> Cir. 1985) (the Director could contest an Administrative Law Judge's award, and could benefit from evidence developed by a dismissed employer even though the Director had supported Claimant's pursuit of benefits while the case was pending before the Administrative Law Judge, and joined in Claimant's objection to the admission of the evidence at that time).

For claims filed after January 19, 2001, see Chapter 4 regarding the admission of evidence generated by an adverse, dismissed party.

#### **B. Service by certified mail**

By law, all final orders (*i.e.* remand, withdrawal of claim, dismissal), supplemental orders regarding fees and costs, and decisions on the merits must be served by certified mail to counsel for the claimant and employer. If a party appears *pro se*, then the document must be served via certified mail to that party. 20 C.F.R. § 725.478.

#### **1. Decision final within 30 days**

The regulatory provisions at 20 C.F.R. § 725.479(a) provide the following:

A decision and order shall become effective when filed in the office of the district director (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30<sup>th</sup> day after such filing (see § 725.481).

20 C.F.R. § 725.479. And, the Administrative Law Judge is without authority to extend the 30-day time period. *Mecca v. Kemmerer Coal Co.*, 14 B.L.R. 1-101 (1990).

## **2. Defect in notice**

### **"Actual" notice established**

The Sixth Circuit held, even though notice of an Administrative Law Judge's adverse decision had not been sent to Claimant's attorney, the attorney had actual notice of the decision and, therefore, the defect in notice would not toll the 30-day period for filing an appeal. Claimant was hospitalized when his wife signed for the certified letter, and advised the attorney of the decision. *Wellman v. Director, OWCP*, 706 F.2d 191, 193 (6<sup>th</sup> Cir. 1983).

The Third Circuit also held, where Employer's counsel was not served with the District Director's award, but had actual knowledge of the decision and did not file a controversion, the 30-day period for filing the controversion was not tolled. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1329, 12 B.L.R. 2-60, 2-72 and 2-73 (3<sup>rd</sup> Cir. 1988).

On the other hand, the Third Circuit concluded, where an attorney was not served with the Administrative Law Judge's decision, and he did not have actual notice of the decision, the 30-day time period from the date the decision was filed with the District Director was tolled. *Patton v. Director, OWCP*, 763 F.2d 553, 560, 7 B.L.R. 2-216, 2-227 and 2-228 (3<sup>rd</sup> Cir. 1985).

## **VI. Depositions**

For additional discussion regarding the admissibility of depositions, see Chapter 26.

### **A. Adequate notice required**

The regulatory provisions at 20 C.F.R. § 725.458 provide, in part, "The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived."

## 1. Reasonable notice in writing; objections and waiver

The Board applied **FRCP 30(b)(1)**,<sup>11</sup> which requires the party taking a deposition give "reasonable notice in writing to every other party to the action." The Board further noted **FRCP 5(b)**<sup>12</sup> requires that service be made upon a party's representative, unless otherwise ordered by the Administrative Law Judge. Thus, it was error to admit deposition testimony where Claimant's lay representative was not given notice of the deposition. The Board concluded the fact that Claimant's representative was not a member of the Bar was irrelevant as "[a] lay representative, once qualified, holds the same powers and is bound by the same procedural rules as an attorney." However, the Board held the error in admitting the deposition was cured because the Administrative Law Judge left the record open for 30 days to allow Claimant to cross-examine the deponent. *Trump v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-1268 (1984).

In *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 11 B.L.R. 2-92 (6<sup>th</sup> Cir. 1988), Employer sent notice of a deposition to Claimant's counsel's partner, but Claimant's counsel never received the notice. The Sixth Circuit held **FRCP 32(d)(1)**<sup>13</sup> is applicable to proceedings arising under the Act such that a deposition taken in violation of the 30-day notice requirement set forth in 20 C.F.R. § 725.458 is admissible unless the opposing party expressly objects, in writing, to "[a]ll errors and irregularities" in service of the notice of deposition. The court then remanded the claim for a determination of whether objections to the defective notice were waived because Claimant's counsel did not file objections in writing. The court cautioned, "Obviously, it is impossible to serve a written objection to a defective notice if, in fact, no notice at all is provided." Thus, the court instructed that a determination be made as to whether Claimant's counsel's objections were waived under the facts of the case.

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<sup>11</sup> The proposed regulations at 29 C.F.R. § 18.64 contain language similar to that found at FRCP 30.

<sup>12</sup> The proposed regulations at 29 C.F.R. §§ 18.30 and 18.31 contain language similar to that found at FRCP 5.

<sup>13</sup> The proposed regulation at 29 C.F.R. § 18.55 contains language similar to that found at FRCP 32.

## **2. Location of deposition, right of cross-examination**

It was proper to apply **FRCP 26(c)** in scheduling depositions. The Board held "good cause" was established for issuance of a protective order for Claimant, an Ohio resident, from having to incur the undue expense of attending a deposition of Employer's physician in New York, NY. The Board noted Employer declined the Administrative Law Judge's offer to permit a post-hearing deposition of the physician by telephone. As a result, the Board held "Employer will not now be heard to complain that it was not given an opportunity to depose Dr. Kleinerman." *Arnold v. Consolidation Coal Co.*, 7 B.L.R. 1-648 (1985).

## **3. Expert witness provisions at 20 C.F.R. § 725.457, inapplicable to deposition testimony**

Twenty C.F.R. § 725.457 states, in part, "Any party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing." The Board holds 20 C.F.R. § 725.457(a) applies only to the appearance by an expert witness at the hearing, not to the introduction of deposition testimony at the hearing. A deposition taken five days before the hearing did not deny due process to other parties who had received adequate notice of the deposition pursuant to 20 C.F.R. § 725.458 (*i.e.* the required 30 days' notice for taking a deposition). *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

## **4. Lack of evidence that Claimant had notice of depositions**

In *Roberts v. Tri-Star Construction Co.*, BRB No. 11-0358 BLA (Feb. 24, 2012)(unpub.), it was error for the Administrative Law Judge to "disregard" the deposition testimony offered by Employer because (1) Claimant was unrepresented by counsel at the time of the depositions, and (2) there was no evidence in the record demonstrating Claimant was provided notice of the depositions. The Board noted Claimant was represented by counsel at the hearing, and counsel failed to object to admission of the depositions. As a result, the Board found the Administrative Law Judge failed to provide Employer with prior notice that the depositions would be excluded from consideration. The Board remanded the claim, and directed the Administrative Law Judge reconsider admissibility of the deposition

testimony, including whether Claimant "received adequate notice of the depositions and/or whether the issue was waived."

## **B. Submission of pre-hearing deposition**

### **1. Generally**

In ruling on the submission of deposition testimony, it is important to understand the distinction between submission of a *pre-hearing* deposition before, during, or after the hearing as opposed to the submission of a *post-hearing* deposition. As long as 30 days' notice is properly given, a *pre-hearing* deposition is admissible before, during, or after the hearing. A *pre-hearing* deposition does not have to be exchanged in accordance with the 20-day rule, and ten days' notice of a party's intention to submit expert witness testimony by deposition does not have to be provided in advance of the hearing date. As an example, a deposition conducted within five days of the date of the hearing was admissible post-hearing where the opposing parties were given 30 days' notice of the deposition. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

On the other hand, as is discussed later in this chapter, it is within the Administrative Law Judge's discretion to permit, and admit, a *post-hearing* deposition. Indeed, the Board set forth specific factors to be considered in determining whether to permit a post-hearing deposition, including whether the party has diligently tried to secure such evidence prior to the hearing. See *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983).

