PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

A. THE CLAIMS PROCESS

4. PROCEDURAL ISSUES AT THE DISTRICT DIRECTOR OR THE HEARING LEVEL

d. Admission of Evidence

(1) Generally; Timely Evidence

All documents transmitted to the Office of Administrative Law Judges by the district director shall be placed into evidence as exhibits of the Director, subject to objection by any party. *See* 20 C.F.R. §725.456(a). Generally, the parties are expected to develop their evidence at the district director level. Any evidence not submitted to the district director may, however, be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing. 20 C.F.R. §725.456(b)(1); ***Cochran v. Consolidation Coal Co.***, 12 BLR 1-137 (1989); ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-236 (1987). Section 413(b) of the Act, 30 U.S.C. §923(b), mandates that "all relevant evidence shall be considered." The Administrative Procedure Act states that "[A] party is entitled to present his case or defense by oral and 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." 5 U.S.C. §556(d); *see* ***North American Coal Co. v. Miller***, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). The Board has construed Section 725.456 to favor the admission of all evidence that is relevant, *but see* ***Scott v. Bethlehem Steel Corp.***, 6 BLR 1-760 (1984), and allow the adjudicator to determine the weight to be assigned to the evidence. ***Cochran***, 12 BLR at 1-138-1-139.

CASE LISTINGS

[medical report, submitted over twenty days prior to hearing, did not violate Section 725.456(b)] ***Amorose v. Director, OWCP***, 7 BLR 1-899 (1985).

[adjudicator properly excluded blood gas study from record under section 725.364, requiring notice to representative when requesting production of evidence, where employer failed to provide such notice] ***McFarland v. Peabody Coal Co.***, 8 BLR 1-163

(1985).

[adjudicator properly allowed claimant's counsel to withdraw proffered evidence as he had no affirmative obligation to secure all relevant and material evidence] ***Somonick v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-892 (1984).

DIGESTS

Notwithstanding claimant's contention that his due process rights had been violated, the Board affirmed the administrative law judge's reliance on a medical report submitted by a potentially liable party in finding Section 727.203(b)(3) rebuttal established where five companies were identified by the district director as potential responsible operators and participated in the proceedings before the administrative law judge. The Board relied on 20 C.F.R. §§725.493(a)(2)(iii), 725.492(d); ***Stanley v. Director, OWCP***, 7 BLR 1-386 (1984) and ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984). ***Martinez v. Clayton Coal Co.***, 10 BLR 1-24 (1987).

In deciding the question of whether claimant's counsel impliedly waived the notice requirement under 20 C.F.R. §725.458, the Board held that the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* set forth in 29 C.F.R. §18.1 *et seq* are applicable to *all* adjudicatory proceedings before the Office of the Administrative Law Judges, United States Department of Labor. Section 18.23(b)(2), which governs the use of depositions and objections to their admissibility, provides, *inter alia*, that *errors of any kind which might be obviated, removed, or cured by prompt presentation*, *are waived unless reasonable objection thereto is made at the taking of the deposition*. 29 C.F.R. §18.23(b)(2) (emphasis added). Where claimant's counsel failed to object at the taking of the deposition to employer's counsel's failure to provide the proper notice (having appeared, and fully participated in cross-examination of the witness at the deposition) and waited until the hearing to object to the admission of the deposition into evidence, the Board affirmed the administrative law judge's determination to admit the deposition into evidence since a timely objection might have allowed counsel an opportunity to cure the defect, (i.e. postpone the deposition and take it after proper notice was provided). ***Peyton v. Brown Badgett Coal Co.***, 10 BLR 1-122 (1987).

