

**BLBA BULLETIN NO. 18-01**Issue Date: **NOV 22 2017**

Expiration Date: When Incorporated into the Division of Coal Mine Workers' Compensation (DCMWC) Procedure Manual

Subject: Substantial compliance and weighing x-ray interpretations when a party fails to submit to the Division of Coal Mine Workers' Compensation (DCMWC) the x-ray film or digital medical storage device upon which an x-ray report is based.

Background:

20 CFR 718.102 sets forth the quality standards for conducting and reporting chest radiographs (x-rays) developed in connection with a black lung claim and states no chest x-ray may constitute evidence of the presence or absence of pneumoconiosis unless those standards are met. Section 718.102(f) directs the parties to submit to the district director the original x-ray film, or if a digital x-ray, a copy of the original digital object on which the x-ray report is based. This provision, however, like all quality standards, is tempered by the overarching substantial compliance standard of 20 CFR 718.101. Section 718.101(b) provides that "any clinical test shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered." The Department in the Preamble to the 2000 regulations reinforces this point by explaining that only substantial, not strict, compliance with the quality standards is necessary. 65 Fed. Reg. 79926, 79929-79930 (Dec. 20, 2000).

The Preamble also provides guidance in determining when substantial compliance has been met, thereby permitting the adjudicator to consider the evidence. The touchstone is reliability: "the party proffering the evidence may demonstrate that the evidence is reliable despite its failure to comply with every criterion in the standard." 65 Fed. Reg. 79927. Thus, "whether any particular piece of evidence is in 'substantial compliance' with the standards and therefore reliable, is a matter for the adjudicator to determine taking into consideration all relevant circumstances." *Id.* Some of the factors the adjudicator should consider are the number, extent, and significance of the defect(s), and the relevance of the evidence to the various elements of entitlement. 65 Fed. Reg. 79928.

The DCMWC has had substantial experience administering claims under the 2000 regulations and evaluating x-ray evidence under the x-ray quality standard. It has concluded that there may be situations where the factfinder can reasonably determine that an x-ray report is reliable even though the party failed to submit the actual x-ray film or digital media storage device to DCMWC. Where the x-ray report is otherwise reliable, the substantial compliance standard allows the factfinder to consider the x-ray report and evaluate it in conjunction with the other x-ray evidence of record.

Applicability: Appropriate DCMWC personnel

Purpose: This Bulletin is being issued to clarify DCMWC's position on how to weigh x-ray reports when DCMWC is not in possession of the underlying x-ray films or digital media storage devices. The Bulletin will thus promote the consistent and uniform application of this policy by all DCMWC offices and claims examining staff.

As discussed above, reliability is the key consideration in determining whether a particular piece of evidence is in substantial compliance with the quality standards. The failure of a party to submit to DCMWC an x-ray film or x-ray digital media storage device does not necessarily render its interpretation unreliable. For example, a party submitting only an x-ray report to DCMWC may make available for review by the opposing party the x-ray film or digital media storage device. In that case, the absence of the film or storage device in DCMWC's files, standing alone, provides little reason to doubt its reliability; especially where the opposing party rereads the x-ray and DCMWC does not intend to do so. More generally, and by analogy, an examining physician, as well as a physician reviewing the medical record, often arrives at a conclusion regarding the presence of pneumoconiosis without having or reviewing the actual x-ray film or digital media storage device. So too a claims examiner may critically evaluate the evidence and determine that not having possession of the actual x-ray film or digital media storage device has no impact on the reliability and credibility of the interpretation.

However, there are two situations where the x-ray interpretation should be determined to have no weight:

1. The claims examiner provides a valid reason for why non-submission of the x-ray film or media storage device detracts from the reading's reliability and credibility, including fraud; and/or
2. The submitting party is unwilling to make the x-ray film or digital media storage device available to other parties for rereading purposes.

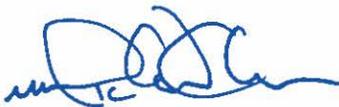
As mentioned above, the claims examiner must fully explain the reasoning underlying his or her substantial compliance determination, *i.e.*, why the x-ray interpretation is (or is not) reliable in the absence of the film's or storage device's submission to DCMWC. This explanation should be included in the Schedule for the Submission of Additional Evidence (SSAE) and the Proposed Decision and Order (PDO). Regardless of the substantial compliance determination, each x-ray interpretation submitted to DCMWC must count toward that party's allotment under the evidence limitations. 20 CFR 725.414.

Finally, it should be emphasized that this Bulletin applies only to instances where parties, other than the Director, fail to submit to DCMWC the x-ray film or media storage device. A chest radiograph – either x-ray film or media storage device – that is conducted as part of a miner's Section 413(b) evaluation must continue to be submitted to DCMWC.

References: 20 CFR 718.101; 20 CFR 718.102; 20 CFR 725.414; 65 Fed. Reg. 79920 *et seq.* (Dec. 20, 2000) (preamble).

Action: Effective immediately, x-ray interpretations where the x-ray film or digital media storage device are not submitted to DCMWC may be considered to be in substantial compliance with the quality standards and accepted as evidence of the presence or absence of pneumoconiosis. Each interpretation must be evaluated individually and a determination made as to whether not having possession of the x-ray film or digital media storage device impacts the reliability and credibility of the reading. Appropriate weight, based upon this assessment, will be assigned and explained fully in the SSAE and PDO. If the claims examiner determines that the absence of the x-ray film or media storage device significantly detracts from the reading's reliability, or if the submitting party refuses to make the images available for rereading by other parties to the claim, no weight will be afforded to the submitted interpretation. In either case, the submission will still count toward that party's allotment of evidence.

Disposition: Retain this Bulletin until incorporated into the DCMWC Procedure Manual



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Distribution: All DCMWC Staff