### **2. Pre-hearing deposition submitted post-hearing**

Although 20 C.F.R. § 725.458 provides, in part, "No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law Administrative Law Judge upon the motion of a party to the claim," these provisions are not applicable to the post-hearing submission of a pre-hearing deposition. When adequate notice was given, and the deposition was taken five days prior to the hearing, the Administrative Law Judge erred in denying admission of the deposition post-hearing under 20 C.F.R. § 725.458 of the regulations. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

Similarly, in another case, the Board held it was error for the Administrative Law Judge to exclude pre-hearing deposition testimony from being admitted post-hearing pursuant to 20 C.F.R. § 725.458 of the regulations. The Board noted counsel provided 30 days' notice of two pre-hearing depositions, which it sought to admit within 10 days of the hearing (after the depositions were transcribed). In response to the 30 days' notice of depositions, Claimant was evaluated by his physician. Claimant then sought to submit the resulting medical report within 30 days of the hearing.

Initially, the Administrative Law Judge granted all three requests. However, when Employer sought to depose Claimant's physician after Claimant's medical report was submitted as evidence, the Administrative Law Judge "reversed his earlier ruling and denied all motions for the admission of evidence post-hearing" in order to "close these cases on a date certain." The Board held this constituted an "abuse of discretion."

With regard to Employer's post-hearing submission of two pre-hearing depositions, the Board noted (1) Claimant had ample notice of the scheduled depositions, (2) his counsel was present to conduct cross-examination, and (3) the transcripts of the depositions would not be available until after the hearing through no fault of Employer. The Board further held Claimant's post-hearing submission of a medical report based upon a pre-hearing examination by his physician also must be admitted in the interests of fairness, and the record must be left open for 30 days under 20 C.F.R. § 725.456(b)(3) so the parties could file any responsive evidence, *i.e.* Employer's cross-examination of Claimant's physician. *Ference v. Rochester & Pittsburgh Coal Co.*, 5 B.L.R. 1-122 (1982).

In *Hardisty v. Director, OWCP*, 7 B.L.R. 1-322 (1984), *aff'd* 776 F.2d 129, 8 B.L.R. 2-72 (7<sup>th</sup> Cir. 1985), the scheduling of depositions shortly before a hearing is permissible where opposing counsel received six weeks' notice of the depositions, and he attended the depositions and cross-examined the witnesses.

### **C. Submission of post-hearing deposition**

Twenty C.F.R. § 725.458 provides, in part, "No post-hearing deposition or interrogatory shall be permitted unless authorized by the Administrative Law Judge upon the motion of a party to the claim." 20 C.F.R. § 725.458.

## **1. Factors considered**

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. The party taking the deposition "bears the burden of establishing the necessity of such evidence." Among the factors to consider in determining whether to permit, and admit, a post-hearing deposition are the following: (1) whether the proffered deposition would be probative and not merely cumulative; (2) whether the party taking the deposition took reasonable steps to secure the evidence before the hearing (or it is established that 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 v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983), the Administrative Law Judge properly refused to permit the 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 he commented on additional medical evidence, which 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.

## **2. Exclusion proper**

In *Seese v. Keystone Coal Mining Co.*, 6 B.L.R. 1-149, 1-152 (1983), the Administrative Law Judge denied Employer's request to submit a post-hearing deposition of its physician for the purpose of explaining shortcomings in the physician's earlier testimony. The Board upheld the Administrative Law Judge's decision because "[n]o proffer of evidence accompanied the request," and no indication was given that the denial would deprive movant of a reasonable opportunity to present evidence.

## **3. Exclusion improper**

### **a. Admitting only one party's post-hearing evidence**

It was arbitrary for the Administrative Law Judge to deny Employer's request for a post-hearing deposition of Claimant's

physician, while granting Claimant's request to admit a post-hearing physical examination by the physician. *Schoenecker v. Allegheny River Mining Co.*, 5 B.L.R. 1-378 (1982).

**b. Opposing party had opportunity to cross-examine witness**

The Administrative Law Judge abused his discretion in denying admission of a post-hearing deposition where Claimant's expert's medical opinion was admitted at the hearing subject to Employer's opportunity to cross-examine the physician. Claimant's counsel was ordered to arrange the deposition, but failed to do so prior to the closing of the record. The Board directed, on remand, the Administrative Law Judge must provide Employer an opportunity to subpoena and depose the physician, or to specifically waive this right. *Jug v. Rochester and Pittsburgh Coal Co.*, 1 B.L.R. 1-628 (1978).

**c. Evidence submitted on eve of the 20-day deadline**

For a medical report submitted on the eve of the 20-day deadline, a party must be provided an opportunity to respond to the medical report, or to cross-examine the physician who prepared the report. Because Claimant's physician's report was sent 20 days prior to the hearing, depriving Employer of the opportunity to submit rebuttal in compliance with the 20-day rule, it was incumbent on the Administrative Law Judge to permit Employer the opportunity to (1) submit a post-hearing rebuttal opinion, and (2) cross-examine Claimant's physician. The court further determined that permitting the rebuttal evidence would not result in the "specter of a never ending series of rebuttals" because, pursuant to the Administrative Procedures Act at 5 U.S.C. § 556(d), the Administrative Law Judge may exclude "irrelevant, immaterial or unduly repetitious evidence." *North American Coal Co. v. Miller*, 870 F.2d 114, 12 B.L.R. 2-222 (3<sup>rd</sup> Cir. 1989).

**d. Evidence unknown or unavailable prior to hearing due to failure to cooperate**

It was an abuse of discretion for the Administrative Law Judge to refuse a physician's post-hearing deposition regarding additional medical evidence, where the medical evidence was unknown prior to the hearing. In particular, the opposing party failed to fully answer

interrogatories. Due process would be satisfied in permitting the post-hearing deposition because the opposing party would have an opportunity to cross-examine the physician during the deposition. *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983).

## **VII. Due process**

### **A. Transfer of case to another Administrative Law Judge**

#### **1. On remand**

A *de novo* hearing was required because the parties' procedural due process rights were violated: (1) notice the case was reassigned on remand was not given until the decision and order on remand was issued; and (2) the parties were not given an opportunity to express any objections about the transfer of the case, or to request a new hearing. *McRoy v. Peabody Coal Co.*, 11 B.L.R. 1-107 (1987). However, the Board limited *McRoy* to its facts. Notably, where credibility of witnesses is not at issue, a substituted Administrative Law Judge need not hold a *de novo* hearing on remand. *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990).

In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board held, pursuant to 5 U.S.C. § 554(d), "the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable." If an Administrative Law Judge is unavailable, then the parties must be notified, and given "an opportunity to express any objections to the transfer of the case to another Administrative Law Judge or request a *de novo* hearing." A new hearing should be held only if witness credibility is at issue.

#### **2. On modification**

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6<sup>th</sup> Cir. 1998), the court held, because the original deciding Administrative Law Judge was no longer with the agency, a modification case was properly reassigned to another Administrative Law Judge after notice was provided to the parties. Claimant argued "that it was error to change the administrative law judge assigned to his case during the

pendency of his proceeding." The court cited to 29 C.F.R. § 18.30,<sup>14</sup> which authorizes the Chief Administrative Law Judge to reassign a claim where the original deciding Administrative Law Judge is no longer available. It then concluded, "As no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

## **B. Timely notice; opportunity to fully present case**

### **1. Presentation of evidence**

#### **a. Copy of opposing party's evidence**

Procedural due process requires that interested parties be notified of the pendency of an action, and afforded the opportunity to be heard. Therefore, where Claimant failed to serve Employer with an autopsy report after the record was reopened, the Administrative Law Judge sent it to Employer. The Board concluded "service of the autopsy report by the administrative law judge provided employer adequate notice of the pending admission of the autopsy report." The Board further stated, "A party may waive its right to cross-examine an opponent's medical evidence by failure to object to the proffered evidence." Thus, it was acceptable for the Administrative Law Judge to conclude Employer waived its objection to admission of the autopsy report because Employer failed to object before the Administrative Law Judge issued a decision. *Gladden v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-577, 1-579 (1984).