The Director was substituted as the party responsible for benefit liability pursuant to the 1981 Amendments while this case was pending on appeal to the Board. The Seventh Circuit held that the Director could contest the administrative law judge's award and benefit from evidence developed by the dismissed employer notwithstanding that the Director had supported an award of benefits when the case was before the administrative law judge and had joined in claimant's objection to admission of the evidence at that time. ***Hardisty v. Director, OWCP***, 7 BLR 1-322, *aff'd* 776 F.2d 129, 8 BLR 2-72 (7th Cir. 1985). Citing ***Hardisty***, ***supra***, the Sixth Circuit held that the

administrative law judge may properly admit evidence which was obtained by an adverse party who was dismissed before the hearing. ***See York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987).

The Board held that on the facts of these cases, the administrative law judge's requirement that the parties exchange and submit to the Office of Administrative Law Judges all evidence, including depositions and witness lists, at least forty days before hearing did not prejudice any parties in this case since claimants did not indicate any intent to introduce evidence less than forty days before the hearing. The Board, however, strongly discouraged administrative law judges from employing a procedure which deviated from that set out in 20 C.F.R. §§725.456, 725.457, 725.458. ***Smith v. Westmoreland Coal Co.***, 12 BLR 1-39 (1988).

The administrative law judge erred in excluding consultative and supplemental consultative reports on the grounds that they were cumulative and repetitious. The administrative law judge is not bound by common law or statutory rules of evidence under 20 C.F.R. §725.455(b). A less stringent standard is applicable to evidence submitted in administrative hearings under the pertinent provisions of the APA, 5 U.S.C. §556(a), (d). Subject to the constraints of Section 725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence, court rulings and treatise authorities favor the admission of all evidence, even where relevancy is questionable, with reliance on the trier-of-fact to determine the weight to be assigned to the evidence. ***Cochran v. Consolidation Coal Co.***, 12 BLR 1-136 (1989).

In remanding the case, the Third Circuit held that the administrative law judge's failure to provide employer with an opportunity to respond to medical evidence violated due process. The court held that good cause was shown for employer's failure to submit a physician's report at least 20 days before the administrative law judge's hearing where the physician's report critiqued another physician's report which was dated approximately 25 days before the hearing. ***North American Coal Co. v. Miller***, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).

The administrative law judge erred in relying solely on the Dictionary of Occupational Titles, which was not contained in the transcript of testimony, either directly or by appropriate reference, to determine that claimant's usual coal mine employment involved heavy labor. ***Snorton v. Zeigler Coal Co.***, 9 BLR 1-106, 1-108 (1986). The Board has specifically noted that ***Snorton*** does not necessarily preclude an administrative law judge from taking judicial notice of the *Dictionary of Occupational Titles* if he does so in accord with the principles concerning the taking of judicial notice. ***Onderko v. Director, OWCP***, 14 BLR 1-2 (1989).

The Board granted the Director's motion for *en banc* reconsideration of the Board's holding in ***Shedlock*** concerning the Section 725.456(b)(1) issue and reaffirmed its initial

Decision. The Board's application of Section 725.456(b) to the facts of this case was not inconsistent with nor contrary to the underlying policy concern which Section 725.456(b) was promulgated to address, namely, the timely development of evidence and the elimination of surprise. ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-236 (1987), *aff'g on recon. en banc*, 9 BLR 1-195 (1986). The Board construed ***Shedlock***, rejecting employer's argument that the holding therein required that employer, in responding to evidence exchanged with other parties by claimant immediately prior to the twenty day deadline imposed by Section 725.456(b)(1), be allowed to have claimant re-examined. ***Owens v. Jewell Smokeless Coal Corp.***, 14 BLR 1-47 (1990)(*en banc*).

Though ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-236 (1987) requires that employer be given some opportunity to respond to evidence submitted immediately prior to the 20 day deadline imposed by Section 725.456, employer's opportunity to respond does not include an automatic right to have claimant reexamined. ***Owens v. Jewell Smokeless Coal Corp.***, 14 BLR 1-47 (1990)(*en banc*).

