PART III

PROCEDURAL ISSUES

I. EVIDENCE LIMITATIONS

1. REVISED SECTION 725.414

Revised Section 725.414, in conjunction with revised Section 725.456(b)(1), sets limits on the quantity of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." Id. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Revised Section 725.414 also limits the scope of medical reports and limits how many physicians may testify with respect to the claim. Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). A physician who "prepares a medical report admitted under [Section 725.414] may testify with respect to the claim" at the hearing, by deposition, or by interrogatories. 20 C.F.R. §725.414(c); *see* 20 C.F.R. §§725.457, 725.458. Also, if a party has submitted fewer than two medical reports in its affirmative case, "a physician who did not prepare a medical report may testify in lieu of such a medical report," and that physician's testimony "is considered a medical report for purposes of the limitations" of Section 725.414. 20 C.F.R. §725.414(c). Under the revised regulations, the scope of a physician's testimony as to the miner's condition is limited to medical evidence that is admissible. *See* 20 C.F.R. §§725.457(d), 725.458.

Revised Section 725.414, in conjunction with revised Section 725.408, also limits the timing of the submission of documentary evidence regarding whether the designated responsible operator has been properly identified, by requiring that any such documentary evidence be submitted at the district director level. 20 C.F.R. §§725.414(b), (d), 725.408.

DIGESTS

The D.C. Circuit held that the evidentiary limitations set forth in the revised regulations at 20 C.F.R. §§725.310(b), 725.414, 725.456, 725.457(d) and 725.458, are consistent with the Administrative Procedure Act, which empowers agencies to exclude irrelevant, immaterial or unduly repetitious evidence, *see* 5 U.S.C. §556(d), and with the Black Lung Act, *see* 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). These rules are not arbitrary, capricious, artificial, or inflexible, but rather enable the administrative law judge to focus on the quality of the medical evidence in the record. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 873-874, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001)

The Board rejected a responsible operator's arguments that revised Section 725.414 is an invalid regulation. Specifically, the Board held that Section 725.414 is not in conflict with the requirement at 30 U.S.C. §923(b) that all relevant evidence be considered, as other language in Section 923(b) incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). Additionally, the Board held that Section 725.414 does not conflict with the Administrative Procedure Act, which specifically empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Finally, the Board held that Section 725.414 is not in conflict with the holding of ***Underwood v. Elkay Mining, Inc.***, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997) regarding the admission of evidence in black lung hearings, as Underwood was decided prior to the regulatory revisions and did not address the Department of Labor's authority to impose limits on the admission of evidence in black lung claims. Nevertheless, Underwood recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary . . . ." ***Underwood***, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

By its terms, revised Section 725.414 imposes no numerical limits on CT-scan readings submitted as a party's affirmative case. Thus, where an administrative law judge ruled that the evidentiary limitations of Section 725.414 apply to CT scans, and therefore limited the responsible operator to two readings of a CT-scan in its affirmative case, the administrative law judge erred because the affirmative-case limitations of Section 725.414 do not extend to CT-scans. Because the Board could not conclude that the administrative law judge's automatic exclusion of the responsible operator's additional

CT-scans was harmless, the Board remanded the case to the administrative law judge for him to consider the CT-scans' admissibility within his own discretion under 5 U.S.C. §556(d), and ***Underwood v. Elkay Mining, Inc.***, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Where an administrative law judge did not make specific findings as to whether records proffered by a responsible operator as treatment records actually constituted records of treatment for a respiratory or pulmonary or related disease under Section 725.414(a)(4), and the Director, Office of Workers' Compensation Programs conceded that some of the records constituted treatment records under Section 725.414(a)(4) and were incorrectly excluded merely because they contained pulmonary function and blood gas studies, the administrative law judge erred in his application of Section 725.414(a)(4). The Board was unable to conclude that the error was harmless, because the administrative law judge subsequently discredited the opinion of a physician who reviewed the pulmonary function and blood gas studies contained in the disputed records excluded by the administrative law judge. Consequently, the Board remanded the case for the administrative law judge to make proper findings as to the admissibility of the proffered records under Section 725.414(a)(4). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Where a responsible operator had already reached its limit of two pulmonary function and blood gas studies in its affirmative case, the administrative law judge properly excluded additional pulmonary function and blood gas studies that the responsible operator argued were admissible because they were associated with claimant's state claim for benefits. Pulmonary function and blood gas studies are specifically limited by Section 725.414, and the state claim evidence employer sought to admit consisted solely of pulmonary function and blood gas studies. Such items of state claim evidence do not fall within the exception for hospitalization or treatment records, *see* 20 C.F.R. §725.414(a)(4), nor are they covered by the subsequent claim provision requiring the admission of prior federal black lung claim evidence. *See* 20 C.F.R. §725.309(d)(1). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