#### **b. Discovery of communications between expert and counsel permitted**

In *V.B. [Blake] v. Elm Grove Coal Co.*, 24 B.L.R. 1-107 (2009), the Board noted, pursuant to the Fourth Circuit's decision in *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278 (4<sup>th</sup> Cir. 2007), discovery of communications between a party's counsel and the party's testifying experts was permitted, "and was necessary for a proper cross-examination" of the party's experts. Under the facts of the case, Employer maintained "claimant's counsel had gone beyond merely providing drafting assistance to Drs. Lenkey and Cohen, such

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<sup>14</sup> The proposed regulation at 29 C.F.R. § 18.15, titled "Substitution of administrative law judge" contains language similar to that found at 29 C.F.R. § 18.30.

that the opinions expressed were those of claimant's attorney, and not of the physicians."

Claimant's counsel responded in an affidavit stating, with regard to Dr. Lenkey, "he and his paralegal drafted a report that was consistent with Dr. Lenkey's views and submitted it to Dr. Lenkey, along with copies of all the relevant records so that Dr. Lenkey could review them again." Dr. Lenkey would then send a final report to counsel.

With regard to Dr. Cohen, Claimant's counsel explained his office prepared a draft report "to summarize the record in the form that Dr. Cohen likes to use." From this, counsel stated Dr. Cohen then "added to and revised the drafts to produce his opinion."

In regard to assisting both doctors, Claimant's counsel stated "the summaries of the evidence and draft reports that he and his paralegal provided were based on his communications with the doctors, and that this assistance was provided to both reduce the time these two busy doctors had to spend on the case, and to reduce the miner's litigation costs." Counsel maintained "the doctors' opinions expressed in the resulting reports 'were, in fact, the doctors' opinions of [the miner's] condition."

Employer argued Claimant's counsel's affidavit should not have been admitted under Illinois Rule of Professional Conduct 3.7, which governs a lawyer acting as a witness because, "by filing an affidavit, Mr. Johnson compromised his role as advocate, and, therefore, either his affidavit should have been stricken from the record, or Mr. Johnson should have been required to withdraw from the case." The Board disagreed to hold the Administrative Law Judge is "not bound by statutory rules of evidence or by technical or formal rules of procedure" except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. As a result, the Administrative Law Judge "is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence." According to the Board, the APA does not bar the consideration of hearsay evidence and, "because Mr. Johnson was available for cross-examination, the administrative law judge found that his affidavit was admissible."

Moreover, the Administrative Law Judge properly noted Illinois Rule of Professional Conduct 3.7 provides an attorney need not withdraw if it would result in "substantial hardship on the client." In this vein, the Administrative Law Judge concluded, "because of

Mr. Johnson's longstanding association with the case, and his familiarity with the facts and its procedural posture, requiring him to withdraw at this stage of the litigation would result in a substantial hardship to claimant."

However, the Administrative Law Judge improperly denied Employer's request to "re-depose" Drs. Lenkey and Cohen in light of information contained in Mr. Johnson's affidavit, and communications between counsel and the experts. In his denial of Employer's request, the Administrative Law Judge stated, "The issue of the mechanics of the drafting of the expert opinions is tangential to the issue of whether the reports are well reasoned, well documented, and credible." The Administrative Law Judge then stated, "Both Drs. Lenkey and Cohen have testified under oath and personally explained, in detail, the basis for their opinions" such that Employer "had ample opportunity to question both physicians, and the record will not be re-opened for cross-examination."

On this point, the Board concluded the Administrative Law Judge erred, and it remanded the claim to allow Employer the opportunity to cross-examine Drs. Lenkey and Cohen based on its access to communications between Claimant's counsel and the experts. Further, the Board instructed the Administrative Law Judge "must qualify all of the evidence as 'reliable, probative, and substantial,' including Mr. Johnson's affidavit, before relying upon it, pursuant to the standard set forth in *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389 (4<sup>th</sup> Cir. 1999)."

### **c. Expert witness testimony**

Although Claimant served proper notice on the Director that he would present the testimony of his treating physician, the Director objected, arguing he did not know the physician intended to testify regarding 1983 examinations of Claimant. The Board accepted an interlocutory appeal in the case, and concluded the Administrative Law Judge properly admitted the testimony of the physician. *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

Testimony of an expert witness presented at the hearing was stricken because of the proponent's failure to give actual notice to the other parties at least ten days in advance of the hearing pursuant to 20 C.F.R. § 725.457(a). Claimant presented expert physician witness testimony at the hearing and the Director, who was not present at the hearing and was not notified that the physician would be testifying,

filed a motion to strike, which the Administrative Law Judge should have sustained. *Hamric v. Director, OWCP*, 6 B.L.R. 1-1091 (1984).

**d. Failure to notify representative of examination; exclusion proper**

The Administrative Law Judge properly refused to admit a non-qualifying blood gas study offered by Employer because the study was scheduled by 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. Moreover, 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 was 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).

**e. Impeachment evidence, an exception to the 20-day rule**

In *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991), the Administrative Law Judge erred in excluding a tape recording taken by the miner of an examining physician because the recording was not exchanged in compliance with the 20-day rule. The miner argued the recording was "of a conversation between himself and Dr. Byers which occurred during the course of his physical examination, and that during this conversation Dr. Byers offered a diagnosis which was contrary to that made in his written medical report." The Board held:

As claimant and the Director correctly contend, however, in excluding this recording from the record, the administrative law judge did not consider its admissibility pursuant to Section 725.456(b)(4), which permits new

evidence to be admitted at the hearing where the evidence is offered for impeachment purposes.

*Id.* at 1-24.<sup>15</sup>

## **2. Notice to carrier**

Due process requires that an insurance carrier be given written notice of a black lung claim prior to administrative adjudication of the claim affecting the carrier's liability. *Warner Coal Co. v. Director, OWCP [Warman]*, 804 F.2d 346, 11 B.L.R. 2-62 (6<sup>th</sup> Cir. 1986). See also *Nat'l Mines Corp. v. Carroll*, 64 F.3d 135 (3<sup>rd</sup> Cir. 1995); *Tazco, Inc. v. Director, OWCP*, 895 F.2d 949 (4<sup>th</sup> Cir. 1990); *Caudill Construction Co. v. Abner*, 679 F.2d 1086, 12 B.L.R. 2-335, 2-338 (6<sup>th</sup> Cir. 1989).

For additional discussion of notification of the carrier, see Chapter 7.

## **3. Delay in notice of liability**

Employer alleged a five year delay in receiving notification of its potential liability from the date the claim was filed prevented it from obtaining a physician's report. The court held, however, the Department of Labor followed its regulations in notifying Employer of its liability, and Employer was not unduly prejudiced because the Administrative Law Judge found the report "unpersuasive." The court further held, "The operator did have ample opportunity to defend against the claims at issue." *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 B.L.R. 2-95 (6<sup>th</sup> Cir. 1989).

For additional discussion of the consequences of a delay in notifying a potential responsible operator or carrier of liability, or losing parts of a record, see Chapter 7.

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<sup>15</sup> Under the pre-amendment regulations, 20 C.F.R. § 725.456(b)(4) provided the following:

Notwithstanding any other provision of this paragraph, documentary evidence other than medical reports which is presented or discovered in connection with the testimony of a witness at the hearing may be admitted into the hearing record, subject to the objection of any party.

20 C.F.R. § 725.456(b)(4). The amended regulations do not contain the provisions of 20 C.F.R. § 725.456(b)(4).

## **VIII. Expert witness testimony**

Pursuant to 20 C.F.R. § 725.457(a), "Any party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing." The regulation further provides that "failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness." 20 C.F.R. § 725.457(a).

### **A. Actual notice of intent to present required**

Testimony of an expert witness presented at the hearing was stricken because of the proponent's failure to give actual notice to the other parties at least ten days in advance of the hearing pursuant to 20 C.F.R. § 725.457(a) of the regulations. Claimant presented expert physician witness testimony at the hearing and the Director, who was not present at the hearing and was not notified the physician would be testifying, filed a motion to strike, which the Administrative Law Judge should have sustained. *Hamric v. Director, OWCP*, 6 B.L.R. 1-1091 (1984).

### **B. Expert witness provisions at 20 C.F.R. § 725.457 inapplicable to expert deposition testimony**

Twenty C.F.R. § 725.457 states, in part, "Any party who intends to present the testimony of an expert witness at a hearing . . . shall so notify all other parties to the claim at least 10 days before the hearing."