Citing the APA, 5 U.S.C. §556(d), the Third Circuit noted that while the administrative law judge is required to admit evidence "required for a full and true disclosure of the facts," he is free to exclude "irrelevant, immaterial or *unduly*" repetitious evidence. ***North American Coal Co. v. Miller***, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). *See also* ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

At the hearing, claimant sought to introduce into evidence a tape recording allegedly containing the diagnosis of a physician which was contrary to the diagnosis made by that same physician in a written medical report contained in the evidentiary record. The administrative law judge refused to admit the tape recording into the record because it was not exchanged with the other parties twenty days prior to the hearing, as required under Section 725.456. The Board held that the administrative law judge's finding was not affirmable in this case, since the administrative law judge did not consider the admissibility of the tape recording as impeachment evidence pursuant to Section 725.456 (b)(4). Therefore, the Board remanded the case to the administrative law judge for further consideration of the admissibility of the evidence for impeachment purposes under that section. ***Bowman v. Clinchfield Coal Co.***, 15 BLR 1-22 (1991).

In a case where the Director granted the Director's Motion to Remand for a complete pulmonary evaluation, the Board held that 29 C.F.R. §18.54 does not bar the introduction of new evidence once the record has been closed. Section 18.54 applies only to adjudicatory proceedings before the Office of Administrative Law Judges, and the Director is requesting that this case be remanded to the office of the district director who is not subject to these regulations, ***Pettry v. Director, OWCP***, 14 BLR 1-98 (1990) (*en banc*); ***Hall v. Director, OWCP***, 12 BLR 1-80 (1988). In addition, Section 18.54 applies to hearings on Black Lung claims only to the extent that it is not in conflict with the Act or the regulations promulgated thereunder. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994); ***Smith v. Westmoreland Coal Co.***, 12 BLR 1-39 (1988).

The Board will not consider additional information regarding successor operators in a motion for reconsideration which was not before the administrative law judge or the Board in its previous decision on appeal. ***Williams v. Humphreys Enterprises, Inc.***, 19 BLR 1-111 (1995).

Section 725.456(d) did not require the administrative law judge to exclude evidence, that had been withheld by claimant until the claim was forwarded to the Office of Administrative Law Judges, where employer expressly waived its objection to the exhibits' admission. ***Dankle v. Duquesne Light Co.***, 20 BLR 1-1 (1995).

The Fourth Circuit, while noting that the exclusionary rule applicable to an agency proceeding for the admission of evidence is essentially limited to relevance, held that the agency process requires that the administrative law judge perform a gate keeping function while assessing evidence to decide the merits of a claim. To assure both a fairness in the process and an outcome consistent with the underlying statutory scheme, the administrative law judge has, under §556(d) of the APA, the affirmative duty to qualify evidence as "reliable, probative, and substantial" before relying upon it to grant or deny a claim. ***U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*]**, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

Where the Board affirmed the administrative law judge's decision to grant claimant's request for withdrawal, the Board also affirmed the administrative law judge's decision not to rule on employer's request to order automatic inclusion of the evidence already developed, into the record of any future claim, because once withdrawal of the claim is granted, the claim is considered not to have been filed, 20 C.F.R. §725.306(b), and there is no further issue present. The Board declined to address employer's request to order automatic inclusion of the evidence already developed, and stated that if claimant files a future claim, any required evidentiary rulings will be made by the adjudicating officer assigned to that case. ***Bailey v. Dominion Coal Corp.***, 23 BLR 1-85 (2005).

As the adjudication officer empowered to conduct formal hearings and render decisions under the Act, an administrative law judge is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence. **[*V.B.*] *v. Elm Grove Coal Co.***, BRB No. 08-0515 BLA, BLR (Feb. 27, 2009).