The administrative law judge did not abuse his broad discretion to handle procedural matters when he ruled on claimant's pre-hearing motions to exclude excess evidence and ordered the responsible operator to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i). Additionally, once the responsible operator selected two medical reports for its affirmative case, the administrative law judge did not abuse his discretion in refusing to permit the responsible operator to later withdraw one of those medical reports at the hearing and substitute a different one. The administrative law judge reasonably considered claimant's objection that he relied on employer's prior designation of its two medical reports when he developed his own medical evidence. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Where a responsible operator submitted more x-ray readings and medical reports than it was permitted to under revised Section 725.414, the administrative law judge did not

abuse his discretion in allowing the responsible operator to select which two x-ray readings and which two medical reports constituted its affirmative case evidence under Section 725.414(a)(3)(i). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Where a physician's medical report was admitted into evidence as part of the responsible operator's affirmative case, the administrative law judge properly admitted that physician's deposition testimony into the record as well. Revised Section 725.414(c) specifies that "[a] physician who prepares a medical report admitted under this section may testify . . . by deposition". 20 C.F.R. §725.414(c). ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

The administrative law judge did not abuse his discretion in declining to consider a physician's opinion regarding the existence of pneumoconiosis when he found the opinion "inextricably tied" to an x-ray reading excluded pursuant to 20 C.F.R. §725.414. Revised Section 725.414 provides that any x-ray referenced in a medical report must be admissible, 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i), and the record supported the administrative law judge's finding that the physician's opinion as to the existence of pneumoconiosis was closely linked to the physician's inadmissible x-ray reading. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Section 725.414, in conjunction with Section 725.456(b)(1), provides mandatory numerical limitations on the evidence submitted by each of the parties. 20 C.F.R. §§725.414(a), 725.456(b)(1). Evidence submitted in excess of these limitations shall only be admitted into the hearing record pursuant to a finding by the administrative law judge that the submitting party has established "good cause" for the admission of the excess evidence, *see* 20 C.F.R. §725.456(b)(1). ***Smith v. Martin County Coal Corp.***, 23 BLR 1-69 (2004).

The Board agreed with the Director's position that in claims arising under the revised regulations, when read in conjunction with 20 C.F.R. §725.414, the regulation at 20 C.F.R. §718.107, providing for the submission of "other medical evidence", is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. The Board declined to hold, however, as urged by claimant, that a party may submit only the first, or original, results of each test or procedure, rather than the best interpretation of each test or procedure, as to do so is potentially unworkable, unnecessary, and contrary to the stated goal of the revised regulations to maintain a focus on the quality of the evidence. Instead, the Board held that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. Therefore, the Board vacated the administrative law judge's admission into the record of several readings of a May 14, 2002 CT scan and May 14, 2002 digital x-ray, and instructed him to require employer to select and submit only one reading of each test which the administrative law judge should then consider together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii). ***Webber v.***

Peabody Coal Co., 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

The Board held that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. §718.107(b), pertaining to the medical acceptability and relevance of "other medical evidence," also contains additional discussion by the physician, if the physician's additional comments are not admissible pursuant to 20 C.F.R. §§725.414 or 725.456(b)(1), the administrative law judge need not exclude the statement or testimony in its entirety, but may sever and consider separately those portions relevant to 20 C.F.R. §718.107(b). Thus, the Board concluded that under the facts of this case, the administrative law judge properly admitted, pursuant to 20 C.F.R. §718.107(b), the deposition testimony of Dr. Wiot pertaining to the medical acceptability and relevance of digital x-rays and CT scans. The Board further held that the administrative law judge also acted within his discretion in severing and separately considering Dr. Wiot's testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis, and in finding Dr. Wiot's opinion of little probative value for the purpose of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