And, a failure to provide notice shall, unless waived by all parties, will result in preclusion of the expert's testimony. The Board holds 20 C.F.R. § 725.457(a) applies only to the appearance by an expert witness at the hearing, not to the introduction of deposition testimony at the hearing. A deposition taken five days before the hearing did not deny due process to the other parties because the other parties received adequate notice of the deposition pursuant to 20 C.F.R. § 725.458. *Tucker v. Eastern Coal Corp.*, 6 B.L.R. 1-743 (1984).

## **IX. Failure to attend hearing**

Pursuant to 20 C.F.R. §§ 725.461(b) and 725.465, the unexcused failure of a party to attend the hearing constitutes a waiver of the right to present evidence at the hearing, and may result in a dismissal of the claim. Dismissal is proper where a claimant and his or her representative fail to appear at the hearing absent a showing of "good cause." The Administrative Law Judge is required to issue an order to show cause prior to dismissing the claim. See *e.g. Clevinger v. Regina Fuel Co.*, 8 B.L.R. 1-1 (1985) (no "good cause" established where (1) counsel stated he had not received the notice of hearing, (2) the Administrative Law Judge noted counsel was present at prior hearings, which were scheduled in the same notice, and (3) counsel failed to respond to the Administrative Law Judge's order to show cause).

### **A. Physical ailment, obligation to provide reasonable accommodation**

If a claimant is physically unable to attend a hearing, the Administrative Law Judge should make every effort to obtain his or her testimony by deposition, or by holding the hearing at a location most convenient to the claimant, including the claimant's home if s/he is bedridden. In this vein, the Board held it was improper for the Administrative Law Judge to dismiss a claim as abandoned where Claimant's counsel notified the Administrative Law Judge that Claimant recently underwent a cancer operation, and was unable to attend the hearing. *Robertson v. Director, OWCP*, 1 B.L.R. 1-932, 1-934 (1978).

The Administrative Law Judge did not abuse his discretion in awarding benefits where Claimant failed to attend the hearing because of a disabling stroke. Claimant's wife, who testified at the hearing, stated that the miner's speech was impaired, and he was confined to a wheelchair. The Administrative Law Judge then denied Employer's motion that the claim be dismissed or denied. Employer argued it had a right to cross-examine the miner, "but did not have an affirmative burden to obtain his deposition or testimony." The Board concluded otherwise to find the Administrative Law Judge appropriately protected Employer's interests by leaving the record open for 45 days to allow Employer to secure Claimant's testimony, and develop any further medical evidence. *Chaney v. Sahara Coal Co.*, 10 B.L.R. 1-8, 1-10 (1987).

**B. Consideration of client's age and illness before binding client to acts of counsel**

The Board concluded the provisions at 20 C.F.R. § 725.461(b) are similar to **FRCP 41(b)**, and held the "rules reflect a court's inherent authority to control its docket, via dismissal, to manage the orderly and expeditious disposition of cases." The Board further held a dismissal "may be reversed only for a clear abuse of discretion," and a party is held responsible for the acts of its attorney. However, the Board did find abuse of discretion, and reversed the dismissal of a claim because the Administrative Law Judge did not consider Claimant's age and illness before binding her to the acts of her counsel, who failed to appear at the hearing. The Board noted Claimant forwarded the notice of hearing to her attorney expecting him to act, and Claimant's immediate response to the order to show cause demonstrated she was not attempting to delay the proceeding. *Howell v. Director, OWCP*, 7 B.L.R. 1-259 (1984).

**C. Proceeding with hearing despite claimant's absence**

The Administrative Law Judge acted within his discretion in proceeding with a hearing despite Claimant's absence. Claimant's right to participate fully at the hearing was adequately protected where the Administrative Law Judge allowed Claimant an opportunity to submit a sworn statement in lieu of live testimony within 30 days of the hearing. The Board also concluded the Administrative Law Judge did not abuse his discretion in denying Claimant's third request for a continuance. *Wagner v. Beltrami Enterprises*, 16 B.L.R. 1-65 (1990).

**D. Error to dismiss claim—Director objected and payments were made by Trust Fund**

Neither Claimant nor her attorney appeared at the scheduled hearing and, by telephone, the Administrative Law Judge was advised Claimant did not wish to pursue her claim. The Administrative Law Judge then issued an order to show cause why the claim should not be dismissed. The Director responded, and requested a decision on the record without a hearing. Claimant also submitted a letter stating she (1) did not wish to withdraw her claim, (2) had no further evidence to submit, and (3) did not object to the submission of evidence by Employer. The Administrative Law Judge nevertheless dismissed the claim.

On appeal, the Director argued the Administrative Law Judge was without authority to dismiss the case over the Director's objection, where payments were made from the Black Lung Disability Trust Fund. The Board agreed. On the other hand, the Board held:

The employer's argument that failure to dismiss the claim would circumvent its right to a hearing is without merit. While the employer does have a right to a hearing, 20 C.F.R. § 725.450, there is no requirement that the claimant be present at such a hearing. Further, the employer may seek a subpoena compelling the claimant to attend if it feels that her testimony is necessary to protect its interests.

*Palovich v. Bethlehem Mines Corp.*, 5 B.L.R. 1-70 (1982).

#### **E. Inadvertent delay; no waiver of appeal rights**

Employer's failure to attend the hearing did not result in a waiver of its appeal rights to the Board where the attorney fully intended to appear, but car trouble precluded his attendance. *Kimmel v. Diamond Coal Co.*, 6 B.L.R. 1-288, 1-290, n.3 (1983).

### **X. Fair hearing**

#### **A. Generally**

Pursuant to 20 C.F.R. § 725.455(b), the Administrative Law Judge is required to inquire fully into the matters at issue, and to receive all relevant and material testimony and documentary evidence. A full and fair hearing includes the opportunity to present a claim or defense by way of argument, proof, and cross-examination of witnesses. 5 U.S.C. § 556(d). *Laughlin v. Director, OWCP*, 1 B.L.R. 1-488, 1-493 (1973). Procedural due process requires notice and an opportunity to be heard. Each party must be allowed to fairly respond to evidence and present its case in full.

#### **B. Importance of finality of hearing process**

Judicial finality "requires that claimants continue to pursue their claims or, if appropriate, that the claims be unconditionally withdrawn or dismissed." As a result, the Board concluded that orders holding certain black lung claims in abeyance were invalid because they lacked

judicial finality. *Slone v. Wolf Creek Collieries, Inc.*, 10 B.L.R. 1-66, 1-70 (1987).

### **C. Untimely hearing request**

The Administrative Law Judge properly determined Claimant was not entitled to benefits because the claim was abandoned as a result of Claimant's failure to request a hearing within 60 days of the District Director's denial, or to petition for modification within one year of such denial. *Stephens v. Director, OWCP*, 9 B.L.R. 1-227, 1-230 (1987).

### **D. Impartiality required**

#### **1. Conduct of the Administrative Law Judge**

Claimant was denied a fair hearing because, "[a]t a number of points during the hearing, the administrative law judge expressed disbelief regarding claimant's testimony and substituted his own personal knowledge and experience in place of hearing testimony." The Board further noted the Administrative Law Judge incorrectly accused Claimant's counsel of asking leading questions, and impeded the examination of witnesses. *Hutnick v. Director, OWCP*, 7 B.L.R. 1-326, 1-328 (1984).

#### **2. Treatment of witnesses**

Claimant received a fair hearing despite a contention that both attorneys did not stand an equal distance from Claimant while he testified. Claimant had difficulty hearing and, as a result, Director's counsel was allowed to move closer to Claimant during questioning. There was no indication from the record that Claimant was harassed, intimidated, or prejudiced. *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-445 (1993).