4. PROCEDURAL ISSUES AT THE DISTRICT DIRECTOR OR THE HEARING LEVEL

d. Admission of Evidence

(2) Late Evidence

The administrative law judge must be granted broad discretion in resolving procedural issues, *see* ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989); ***Morgan v. Director, OWCP***, 8 BLR 1-491 (1986), especially if the resolution of such issues regards findings of fact. ***Farber v. Island Creek Coal Co.***, 7 BLR 1-428, 1-429 (1984); ***Laird v. Freeman United Coal Co.***, 6 BLR 1-883 (1984).

Section 725.456(b)(2) allows the administrative law judge discretion to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged. ***Newland v. Consolidation Coal Co.***, 6 BLR 1-1286 (1984). If the documentary evidence is not exchanged in accordance with Section 725.456(b)(1) and the parties do not waive the twenty-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record, *see* ***Farber***, ***supra***, or remand the case to the district director for further development of evidence. 20 C.F.R.§725.456(b)(2); *see* ***Trull v. Director, OWCP***, 7 BLR 1-615 (1984).

Section 725.456 explicitly sets forth a standard of "good cause" that may, under certain circumstances, justify admission of evidence not exchanged in compliance with the twenty-day rule. The regulation, however, does not indicate that "good cause" is determined by mere reference to the relevance of the evidence. *See* ***Conn v. White Deer Coal Co.***, 6 BLR 1-979 (1984). Furthermore, Section 725.456(d) provides that documentary evidence that is obtained by a party when the claim is pending before the district director and is withheld until the claim is forwarded to the Office of Administrative Law Judges may not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by another party. The Board has held that inasmuch as the purpose of Section 725.456(d) is to eliminate delays in the processing of claims as well as to prevent surprise to claimant, this regulation applies to all evidence withheld, not merely to evidence that has been deliberately withheld. ***Adams v. Island Creek Coal Co.***, 6 BLR 1-677 (1983); *see also* ***Scott v. Bethlehem Steel Corp.***, 6 BLR 1-760 (1984).

If the administrative law judge admits "late" evidence into the record, Section 725.456(b)(3) requires that the record be left open for at least thirty days thereafter "to permit the parties to take such action as each considers appropriate in response to such evidence." *See* ***Baggett v. Island Creek Coal Co.***, 6 BLR 1-1311 (1984); ***Horn v. Jewell Ridge Coal Corp.***, 6 BLR 1-933 (1984). Finally, if the administrative law judge

determines during a hearing that the documentary evidence is incomplete as to any issue to be adjudicated, s/he may either remand the claim to the district director or allow the parties a reasonable time to obtain and submit such evidence before termination of the hearing. 20 C.F.R. §725.456(e); *see* ***King v. Cannelton Industries, Inc.***, 8 BLR 1-146, 1-148 (1985); *see also* ***Conn***, ***supra***.

CASE LISTINGS

[denial of extension for filing post-hearing evidence upheld where request untimely and evidence could have been timely obtained] ***Haer v. Penn Pocahontas Coal Co.***, 1 BLR 1-579 (1978).

[abuse of discretion by refusing to accept evidence offered by Director after expiration of ten-day period previously granted by adjudicator since claimant not at fault in oversight and it would result in denial of full and fair opportunity for hearing] ***Strozier v. United States Pipe & Foundry Co.***, 2 BLR 1-87 (1979).

[refusal to allow employer to obtain post-hearing deposition affirmed where employer had not articulated any resulting prejudice] ***Seese v. Keystone Coal Mining Corp.***, 6 BLR 1-149 (1983).

[parameters for admission of post-hearing deposition pursuant to Section 725.458] ***Lee v. Drummond Coal Co.***, 6 BLR 1-544 (1983).

[post-hearing examination of claimant affirmed under Section 725.456(e) as adjudicator desired to learn more about effects of claimant's back injury] ***Lefler v. Freeman United Coal Co.***, 6 BLR 1-579 (1983).

[exclusionary rule of Section 725.456(d) not limited to evidence deliberately withheld, but, absent extraordinary circumstances, to all cases in which evidence withheld until claim is forwarded to OALJ] ***Adams v. Island Creek Coal Co.***, 6 BLR 1-677 (1983).