In a case involving medical opinions in which Drs. Cohen, Renn, and Repsher referred to negative x-ray readings that were excluded because they exceeded the evidentiary limitations, the Board held that the administrative law judge acted within his discretion in giving little weight to the opinions of Drs. Renn and Repsher under 20 C.F.R. §718.202(a)(4) because they relied upon several of the excluded readings in ruling out the presence of clinical pneumoconiosis. The Board determined that the proper resolution of this procedural issue was committed to the administrative law judge's discretion because 20 C.F.R. §725.414(a)(2)(i) and (a)(3)(i) are silent as to what action an administrative law judge should take when a medical report contains references to x-ray evidence that was excluded because it exceeded the evidentiary limitations. The Board noted that in accordance with this principle, employer was required to prove that the administrative law judge abused his discretion in order to alter the administrative law judge's disposition. The Board held that employer did not meet its burden because the administrative law judge rationally determined that unlike Dr. Cohen, Drs. Renn and Repsher relied upon the excess negative x-ray readings in opining that claimant does not have pneumoconiosis. In so holding, the Board stressed that exclusion of a medical report in its entirety is not a favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. ***Harris v. Old Ben Coal Co.***, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Where the claimant submitted two interpretations of an x-ray dated March 5, 2002, in his affirmative case, the Board held that the administrative law judge erred in limiting the employer to only one interpretation of this x-ray on rebuttal. The Board agreed with the

Director that 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), permitting each party to submit "no more than one physician's interpretation of each chest X-ray" in rebuttal, refer to the x-ray interpretations that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film. Thus, each party may submit one rebuttal x-ray interpretation for each x-ray interpretation the opposing party submits in its affirmative case, even if the two affirmative case interpretations are of the same x-ray. Consequently, the Board vacated the administrative law judge's evidentiary ruling and remanded the case for the administrative law judge to admit employer's second rebuttal interpretation of the March 5, 2002 x-ray, and to reconsider whether the x-ray evidence established the existence of pneumoconiosis. ***Ward v. Consolidation Coal Co.***, 23 BLR 1-151 (2006).

An administrative law judge is not obligated *sua sponte* to conduct an independent assessment as to whether or not "good cause" justifies the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *See also* 20 C.F.R. §725.456(b)(1). If a party wants to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good cause" for its submission. ***Brasher v. Pleasant View Mining Co.***, 23 BLR 1-141 (2006).

Although 20 C.F.R. §725.456(b)(1) provides that medical evidence in excess of the limitations contained in 20 C.F.R. §725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. §725.414. ***Brasher v. Pleasant View Mining Co.***, 23 BLR 1-141 (2006).

The Fourth Circuit held that, in applying the evidentiary limitations set forth in the revised regulations at 20 C.F.R. §§725.414, the administrative law judge did not abuse his discretion in permitting claimant to select which two medical reports out of three he wished to submit in support of his affirmative case. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006).

The Board held that a report by a pathologist who has reviewed the autopsy tissue slides, but has not provided a detailed gross macroscopic description of the lungs or visualized portion of a lung, as set forth at 20 C.F.R. §718.106(a), is nonetheless in substantial compliance with the Section 718.106(a) quality standards, and, therefore, can constitute a report of an autopsy for the purposes of 20 C.F.R. §725.414(a)(2)(i) and (a)(3)(i). ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*).

The Board held that where a party submits a physician's interpretation of an autopsy, in rebuttal of the opposing party's case pursuant to 20 C.F.R. §725.414(a)(2)(i)-(ii), (a)(3)(i)-(ii), the report submitted in rebuttal may not exceed the scope of the autopsy to which it is responsive. In this case, Dr. Plata, the autopsy prosector, based his conclusions on his macroscopic and microscopic review of the miner's body. In

contrast, Dr. Bush, the autopsy rebuttal physician, specifically stated that the degree of the miner's disease could not be evaluated pathologically, and that, therefore, he had relied in part on his review of the clinical evidence of record to formulate his opinion. Thus, Dr. Bush based his conclusions on materials beyond the scope of the autopsy submitted by claimant. At the hearing, the administrative law judge stated that he would review Dr. Bush's report and redact any portions that went beyond the scope of Dr. Plata's autopsy; however, he failed to do so in his decision. Therefore, the Board remanded the case for the administrative law judge to review Dr. Bush's rebuttal opinion, and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant. ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*).

Under the revised regulations which became effective on January 19, 2001, where a miner's claim and survivor's claim are consolidated for purposes of the hearing pursuant to 20 C.F.R. §725.460, the parties are entitled to submit separate affirmative case, rebuttal and rehabilitative evidence, as set forth at 20 C.F.R. §725.414, in support of the miner's claim and in support of the survivor's claim. However, the separate designation of the evidence submitted in support of each claim does not preclude the parties from submitting the same medical reports in support of both the miner's claim and the survivor's claim, where appropriate. ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*).