#### **3. Competency of witnesses**

The Administrative Law Judge did not err in failing to explore a witness's mental capacity, despite a contention the miner's speech impairment impeded his ability to testify. The Administrative Law Judge afforded the lay representative great latitude, the transcript did not indicate any mental infirmity, and no formal objections to the witness' mental qualifications were raised. In this vein, the Board held the fact-finder is in a better position than an appellate tribunal to determine whether a witness is mentally capable of testifying, and the

Administrative Law Judge's determination will not be overturned unless it is "clearly erroneous." *Elswick v. Eastern Assoc. Coal Corp.*, 2 B.L.R. 1-1016 (1980).

Under *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the Administrative Law Judge must determine the complexity of the legal and medical problems presented in the case, and must assess Claimant's ability to comprehend the issues and participate actively in their resolution. Factors to consider include physical defects, age, formal education, apparent intelligence and general knowledge.

## **E. Right to oral hearing**

For further discussion of issues surrounding the right to a hearing, see Chapter 26.

### **1. On remand**

#### **a. Witness credibility not dispositive**

A motion for a new hearing is properly denied when witness credibility is not dispositive. *Berka v. North American Coal Corp.*, 8 B.L.R. 1-183, 1-184 (1985). See also *White v. Director, OWCP*, 7 B.L.R. 1-348 (1984); *Strantz v. Director, OWCP*, 3 B.L.R. 1-431, 1-433 (1981); *Worrell v. Consolidation Coal Co.*, 8 B.L.R. 1-158, 1-160 (1985); *Meholovitch v. Oglebay Norton Co.*, Case No. 85-3485 (6<sup>th</sup> Cir. May 9, 1986)(unpub.).

#### **b. New hearing required; witness credibility at issue**

A new hearing is required if the credibility of witnesses is a crucial, important, or controlling factor in resolving a factual dispute. *Worrell, supra*; *White, supra*; *Strantz, supra*.

#### **c. Notice to parties**

In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board held, pursuant to 5 U.S.C. § 554(d), "the same Administrative Law Judge who heard the case the first time should hear the case on remand unless he is unavailable." If an Administrative Law Judge is unavailable, then the parties must be notified and be given "an opportunity to express any objections to the transfer of the case to another administrative law judge or request a *de novo* hearing."

## **2. Multiple claims under 20 C.F.R. § 725.309**

Pursuant to *Lukman v. Director, OWCP*, 896 F.2d 1248 (10<sup>th</sup> Cir. 1990) and *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990)(en banc), the parties are entitled to an oral hearing in a subsequent claim filed pursuant to 20 C.F.R. § 725.309 of the regulations.

## **3. Overpayment claims**

Citing to *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Board held, in cases where the waiver of recovery is not at issue, the District Director may begin recoupment prior to a hearing and decision concerning the amount of the overpayment. *Burnette v. Director, OWCP*, 14 B.L.R. 1-152 (1990).

### **F. Waiver of hearing**

#### **1. Waiver must be voluntary, intentional, and in writing**

Pursuant to 20 C.F.R. § 725.461, "If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing."

A request for waiver of an oral hearing must be voluntary, intentional, and in writing. *Morgan v. Carbon Fuel Co.*, 3 B.R.B.S. 302, 307 (1976).

#### **2. Withdrawal of waiver of hearing**

A waiver of the right to a formal hearing may be withdrawn for "good cause" at any time prior to "mailing" of the decision in the claim pursuant to 20 C.F.R. § 725.461(a). And, the Administrative Law Judge may conduct a hearing despite the fact that the parties have agreed to a waiver, if s/he determines the appearance and testimony of witnesses would be of value. 20 C.F.R. § 725.461(a).

### **3. Error to decide merits of claim where hearing not waived**

The Administrative Law Judge erred in awarding benefits on the record under 20 C.F.R. Part 727, where neither the Director nor Claimant requested a waiver of their right to a hearing in writing pursuant to 20 C.F.R. § 725.461. The Board noted, although Claimant advised the Administrative Law Judge in advance he would not be able to attend the hearing, the "Director submits that Claimant's unjustified failure to attend the hearing prejudicially deprived the Director of the right to examine, and that claimant's testimony is crucial to the resolution of the contested issue of total disability."

The Board remanded the claim for issuance of an order to show cause why the claim should not be dismissed pursuant to 20 C.F.R. § 725.465(c), which 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 should not be granted and afford all parties a reasonable time to respond to such order." *Churpak v. Director, OWCP*, 9 B.L.R. 1-71, 1-72 and 1-73 (1986).

#### **G. Hearing limited to contested issues**

Pursuant to 20 C.F.R. § 725.421(b), the District Director is required to forward a Form CM-1025 to the Administrative Law Judge, which sets forth the contested and uncontested issues in the claim. Moreover, 20 C.F.R. § 725.463(a) provides the hearing is confined to the issues listed as contested, or to any other issue raised in writing before the District Director. The purpose of these regulatory provisions is "to expedite cases by ensuring that the parties are not surprised by new issues at the hearing, and to force the parties to develop evidence prior to the hearing." *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784, 1-786 (1984). The Board holds, "Intent and notice are important criteria" to consider in applying 20 C.F.R. § 725.463(a) "to permit or prevent consideration of substantive issues." *Chaffins v. Director, OWCP*, 7 B.L.R. 1-431 (1984).

For additional discussion of the issues to be adjudicated and amending the Form CM-1025, see Chapter 26.

## **XI. Hearsay**

### **A. Medical reports and testing**

#### **1. Elements of reliability**

Medical reports, which are *ex parte*, may constitute "substantial evidence" provided certain safeguards are met. In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court held:

. . . a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

*Id.* at 402.

The following factors must be considered in determining how much weight to accord to a "hearsay" report: (1) whether the out-of-court declarant has an interest in the result of the case; (2) whether the opposing party could have obtained the report prior to the hearing and could have subpoenaed the declarant; (3) whether the report is internally consistent on its face; and (4) whether the report is inherently reliable. See also *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 2 B.L.R. 2-7 (5<sup>th</sup> Cir. 1979).

#### **2. Reports based on physical examinations**

Properly authenticated reports, which are written by a licensed physician who examined the miner, may be received as evidence at a hearing. Despite their hearsay character, these reports may constitute "substantial evidence" in support of a medical finding. *Hogarty v. Honeybrook Mines, Inc.*, 3 B.R.B.S. 485 (1976).

### **3. Consultative reports**

In *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 B.L.R. 2-10 (3<sup>rd</sup> Cir. 1986), the Third Circuit held a non-examining physician's report is admissible, and may constitute "substantial evidence."

### **4. Results of objective testing**

In *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984), the Board held x-ray, blood gas and pulmonary studies, and physicians' reports are admissible over hearsay objections. See also *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 2 B.L.R. 2-7 (5<sup>th</sup> Cir. 1979) (*ex parte* physicians' reports and x-ray readings constitute probative evidence in black lung claims).

#### **B. Affidavits**

An affidavit regarding the length of coal mine employment is admissible despite challenges based on its hearsay character. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983). See also *White v. Douglas Van Dyke Coal Co.*, 6 B.L.R. 1-905, 1-908 n. 3 (1984).

#### **C. Death of authoring physician**

The Administrative Law Judge erred in excluding a medical report as "hearsay," where the deposed physician was unavailable for cross-examination due to his death. The Board concluded the opposing party had a fair opportunity to counter the physician's findings and, therefore, due process was satisfied. *Fowler v. Freeman United Coal Mining Co.*, 7 B.L.R. 1-495 (1984), *aff'd. sub. nom.*, *Freeman United Coal Mining Co. v. Director, OWCP [Fowler]*, Case No. 85-1013 (7<sup>th</sup> Cir. June 24, 1986)(unpub.).

#### **D. Evidence that is lost or destroyed**

##### **1. Chest x-ray studies**

Lost, destroyed, or "otherwise unavailable" x-ray studies of a deceased miner should be handled under 20 C.F.R. § 718.102(d) as follows:

Where the chest X-ray of a deceased miner has been lost, destroyed, or is otherwise unavailable, a report of the chest X-ray submitted by any party shall be considered in conjunction with the claim.