[refusal to reopen record after denial issued affirmed as claimant did not show good cause for failure to obtain physician's affidavit regarding good cooperation/effort on pulmonary function studies earlier nor was timely request made that record remain open] ***Thomas v. Freeman United Coal Mining Co.***, 6 BLR 1-739 (1984).

[section 725.457(a) applies only to appearance by an expert witness at hearing, not to introduction of deposition testimony at hearing; deposition taken only five days before hearing did not deny other parties due process as they received adequate notice of deposition; consent to admission of such a deposition unnecessary] ***Tucker v. Eastern Coal Corp.***, 6 BLR 1-743 (1984).

[no rational basis for allowing employer to develop new evidence where employer failed to undertake good faith effort to marshall its case] ***Scott v. Bethlehem Steel Corp.***, 6 BLR 1-760 (1984).

[adjudicator did not abuse discretion in admitting post-hearing report since medical exam prior to commencement of twenty-day period but good cause established as report not received prior to hearing; due process requires remand for employer response] ***Pendleton v. United States Steel Corp.***, 6 BLR 1-815 (1984).

[remand for determination of whether employer established "good cause" why an affidavit had not been exchanged pursuant to Section 725.456(b)(2); determination that claimant could not be surprised by contents of affidavit does not satisfy need for "good cause" finding] ***White v. Douglas Van Dyke Coal Co.***, 6 BLR 1-905 (1984).

[procedural safeguards of Section 725.456(b)(3) require preliminary determination of good cause for failure to comply with twenty day rule; relevance of evidence, in and of itself, does not constitute good cause; section 725.456(e) gives adjudicator discretion to provide for further submission or development of evidence when documentary evidence incomplete as to any issue to be adjudicated] ***Conn v. White Deer Coal Co.***, 6 BLR 1-979 (1984).

[adjudicator has no duty to admit evidence not submitted to district director due to counsel's oversight/negligence where it existed three years before informal conference even if extremely probative] ***Dotson v. Eastern Coal Corp.***, 6 BLR 1-1036 (1983).

[section 725.457(a) requires adjudicator to strike testimony of expert witness that was presented at hearing because of proponent's failure to give actual notice to other parties at least ten days before hearing] ***Hamric v. Director, OWCP***, 6 BLR 1-1091 (1984).

[adjudicator must provide rationale for acceptance or rejection of new evidence submitted post-hearing prior to issuance of decision] ***Covert v. Westmoreland Coal Co.***, 6 BLR 1-1111 (1984).

[error in admitting depositions, notice of which had not been sent to claimant's lay representative, cured by leaving record open for thirty days to allow claimant to cross-examine witnesses] ***Trump v. Eastern Associated Coal Corp.***, 6 BLR 1-1268 (1984).

[adjudicator properly excluded medical report, 20 C.F.R. §725.456(b)(2), where employer failed to explain why it waited more than two and one-half years to secure review of pulmonary function study] ***Newland v. Consolidation Coal Co.***, 6 BLR 1-1286 (1984).

[denial of employer's request for continuance to obtain autopsy slides for independent review upheld where employer had access to, but failed to timely secure slides for one

year] ***Witt v. Dean Jones Coal Co.***, 7 BLR 1-21 (1984).

[Director estopped to object to submission of new evidence at hearing where good cause shown and record held open for thirty days after hearing but Director did not attend hearing, did not request notification of newly submitted evidence, and made no attempt to ascertain contents of hearing] ***DeLara v. Director, OWCP***, 7 BLR 1-110 (1984).

[adjudicator disregard of medical report not properly introduced by counsel affirmed where twenty-day rule violated and counsel failed submit report while record kept open] ***Kuchwara v. Director, OWCP***, 7 BLR 1-167 (1984).