Where a miner's claim and a survivor's claim are consolidated for purposes of the hearing pursuant to 20 C.F.R. §725.460, there is no provision for the automatic inclusion of the miner's claim evidence into a survivor's claim filed pursuant to the revised regulations which became effective on January 19, 2001. Thus, the medical evidence from a living miner's claim must be designated as evidence by one of the parties, as set forth at 20 C.F.R. §725.414, in order for it to be included in the record relevant to a survivor's claim. ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229 (2007)(*en banc*).

The evidentiary limitations of 20 C.F.R. §725.414 apply to modification proceedings, and work in tandem with the evidentiary limitations set forth at 20 C.F.R. §725.310(b). Therefore, where a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b). Thus, the administrative law judge erred in allowing the parties to submit only the amount of evidence set forth at 20 C.F.R. §725.310(b). ***Rose v. Buffalo Mining Co.***, 23 BLR 1-221 (2007).

The Fourth Circuit held that the "Evidence-Limiting Rules" set forth at 20 C.F.R. Part 725 (the evidentiary limitations provisions of the revised regulations) are a reasonable and valid exercise of the Secretary's authority to regulate evidentiary development in Black Lung Act proceedings, that they are based on a permissible construction of the Act, and they are

neither arbitrary, capricious, nor manifestly contrary to the statute. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

The Fourth Circuit held that, pursuant to the rebuttal provisions at 20 C.F.R. §725.414(a)(2)(ii) and (a)(3)(ii), where a party has submitted two interpretations of the same x-ray in support of its affirmative case, the opposing party is entitled to submit two interpretations of that x-ray in rebuttal. In other words, a party may submit one piece of rebuttal evidence for each piece of affirmative evidence submitted by the opposing party. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

On reconsideration, the Board reaffirmed its prior holding in *Webber*, that in claims arising under the revised regulations, the regulation at 20 C.F.R. §718.107, providing for the submission of "other medical evidence," is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. The Board rejected employer's argument that this holding represented an "about-face" departure, "without explanation or rationale," from its prior holding in ***Dempsey v. Sewell Coal Co.***, 23 BLR 1-47, 1-59 (2004)(*en banc*). The Board further rejected employer's argument that the Director's position on this issue was not entitled to deference because it reflected a "flip-flop" from the agency's prior interpretation of the regulation, in violation of the Administrative Procedure Act and proper notice and comment rulemaking procedures. First, the Board noted that the Director consistently argued in both ***Dempsey*** and ***Webber*** that "the results" referred to in Section 718.107 is properly interpreted to mean one set of results. Second, the Board held that the Director's adoption of an interpretation of Section 718.107 as having an implicit numerical limit, *i.e.* one set of results, did not require separate notice and comment, as agencies may interpret and re-interpret their regulations through adjudication, without notice and comment, ***see Bullwinkel v. F.A.A.***, 23 F.3d 167, 171 (7th Cir. 1994), provided, as was the case here, that the agency is not re-writing the plain language of the regulation and the change is not arbitrary or unexplained. Finally, the Board reaffirmed its prior holding that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. ***Webber v. Peabody Coal Co.***, 23 BLR 1-261 (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring).

A party has a right to cross-examine a physician whose report is made part of the record pursuant to 20 C.F.R. §725.414(a)(4) – which permits the admission of treatment and/or hospital records without regard to the evidentiary limitations – if the physician's report is material and cross-examination is necessary for both the fair adjudication of a claim and a full and true disclosure of the facts. ***L.P. v. Amherst Coal Co.***, BLR (July 23, 2008) (Decision and Order on Reconsideration *En Banc*).

If the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order, thereby giving the parties the opportunity to make good cause arguments under Section 725.456(b)(1) 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. ***L.P. v. Amherst Coal Co.***, BLR (July 23, 2008) (Decision and Order on Reconsideration *En Banc*).