20 C.F.R. § 718.102(d).

An x-ray re-reading was properly admitted even though the x-ray film was lost. This is because the opposing party could depose the reader, thus satisfying its right to cross-examination. Specifically, the Board noted "employer was on notice for eight and one-half months that the x-ray was missing and failed to avail itself of the opportunity to depose the interpreting physician." *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846 (1985).

## **2. Autopsy evidence**

In *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1991), the Board held, where autopsy slides were not available for review by Employer's physicians, Employer's right of cross-examination could be satisfied by deposing the prosector, or by presenting the prosector's testimony at the hearing. The Board concluded the right of cross-examination through the use of these methods is consistent with the standard set forth in *Richardson v. Perales*, 402 U.S. 389, 405 (1971). See also *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 B.L.R. 2-95 (6<sup>th</sup> Cir. 1989) (Employer was not denied a fair hearing despite the fact it was notified of a claim five years after the miner's death).

## **XII. Official notice**

### **A. Procedure used**

In *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984), the Board delineated the procedures for taking official notice, and stated the following:

The rules of official notice in administrative proceedings are more relaxed than in common law courts. The mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. (citation omitted). Although the administrative law administrative law judge erred in failing to cite the "B" reader list as the source of

his information regarding Dr. Morgan's qualifications, and the parties should have been afforded a full opportunity to dispute his qualifications, *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979), the error is harmless because Dr. Morgan's name does, in fact, appear on the "B" reader list and a contrary finding cannot be made on remand. (citations omitted). Claimant has not shown that he was substantially prejudiced by the administrative law administrative law judge's action.

*Id.* at 1-546.

**B. Taking official notice of one expert but not another expert constitutes error**

In *Simpson v. Director, OWCP*, 9 B.L.R. 1-99 (1986), the record was silent with regard to the B-reader status of two physicians. The Administrative Law Judge erred in taking official notice of the B-reader status of one of the physician's appearing on the B-reader list without taking official notice of the other physician's name appearing on the list. This resulted in the Administrative Law Judge improperly according more weight to the x-ray interpretation of one reader based on the physician's "superior" B-reader credentials which, as the Board concluded, was substantially prejudicial to the opposing party.

For additional discussion regarding taking official notice, see Chapter 3.

**XIII. Reassignment/transfer of cases**

**A. Bias by original deciding Administrative Law Judge**

The Board holds it has authority to order reassignment of a case to a different Administrative Law Judge on remand if it determines the original deciding Administrative Law Judge exhibited bias against one of the parties. *Cochran v. Consolidation Coal Co.*, 16 B.L.R. 1-101 (1992).

In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4<sup>th</sup> Cir. 1998), the court held, considering the numerous legal errors made by the original Administrative Law Judge, the claim should be reassigned to another Administrative Law Judge on remand as it "requires a fresh look at the evidence, unprejudiced by the various

outcomes of the administrative law judge's and Board's orders below . . . ."

**B. Unavailability of original deciding Administrative Law Judge**

**1. On remand**

The Chief Administrative Law Judge properly assigned a case on remand to a new Administrative Law Judge without first giving Claimant notice. The court held:

This is not a case where the matter was simply referred to another administrative law judge. Here, the original administrative law judge had left the agency, leaving reassignment as the only option. As to the notice problem, 29 C.F.R. § 18.30<sup>16</sup> states that if an administrative law judge is unavailable, the Chief Administrative Law Judge 'may designate another administrative law judge for the purposes of further hearing or appropriate action.' No notice, so as to allow additional hearings or submissions, is generally required. New hearings are required only when the evaluation of credibility is crucial to resolving the factual disputes involved. The Chief Administrative Law Judge, in his remand order in this case, stated that questions of credibility were not controlling, and the claimant has not made any specific arguments as to why such questions are controlling. The new administrative law judge, in order to address the errors made by the first administrative law judge, simply had to evaluate the evidence under a different standard. The Chief Administrative Law Judge acted well within his discretion when he appointed the new administrative law judge.

*Fife v. Director, OWCP*, 888 F.2d 365 (6<sup>th</sup> Cir. 1989).

In *Strantz v. Director, OWCP*, 3 B.L.R. 1-431 (1981), the Board held, pursuant to 5 U.S.C. § 554(d), "the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable." If an Administrative Law Judge is unavailable, then the parties must be notified and given "an

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<sup>16</sup> The provisions of 29 C.F.R. § 18.30 are found in the proposed regulatory amendments at 29 C.F.R. § 18.15.

opportunity to express any objections to the transfer of the case to another administrative law Administrative Law Judge or request a *de novo* hearing." A new hearing should be held if credibility is at issue.

For further discussion regarding conducting hearings, see Chapters 4 and 26.

## **2. On modification**

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6<sup>th</sup> Cir. 1998), because the original deciding Administrative Law Judge was no longer with the agency, a modification claim was properly reassigned to another Administrative Law Judge after notice was provided to the parties. Claimant argued "that it was error to change the Administrative Law Judge assigned to his case during the pendency of his proceeding." The court cited to 29 C.F.R. § 18.30,<sup>17</sup> which authorizes the Chief Administrative Law Judge to reassign a claim if the original deciding Administrative Law Judge is no longer available. It then concluded, "As no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

## **XIV. Representatives**

### **A. Right to representation**

The Board holds, pursuant to 5 U.S.C. § 555(b) and the regulations at 20 C.F.R. §§ 725.362-725.364, Claimant has the right to be represented by counsel at the hearing. *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984). A party may waive its right to be represented. 20 C.F.R. § 725.362(b).

#### **1. The *pro se* claimant, special considerations**

The Administrative Law Judge must inform a *pro se* claimant of his or her right to be represented by counsel of choice without charge. Moreover, pursuant to 20 C.F.R. § 725.362(b), the Administrative Law Judge must determine whether a claimant's lack of representation is

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<sup>17</sup> The provisions of 29 C.F.R. § 18.30 are found in the proposed regulatory amendments at 29 C.F.R. § 18.15.

knowing and voluntary. If a claimant elects to appear *pro se*, the Administrative Law Judge, as an impartial adjudicator, has no special obligation to develop the evidence to enhance a claimant's case. Specifically, the Board held providing a full and fair hearing means:

. . . the administrative law judge has the responsibility to inform a *pro se* claimant of his right to be represented by a representative of his choice, at no cost to him, and to inquire whether claimant desires to proceed without such representation. If so, the administrative law judge must proceed to inform claimant of the issues in the case; allow claimant the opportunity to admit evidence and to object to admission of the adversary's evidence; and allow claimant the opportunity to provide testimony concerning relevant issues.

*Shapell v. Director, OWCP*, 7 B.L.R. 1-304 at 1-306 and 1-307 (1984).

Consequently, the Board held, although (1) Claimant agreed when the Administrative Law Judge "presumed" Claimant wished to proceed without counsel, and (2) the Administrative Law Judge then "extensively questioned claimant as to his coal mine employment and his medical problems," the Administrative Law Judge nevertheless denied the miner a fair hearing because:

The administrative law judge merely inquired as to whether claimant wished to proceed *pro se* without informing him that he had a right to representation and that he would suffer no economic loss as a result of representation. The administrative law judge also failed to determine whether claimant's lack of representation was voluntary.

*Id.* at 1-307. It is important to note, however, the Board remanded the case for a hearing, but "reject[ed] the parties' requests for a *de novo* hearing because the administrative law judge fully performed his duties with respect to the conduct of the hearing itself," and "no party has asserted that a *de novo* hearing is necessary to further develop any testimonial evidence." *Id.* at 1-308.

In *Young v. Director, OWCP*, BRB No. 97-1411 BLA (June 24, 1998)(unpub.), the Board held, in a case arising in the Sixth Circuit involving a modification petition by a *pro se* Claimant, it was

error for the Administrative Law Judge to deny Claimant a hearing, and conclude Claimant would proceed without counsel. Specifically, the Board stated:

Section 6(a) of the Administrative Procedure Act . . . grants claimant the right to be represented at the hearing. (citations omitted).