[denial of motion to keep record open to obtain medical records regarding claimant's retirement tantamount to finding of failure to show good cause as to why evidence not exchanged twenty days prior to hearing] ***Stephenson v. Director, OWCP***, 7 BLR 1-212 (1984).

[exclusion of medical report not timely exchanged within constraints of Section 725.456(b)(1) upheld] ***Hess v. Clinchfield Coal Co.***, 7 BLR 1-295, 1-298 (1984).

[employer afforded fundamental fairness required by due process where adjudicator reopened record to admit autopsy report, provided employer with copy and waited more than thirty days employer to respond before issuing decision] ***Gladden v. Eastern Associated Coal Corp.***, 7 BLR 1-577 (1984).

[adjudicator properly found "good cause" established for failing to exchange evidence more than twenty days before hearing, 20 C.F.R. §725.456(b)(2); ***Buttermore v. Duquesne Light Co.***, 7 BLR 1-604 (1984)(Ramsey, CJ., concurring and dissenting); on reconsideration, however, Board held adjudicator must make explicit finding of good cause before issue addressed on appeal] ***Buttermore v. Duquesne Light Co.***, 8 BLR 1-36 (1985)(Smith, J., dissenting).

[improper exclusion of letter relevant to transfer of liability offered into evidence after first reconsideration filed; although Director had letter for six years, it had no significance prior to the effective date of 1981 Amendments] ***Jarvis v. Barnes and Tucker Coal Co.***, 8 BLR 1-299 (1985).

[adjudicator has broad discretion in procedural matters and may properly refuse to admit into evidence medical opinions submitted post-hearing] ***Itell v. Ritchey Trucking Co.***, 8 BLR 1-356 (1985).

DIGESTS

The administrative law judge misapplied the twenty-day rule for the exchange of documentary evidence prior to a hearing, 20 C.F.R. §725.456(b), by excluding a physician's deposition from the record because the administrative law judge had not received a copy of the deposition twenty days prior to the hearing. The administrative law judge is not a "party" within the meaning of Section 725.456(b); *see* 20 C.F.R. §725.360. ***Luketich v. Director, OWCP***, 8 BLR 1-477 (1986).

The Board held that the administrative law judge abused his discretion pursuant to 20 C.F.R. §725.456(e) by remanding the claim to the district director for the development of cumulative evidence. The Board stated that any further development of the evidence before the administrative law judge was precluded unless mutually consented to by the parties pursuant to 20 C.F.R. §725.456(b)(2). ***Morgan v. Director, OWCP***, 8 BLR 1-491 (1986).

The Board held that the administrative law judge did not abuse his discretion when he issued an order compelling claimant to submit to a second employer-procured physical examination where the pulmonary function study conducted as a part of the first such exam could not be interpreted due to poor patient effort. Section 725.456(e) gives the administrative law judge discretion to provide for the submission or development of further evidence. In this case, the action did not deprive either party of a full and fair hearing. ***Blackstone v. Clinchfield Coal Co.***, 10 BLR 1-27 (1987).

In a case in which evidence was submitted to the administrative law judge with a motion for reconsideration, the Board held that the admissibility of such evidence was to be considered pursuant to 20 C.F.R. §725.456(b)(2). ***Hensley v. Grays Knob Coal Co.***, 10 BLR 1-88 (1987).

After the claimant has requested a formal hearing the claim is no longer pending before the district director, for the purpose of Section 725.456(d), even if the case file is still in the physical possession of the district director. Thus, the administrative law judge erred in excluding the evidence developed subsequent to the date of the hearing request on the ground that such evidence had been obtained by claimant prior to the forwarding of the claim from the district director to the Office of the Administrative Law Judges. ***Hall v. Director, OWCP***, 10 BLR 1-107 (1987).