The Board extended its reasoning in ***Keener v. Peerless Eagle Coal Co.***, 23 BLR 1-229, 1-241 (2007) (*en banc*) to biopsy evidence and held that a biopsy slide review can be in substantial compliance with 20 C.F.R. §718.106 even if it does not include a gross macroscopic description of the tissue samples. ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

The Board recognized that rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) need not contradict the specific item of evidence to which it is responsive, but rather, need only refute "the case" presented by the opposing party. ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

Because an x-ray interpretation had been generated by employer, and the result was against employer's interest, claimant argued that the x-ray interpretation should have been admitted for "good cause." Under the facts of this case, the Board held that the administrative law judge did not abuse his discretion in finding that good cause did not exist to admit the additional x-ray interpretation into the record. ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

The Board held that biopsy reports generated as part of claimant's hospitalization or treatment for a respiratory or pulmonary condition do not count against claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. §725.414(a)(2)(i), (ii). ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

The Board rejected employer's contention that it was entitled to submit evidence in rebuttal to biopsy evidence admitted as part of claimant's hospitalization and medical treatment records. In rejecting employer's contention, the Board noted that there was no indication that employer had argued that an additional biopsy report should have been admitted for "good cause." The Board further noted that employer had been provided with an adequate opportunity to evaluate claimant's biopsy tissue slides. ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

2. Revised Section 725.456(b)(1)

Revised Section 725.456(b)(1) provides that "[m]edical evidence in excess of the limitations contained in §725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). The regulation provides further that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of the responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." *Id*.

DIGESTS

Where a responsible operator argued that medical evidence exceeding the limits of Section 725.414 should be admitted into the record because the evidence was relevant, the administrative law judge did not abuse his discretion in finding that the responsible operator failed to establish "good cause" for admitting additional x-ray readings, pulmonary function studies, blood gas studies, and medical reports. Additionally, where the responsible operator asserted that additional medical evidence was "helpful and necessary" for its physicians to distinguish between pneumoconiosis and another disease, the administrative law judge acted within his discretion in finding that the responsible operator did not establish "good cause" because it did not explain why the admitted evidence of record was insufficient to permit the distinction or indicate how the additional evidence would assist its physicians in making the distinction. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

Section 725.456(b)(1), unlike Section 725.456(b)(3), does not provide for the parties to waive the evidentiary limitations on the medical evidence submitted in fulfillment of Section 725.414. Whereas, Section 725.456(b)(3) allows the parties to waive the requirement that documentary evidence must be submitted to all other parties at least 20 days prior to the formal hearing, Section 725.456(b)(1) does not provide a comparable waiver provision for evidence submitted under Section 725.414. Rather, Section 725.414 states that that medical evidence submitted in excess of the Section 725.414 limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). ***Smith v. Martin County Coal Corp.***, 23 BLR 1-69 (2004).

The Section 725.414 evidentiary limitations are mandatory and the regulations do not provide for the parties on their own accord to waive these limitations. Section 725.456(b)(1) states that medical evidence submitted in excess of the Section 725.414 limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). However, the administrative law judge, within his discretion, may admit any medical evidence submitted in excess of these limitations, pursuant to a finding that the party submitting the evidence has established "good cause" for the submission of the additional evidence. 20 C.F.R. §725.456(b)(1). ***Smith v. Martin County Coal Corp.***, 23 BLR 1-69 (2004).

An administrative law judge is not obligated *sua sponte* to conduct an independent assessment as to whether or not "good cause" justifies the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *See also* 20 C.F.R. §725.456(b)(1). If a party wants to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good

cause" for its submission. ***Brasher v. Pleasant View Mining Co.***, 23 BLR 1-141 (2006).

Although 20 C.F.R. §725.456(b)(1) provides that medical evidence in excess of the limitations contained in 20 C.F.R. §725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. §725.414. ***Brasher v. Pleasant View Mining Co.***, 23 BLR 1-141 (2006).

X-ray interpretations and other medical records are included in the term "documentary evidence" referenced in 20 C.F.R. §725.456(b)(1). The comments accompanying the revised regulation at 20 C.F.R. §725.456 reveal that the Department of Labor (DOL) anticipated that all evidence relevant to the liability of another party would be submitted while the case was before the district director. The comments reveal the DOL's intent that operators be required to submit "any evidence" relevant to the liability of another party while the case is before the district director. The term "any evidence" necessarily includes "medical evidence." ***Weis v. Marfork Coal Co.***, 23 BLR 1-182 (2006) (*en banc*) (McGranery & Boggs, JJ., dissenting).