. . .

In order to conduct a full and fair hearing, the Board has held that the administrative law judge must inform a *pro se* claimant of his or her right to be represented by a representative of his choice without cost to him and inquire whether claimant desires to proceed without representation. (citations omitted). Furthermore, Section 725.362(b) requires that the administrative law judge determine whether claimant has made a knowing and voluntary waiver of his or her right to presentation. The administrative law judge must then proceed to inform claimant of the issues in the case, allow claimant the opportunity to admit evidence and to object to the admission of the adversary's evidence, and allow claimant the opportunity to provide testimony concerning relevant issues. (citations omitted).

The Board determined, because the Administrative Law Judge denied the parties a hearing on modification (after determining there were no issues involving witness credibility), he could not adequately determine whether Claimant intended to voluntarily proceed with her claim in *pro se* status. Moreover, because the Administrative Law Judge issued an order to show cause why a hearing was necessary to which Claimant failed to respond, the Administrative Law Judge "improperly placed the burden on claimant to establish the necessity of a hearing." Citing to 20 C.F.R. §§ 725.450 and 725.461(a) and *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6<sup>th</sup> Cir. 1998), the Board concluded there had not been "a valid waiver of claimant's right to a hearing on modification."

**2. Claimant's counsel fails to appear, whether to proceed**

**a. Proceeding not *per se* error**

In *Laughlin v. Director. OWCP*, 1 B.L.R. 1-488 (1978), the Board held, under the circumstances of the case, it was proper for the Administrative Law Judge to conduct the hearing where Claimant was unrepresented:

While denial of the right to be represented by retained counsel would clearly be error, the fact that an administrative hearing was conducted at a time when the claimant was unrepresented is not error *per se*. Absent a clear showing of prejudice or unfairness in the proceedings, the lack of counsel is not grounds for remand if the claimant was fully informed of his right to be represented by counsel and subsequently elects to proceed without representation.

*Id.* at 1-490.

**b. Inquiring whether claimant wants to proceed**

The Administrative Law Judge acted properly, where Claimant appeared for hearing but his counsel did not, in inquiring whether the Claimant wished to proceed without counsel after informing him of his rights with respect to the presentation of his case. The Administrative Law Judge left the record open for 20 days to permit Claimant's counsel to offer evidence, which he did not do. The Administrative Law Judge, in deciding to proceed with the hearing, noted Claimant had: (1) traveled 400 miles to get to the hearing; (2) waited approximately five years for the hearing to take place; and (3) agreed to proceed without counsel after being asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121, 1-123 (1989).

**c. Whether claimant has capacity to proceed**

It must be determined whether a *pro se* party has the capacity to represent himself or herself. The Board noted, after review of the

hearing transcript, "[t]he claimant either attempted to object to the introduction of some evidence, or did not understand what was being asked of him." As a result, the Board determined the Administrative Law Judge committed error in proceeding with the hearing. *York v. Director, OWCP*, 5 B.L.R. 1-833, 1-837 (1983), *overruled on other grounds, Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984).

Indeed, under *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984), the Administrative Law Judge must determine the complexity of the legal and medical problems presented in the case, and must assess Claimant's ability to comprehend the issues and participate actively in their resolution. Factors to consider include physical defects, age, formal education, apparent intelligence and general knowledge.

#### **d. Leaving record open for post-hearing submissions**

It is within the Administrative Law Judge's discretion to proceed with a hearing despite the absence of Claimant's counsel. The Administrative Law Judge acted properly by inquiring whether Claimant wished to proceed without counsel after fully informing Claimant of his rights with respect to the presentation of his case. The Administrative Law Judge also left the record open for the submission of post-hearing evidence by counsel. The Board concluded, pursuant to 20 C.F.R. § 725.454(d), counsel failed to provide ten days' notice of his request for continuance, and his "scheduling conflict" did not constitute "good cause" to grant a continuance. In particular, counsel notified the Administrative Law Judge of a scheduling conflict 20 minutes after the hearing was to start. In denying the continuance, the Administrative Law Judge noted Claimant had: (1) traveled 400 miles to the hearing location; (2) waited five years for the hearing to be scheduled; and (3) chose to proceed without counsel when asked on two occasions. *Prater v. Clinchfield Coal Co.*, 12 B.L.R. 1-121 (1989).

### **3. Claimant unable to attend hearing**

The Administrative Law Judge erred in awarding benefits on the record under 20 C.F.R. Part 727, where neither the Director nor Claimant requested a waiver of their right to a hearing in writing pursuant to 20 C.F.R. § 725.461. The Board noted, although Claimant advised the Administrative Law Judge in advance of the hearing that he would not be able to attend, the "Director submit(ted) that Claimant's unjustified failure to attend the hearing prejudicially

deprived the Director of the right to examine, and that claimant's testimony (was) crucial to the resolution of the contested issue of total disability." The Board remanded the claim for issuance of an order to show cause why it should not be dismissed pursuant to 20 C.F.R. § 725.465(c) which provides, in part, "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 should not be granted and afford all parties a reasonable time to respond to such order." *Churpak v. Director, OWCP*, 9 B.L.R. 1-71, 1-72 and 1-73 (1986).

### **B. Disqualification of representative; appearance of impropriety**

Pursuant to 29 C.F.R. §§ 18.34(g)(3) and 18.36,<sup>18</sup> an Administrative Law Judge may disqualify counsel for conflicts of interest, or conduct prohibited by the applicable rules of professional conduct. *Baroumes v. Eagle Marine Services*, 23 B.R.B.S. 80 (1989). See also *Smiley v. Director, OWCP*, 984 F.2d 278 (9<sup>th</sup> Cir. 1993) (attorney's dual representation of Claimant and, in an unrelated matter, the carrier who would pay judgment in Claimant's favor). These regulations require that the Administrative Law Judge give the parties notice and an opportunity to be heard regarding the disqualification of a representative.

It gave an appearance of impropriety where Claimant was represented by his son, a DOL-ESA-OWCP employee. However, the Administrative Law Judge did not err in permitting representation where the son's supervisor approved of the representation, and directed that no fees could be awarded to him in the event that Claimant prevailed. *Hayes v. Director, OWCP*, 11 B.L.R. 1-20, 1-22 (1987).

For further discussion of issues related to attorney and lay representation, see Chapter 27.

### **C. Party bound by acts of representative**

Generally, a party is bound by the acts of its attorney. Where Employer's counsel failed to timely comply with the Board's filing requirements, Employer's appeal was properly dismissed with

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<sup>18</sup> The proposed regulations at 29 C.F.R. §§ 18.22 and 18.87 contain similar language to that found at 29 C.F.R. §§ 18.34 and 18.36, respectively.

prejudice. The Sixth Circuit noted the fact that "counsel may have been engaged in four thousand similar black lung cases and error-free in forty previous appeals is not persuasive." Consequently, the court found Employer received due process since both the District Director, and the Administrative Law Judge, reviewed the claim. *Consolidation Coal Co. v. Gooding*, 703 F.2d 230, 233 (6<sup>th</sup> Cir. 1983).

Claimant's argument that the inadequate performance of his counsel deprived him of the right to participate fully in the hearing was rejected. The Fourth Circuit reasoned: (1) Claimant freely selected his attorney; (2) the attorney appeared with him at the hearing; (3) the Administrative Law Judge appeared impartial; and (4) the record did not support a finding that the performance of counsel at the hearing was inadequate. *Collins v. Director, OWCP*, 795 F.2d 368, 375, 9 B.L.R. 2-58, 2-63 (4<sup>th</sup> Cir. 1986).

On the other hand, the extreme sanction of dismissal with prejudice is not appropriate without consideration of the client's conduct before binding him or her to the attorney's misfeasance. In this vein, the Board concluded the Administrative Law Judge erred in dismissing a claim where Claimant did not attend the hearing due to illness. Claimant advised her counsel who, in turn, failed to request a continuance, or provide reasons for Claimant's failure to appear. The Board held dismissal for want of prosecution:

. . . cannot be mechanically applied to punish a party for the acts of his attorney. Dismissal with prejudice is an extreme sanction, and is warranted only if 'a clear record of delay or contumacious conduct by the plaintiff exist(s) . . . and a lesser sanction would not better serve the interest of justice.' (citation omitted).