The administrative law judge is not required pursuant to 20 C.F.R. §725.456(b)(2) to make a specific finding that good cause did not exist before excluding late evidence. ***Jennings v. Brown Badgett, Inc.***, 9 BLR 1-94 (1986), *rev'd on other grounds sub nom*. ***Brown Badgett Inc. v. Jennings***, 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988).

The Board held that a deposition taken in violation of the thirty day notice requirement set forth in 20 C.F.R. §725.458 is inadmissible without express or implied waiver of the notice requirement by the opposing party. The Board held that Rule 32(d)(1) of the Federal Rules of Civil Procedure, which provides for presumptive waivers, is inapplicable to this issue because of the plain language of the regulation. ***Jennings v. Brown Badgett, Inc.***, 9 BLR 1-94 (1986). The Board's decision was reversed by the Sixth Circuit, which ruled that F.R.C.P. 32(d)(1) is applicable to the Black Lung Act. Therefore, the Court held, all errors and irregularities in the giving of the 30-day notice required under 20 C.F.R. §725.458 are waived unless a written objection is promptly served upon the party giving notice. ***Brown Badgett, Inc. v. Jennings***, 842 F.2d 899, 11 BLR 2-94, 2-122 (6th Cir. 1988).

Evidence which would be excluded by the administrative law judge under 20 C.F.R. §725.456(d) because it was in existence at time of hearing and withheld, in the absence of extraordinary circumstances, cannot support modification under 20 C.F.R. §725.310. ***Wilkes v. F & R Coal Co.***, 12 BLR 1-1 (1988).

The Board affirmed the administrative law judge's admission of evidence wherein the administrative law judge allowed the post-hearing admission of rereadings of x-rays by both the Director and employer "in fairness" to the parties where claimant's original reading, while submitted in compliance with the twenty-day rule, was timely by only a few days. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989).

The decision as to whether to reopen the record on remand is within the province of the administrative law judge, 20 C.F.R. §725.456(e); ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146, 1-148 (1989); ***White v. Director, OWCP***, 7 BLR 1-348, 1-351 (1985); *see* ***Toler v. Eastern Associated Coal Corp.***, 12 BLR 1-49, 1-51 (1988); here, the Board sets the parameters for the administrative law judge to reopen the record to consider, if he so wishes, the Dictionary of Occupational Titles. ***Onderko v. Director, OWCP***, 14 BLR 1-2 (1989).

The Board held that, inasmuch as the Third Circuit's adoption of the Director's rational interpretation of a material change in conditions in ***Swarrow*** does not significantly alter the type of evidence that is necessary to meet a party's burden of proof, ***Swarrow*** does not compel the reopening of the record on remand in order to satisfy due process and fundamental fairness. The Board rejected employer's assertion that ***Swarrow*** mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence. Further, the Board rejected employer's assertion that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in ***Swarrow*** has affected its litigation strategy and its ability to present evidence on this issue such that the administrative law judge's refusal to reopen the record on remand constitutes a manifest injustice, holding that ***Swarrow*** neither creates a new factual element which

must be addressed in order to establish or defend against a finding of a material change in conditions, nor affects the type of evidence relevant to a material change in conditions inquiry. Moreover, inasmuch as the burden of proof with respect to establishing a material change in conditions in the Third Circuit continues to be on claimant, and not on employer, the Board rejected employer's assertion that since ***Swarrow*** shifts the burden of proof in violation of the Administrative Procedure Act the Third Circuit's decision in ***Swarrow*** is not in accordance with the holding articulated by the Supreme Court in ***Ondecko***. The Board, therefore, concluded that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. ***Troup v. Reading Anthracite Coal Co.***, 21 BLR 1-211 (1999).

The administrative law judge did not abuse his discretion in finding that good cause excused claimant's submission of evidence less than twenty days before the hearing pursuant to revised Section 725.456(b)(3), where claimant explained that he was unable to proceed with his development of admissible evidence until his motions to exclude the responsible operator's evidence exceeding the limits of revised Section 725.414 were decided. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

03/09