If an employer does not submit evidence pertaining to the liability of a potentially liable operator to the district director, it cannot be admitted into the record "in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Section 725.456(b)(2) provides that any other documentary evidence, including medical evidence, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim. Section 725.456(b)(2), however, is "[s]ubject to the limitations in paragraph (b)(1)." Thus, if evidence is excluded under 20 C.F.R. §725.456(b)(1), it cannot be admitted pursuant to 20 C.F.R. §725.456(b)(2). ***Weis v. Marfork Coal Co.***, 23 BLR 1-182 (2006) (*en banc*) (McGranery & Boggs, JJ., dissenting).

If the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order, thereby giving the parties the opportunity to make good cause arguments under Section 725.456(b)(1) 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. ***L.P. v. Amherst Coal Co.***, BLR (July 23, 2008) (Decision and Order on Reconsideration *En Banc*).

3. Revised Section 718.107

The Board held that a reading of the plain language of Appendix A to Part 718 makes clear that the x-ray standards described therein do not apply to digital x-rays, and that, therefore, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107, where the administrative law judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. §718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

CT scans and digital x-rays are admissible as "[o]ther medical evidence" under 20 C.F.R. §718.107(a), which provides for the submission of "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its sequelae, "or a respiratory or pulmonary impairment." ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

The Board agreed with the Director's position that in claims arising under the revised regulations, when read in conjunction with 20 C.F.R. §725.414, the regulation at 20 C.F.R. §718.107, providing for the submission of "other medical evidence", is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. The Board declined to hold, however, as urged by claimant, that a party may submit only the first, or original, results of each test or procedure, rather than the best interpretation of each test or procedure, as to do so is potentially unworkable, unnecessary, and contrary to the stated goal of the revised regulations to maintain a focus on the quality of the evidence. Instead, the Board held that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. Therefore, the Board vacated the administrative law judge's admission into the record of several readings of a May 14, 2002 CT scan and May 14, 2002 digital x-ray, and instructed him to require employer to select and submit only one reading of each test which the administrative law judge should then consider together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii). ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

The Board held that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. §718.107(b), pertaining to the medical acceptability and relevance of "other medical evidence," also contains additional discussion by the physician, if the physician's additional comments are not admissible pursuant to 20 C.F.R. §§725.414 or 725.456(b)(1), the administrative law judge need not exclude the statement or testimony in its entirety, but may sever and consider separately those portions relevant to 20 C.F.R. §718.107(b). Thus, the Board concluded that under the facts of this case, the administrative law judge properly admitted, pursuant to 20 C.F.R. §718.107(b), the deposition testimony of Dr. Wiot pertaining to the medical acceptability

and relevance of digital x-rays and CT scans. The Board further held that the administrative law judge also acted within his discretion in severing and separately considering Dr. Wiot's testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis, and in finding Dr. Wiot's opinion of little probative value for the purpose of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*).

On reconsideration, the Board rejected claimant's argument that digital x-rays utilize film, and, therefore, digital x-rays should be considered at 20 C.F.R. 718.202(a)(1). Noting that while digital x-rays may be viewed on film, they are not captured on film, the Board reaffirmed its prior holding in ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), that the quality standards for analog x-rays, set forth at Appendix A to Part 718, do not apply to digital x-rays. Therefore, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107. The Board also reaffirmed its prior holding that pursuant to 20 C.F.R. §718.107(b), the administrative law judge must determine on a case-by-case basis whether the party proffering the digital x-ray, or "other medical evidence," has established its medical acceptability. ***Webber v. Peabody Coal Co.***, 23 BLR 1-261 (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*).

On reconsideration, the Board reaffirmed its prior holding in *Webber*, that in claims arising under the revised regulations, the regulation at 20 C.F.R. §718.107, providing for the submission of "other medical evidence," is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. The Board rejected employer's argument that this holding represented an "about-face" departure, "without explanation or rationale," from its prior holding in ***Dempsey v. Sewell Coal Co.***, 23 BLR 1-47, 1-59 (2004)(*en banc*). The Board further rejected employer's argument that the Director's position on this issue was not entitled to deference because it reflected a "flip-flop" from the agency's prior interpretation of the regulation in violation of the Administrative Procedure Act and proper notice and comment rulemaking procedures. First, the Board noted that the Director consistently argued in both ***Dempsey*** and ***Webber*** that "the results" referred to in Section 718.107 is properly interpreted to mean one set of results. Second, the Board held that the Director's adoption of an interpretation of Section 718.107 as having an implicit numerical limit, *i.e.* one set of results, did not require separate notice and comment, as agencies may interpret and re-interpret their regulations through adjudication, without notice and comment, ***see Bullwinkel v. F.A.A.***, 23 F.3d 167, 171 (7th Cir. 1994), provided, as was the case here, that the agency is not re-writing the plain language of the regulation and the change is not arbitrary or unexplained. Finally, the Board reaffirmed its prior holding that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. ***Webber v. Peabody Coal Co.***, 23 BLR 1-261 (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring).