*Howell v. Director, OWCP*, 7 B.L.R. 1-259, 1-262 (1983). The Board concluded dismissal was not proper because Claimant forwarded the hearing notice to her former counsel expecting appropriate action to be taken. Further, Claimant's prompt action in responding to the show cause order by obtaining a new attorney, and her overall pursuit of her claim, did not indicate intent to delay the proceedings. The Board also noted the Director "made no claim of prejudice from the delay." *Id.* at 1-262 and 1-263. See also *Link v. Wabash*, 370 U.S. 626, 630-31 (1962); *McCargo v. Hedrick*, 545 F.2d 393 (7<sup>th</sup> Cir. 1976); *Reizakis v. Coy*, 490 F.2d 1132 (4<sup>th</sup> Cir. 1974); *Flaska v. Little River Marine Construction Co.*, 389 F.2d 885 (5<sup>th</sup> Cir. 1968).

## **XV. Right of cross-examination**

### **A. Generally**

In accordance with *Richardson v. Perales*, 402 U.S. 389, 401 (1971), and the statutory provisions at 5 U.S.C. § 556(d), administrative proceedings must conform to the requirements of the Fifth Amendment. Five U.S.C. § 556(d) provides, "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

### **B. Waiver of right of cross-examination**

The Director waived its right to present evidence challenging Claimant's entitlement to benefits when the Director did not contest entitlement at the hearing or on reconsideration, but raised the issue for the first time before the Board. *Kincell v. Consolidation Coal Co.*, 9 B.L.R. 1-221, 1-223 (1986).

Employer waived its right to "cross-examine the author of Claimant's Exhibit 1 and its right to access to the chest x-ray in question both by its failure to request issuance of a subpoena prior to or during the hearing and by its failure to object to the x-ray's submission into evidence at the hearing." The Administrative Law Judge acted properly in admitting Claimant's Exhibit 1. Moreover, the Administrative Law Judge properly denied Employer's motion for reconsideration, and refused to reopen the hearing record. *Hoffman v. Peabody Coal Co.*, 4 B.L.R. 1-52 (1981) (Claimant's Exhibit 1 contained a report diagnosing complicated pneumoconiosis based on an x-ray study that was available at the time the case was pending before the District Director, and the exhibit was proffered in violation of the 20-day rule).

### **C. Improper denial of right of cross-examination**

#### **1. Delay in notifying employer of potential liability**

In *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4<sup>th</sup> Cir. 1998), Employer was dismissed from the case, and relieved of liability for the payment of benefits, where "the extraordinary delay in notifying [Employer] of its potential liability deprived it of a meaningful opportunity to defend itself in violation of

the Due Process Clause of the Fifth Amendment." The court set forth the lengthy procedural history of the claim, and found "[Employer] was finally notified of the claim on April 6, 1992, seventeen years after notice could have been given and eleven years after the regulations command that it be given." The court further noted the following:

The problem here is not so much that Claimant died before notice to [Employer], but rather that he died many years after such notice could and should have been given. The government's grossly inefficient handling of the matter—and not the random timing of death—denied [Employer] the opportunity to examine [Claimant].

(emphasis in original).

For further discussion of case law on the consequences of delay in notifying a potential responsible operator, see Chapter 7.

## **2. Party's failure to cooperate during discovery**

Employer was denied a full and fair hearing. In particular, it was deprived of the opportunity to have x-rays re-read, or physicians deposed, due to Claimant's lack of consent. *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249 (1979).

### **D. The 20-day rule for exchanging evidence and "good cause"**

Central to providing a fair hearing is that each party has notice and an opportunity to be heard, which includes an opportunity to conduct cross examination. The 20-day rule is the centerpiece requirement for submission of evidence in black lung claims. The regulations at 20 C.F.R. § 725.456(b)(2) provide evidence, which has not been submitted to the District Director, "may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim."<sup>19</sup> See *Amorose v. Director, OWCP*, 7 B.L.R. 1-899 (1985) (a medical report submitted more than 20 days

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<sup>19</sup> The Administrative Law Judge is not considered a "party." Therefore, the Administrative Law Judge misapplied the 20-day rule when he excluded a physician's deposition, which was properly exchanged between Claimant and the Director, solely because the Administrative Law Judge had not received a copy of it 20 days prior to the hearing. *Luketich v. Director, OWCP*, 8 B.L.R. 1-477 (1986).

prior to the hearing did not violate 20 C.F.R. § 725.446(b)(1)). This regulation is designed to eliminate surprise and to afford each party adequate time to prepare its case.

The Administrative Law Judge has discretion to admit evidence that is not exchanged in compliance with the 20-day rule if (1) the parties waive the 20-day requirement, or (2) "good cause" is demonstrated as to why such evidence was not timely exchanged.

For a discussion of the application of "good cause" in black lung claims, see Chapter 4. For a discussion of handling evidence submitted on reconsideration, see Chapter 26.

### **E. Treating physician, right of cross-examination**

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

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

*Id.* at 1-63.

The Board further noted "adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency." From this, the Board concluded:

Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude that consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

*Id.* at 1-63.

## **XVI. Settlements and withdrawals of claims**

Settlement of claims under the Black Lung Benefits Reform Act is prohibited. *Lodigan v. Central Industries, Inc.*, 7 B.L.R. 1-192 (1984). For further discussion of settlements as well as the handling of motions to withdraw claims, see Chapter 26.

## **XVII. Subpoenas**

### **A. Administrative Law Judge has subpoena power when the case is pending before the District Director**

In *Maine v. Brady-Hamilton Stevedore Co.*, 18 B.R.B.S. 129 (1986), the Board held District Directors do not possess the authority to issue subpoenas. The Board stated, "If a case is pending at the (District Director's) level, and the issuance of a subpoena becomes necessary, the parties may simply apply to the Office of the Chief Administrative Law Judge for the proper adjudicatory officer to issue the appropriate subpoena." See also *Dorazio v. River Marine Management, Inc.*, BRB No. 11-0578 (July 27, 2011)(unpub.) (in a claim pending before the District Director, the Administrative Law Judge issued a subpoena for production of documents; "only the administrative law judge, and not the district director, can issue a subpoena").

And, the Board has not denied this authority to the Administrative Law Judge in black lung proceedings. See *Yates v. ARMCO Steel Corp.*, 10 B.L.R. 1-132 (1987) ("It is clear that all

adjudicative functions reside only in the administrative law judge; administrative and pre-hearing duties are performed by the (District Director)"; subpoena authority lies with the Administrative Law Judge).

**B. Party's due process right limited to requesting subpoena**

The Administrative Law Judge did not violate Claimant's right to due process by denying his request for subpoenas. Claimant's due process right to a subpoena is limited to a right to request the subpoena. The ultimate issuance of the subpoena is a matter within the Administrative Law Judge's discretion. Specifically, the Administrative Law Judge concluded the reasons for requesting the subpoenas, including obtaining the testimony of physicians who interpreted certain x-ray studies of record as negative, were insufficient. Claimant argued the physician's attendance at the hearing was necessary because his responses to interrogatories would have been "too extensive." The Board held the Administrative Law Judge was not required to provide any further explanation for his denial of Claimant's subpoena request. *Bowman v. Clinchfield Coal Co.*, 15 B.L.R. 1-22 (1991). See also *Souch v. Califano*, 599 F.2d 577, 580 n. 5 (4<sup>th</sup> Cir. 1979).

**C. Party may be subpoenaed to attend hearing**

Claimant has a right to a hearing, but s/he is not required to be present. The opposing party may subpoena Claimant to appear where the opposing party deems Claimant's testimony necessary. *Palovich v. Bethlehem Mines Corp.*, 5 B.L.R. 1-70, 1-72 and 1-73 (1982).