a. Admissibility of Digital X-Rays

In a case involving the admissibility of digital x-rays, the Board agreed with the Director's position that an analysis of the regulations reveals that digital x-rays do not fall within the terms of 20 C.F.R. §718.202(a), but rather are governed by 20 C.F.R. §718.107, which provides for the admission of "other medical evidence" not otherwise reference in 20 C.F.R. Part 718. The Board also agreed with the Director's view that when a party seeks to admit a digital x-ray, the issue for an administrative law judge to determine, on a case-by-case basis, is whether that party has established, as required by Section 718.107(b), that the digital x-ray is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). ***Harris v. Old Ben Coal Co.***, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

The Board applied its holding in ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*), and vacated the administrative law judge's decision to admit and weigh numerous CT scan rereadings. The Board indicated that when considered in conjunction with 20 C.F.R. §725.414, the regulation at 20 C.F.R. §718.107, providing for the submission of "other medical evidence," allows for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure. Accordingly, the Board remanded the case to the administrative law judge with instructions that the administrative law judge require the parties to select and designate their CT scan readings so that he can render a decision as to their admissibility. ***Harris v. Old Ben Coal Co.***, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

On reconsideration, the Board rejected claimant's argument that digital x-rays utilize film, and, therefore, digital x-rays should be considered at 20 C.F.R. 718.202(a)(1). Noting that while digital x-rays may be viewed on film, they are not captured on film, the Board reaffirmed its prior holding in ***Webber v. Peabody Coal Co.***, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), that the quality standards for analog x-rays, set forth at Appendix A to Part 718, do not apply to digital x-rays. Therefore, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107. The Board also reaffirmed its prior holding that pursuant to 20 C.F.R. §718.107(b), the administrative law judge must determine on a case-by-case basis whether the party proffering the digital x-ray, or "other medical evidence," has established its medical acceptability. ***Webber v. Peabody Coal Co.***, 23 BLR 1-261 (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring).

On reconsideration, the Board affirmed its holding in ***Harris***, that digital x-rays do not fall within the terms of 20 C.F.R. §718.202(a), but rather are governed by 20 C.F.R. §718.107, which provides for the admission of "other medical evidence" not otherwise

referenced in 20 C.F.R. Part 718. The Board rejected claimant's argument on reconsideration that because the digital x-ray in this case was printed out on film, it was in compliance with 20 C.F.R. §718.202(a). The Board held that the salient point is that the x-ray image at issue was recorded digitally, a method that is not addressed in 20 C.F.R. §§718.102, 718.202(a)(1) or Appendix A to Part 718. ***Harris v. Old Ben Coal Co.***, 23 BLR 1-273 (2007) (*en banc recon.*)(McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

On reconsideration, the Board affirmed its holding in ***Harris***, that when a party seeks to admit a digital x-ray, the administrative law judge must consider, on a case-by-case basis, whether that party has established, as required by 20 C.F.R. §718.107(b), that the digital x-ray is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). The Board rejected employer's argument on reconsideration that the acceptance of digital x-ray technology is not in dispute, holding that it was unpersuasive in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization. ***Harris v. Old Ben Coal Co.***, 23 BLR 1-273 (2007)(*en banc recon.*)(McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

4. Evidence Limitations--Revised Section 725.310(b)

Revised Section 725.310(b), in conjunction with revised Section 725.414, sets limits on the quantity of specific types of medical evidence that the parties can submit into the record in modification proceedings on claims arising under the revised regulations. Revised Section 725.310(b) provides, in relevant part:

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

20 C.F.R. §725.310(b).

DIGESTS

The evidentiary limitations of 20 C.F.R. §725.414 apply to modification proceedings, and work in tandem with the evidentiary limitations set forth at 20 C.F.R. §725.310(b). Therefore, where a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b). Thus, the administrative law judge erred in allowing the parties to submit only the amount of evidence set forth at 20 C.F.R. §725.310(b). ***Rose v. Buffalo Mining Co.***, 23 BLR 1-221 (2007).

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