

## 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

##### e. Hearsay; Right to Cross-Examination

Any evidence that has probative force and tends to prove or disprove a material fact is generally admissible in hearings held under the Act. Citing *Richardson v. Perales*, 402 U.S. 389 (1971) as authority, the Board has held that properly authenticated reports written by a licensed physician who has examined the claimant may be received as evidence in a hearing and, despite their hearsay character, may constitute substantial evidence supportive of a finding. *Hogarty v. Honeybrook Mines, Inc.*, 3 BRBS 485 (1976). The Board has also held that the reports of non-examining physicians may provide probative evidence to establish rebuttal. <sup>See Part IV C. 4 (c) of the Desk Book;</sup> *see also Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986). In *United States Pipe & Foundry Co. v. Webb*, 595 F.2d 264 (5th Cir. 1979), the United States Court of Appeals for the Fifth Circuit listed several factors that may be considered by an administrative law judge when the reliability of a report is challenged. These factors include: (1) whether the out-of-court declarants have an interest in the result of the case, (2) whether the opposing party could have obtained the reports prior to the hearing and could have subpoenaed the declarants, (3) whether the reports are internally consistent on their face and (4) whether the reports are inherently reliable. Finally, it is a well-established rule that a party must be provided an opportunity to respond to medical reports submitted into the record by the opposing party or to cross-examine the physicians who prepared the reports. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *Fowler v. Freeman United Coal Co.*, 7 BLR 1-495 (1984), *aff'd sub nom. Freeman United Coal Mining Co. v. Director, OWCP*, No. 85-1013 (7th Cir. Jan. 24, 1986)(unpub.); *Lane v. Harman Mining Corp.*, 5 BLR 1-87 (1982); *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 BLR 1-249 (1979), *rev'd on other grounds sub nom. Director, OWCP v. Rochester and Pittsburgh Coal Co.*, 678 F.2d 17, 4 BLR 2-74 (3d Cir. 1982); *Strozier v. United States Pipe & Foundry Co.*, 2 BLR 1-87 (1979).

## CASE LISTINGS

[introduction of post-hearing medical reports into record is error if admission allowed only after reporting physician cross-examined through interrogatories and record silent as to whether this prerequisite met] **Shultz v. Borgman Coal Co.**, 1 BLR 1-233 (1977).

[no waiver of employer's right to cross-examination because of failure to depose witness if claimant's counsel ordered to arrange deposition and failed to do so] **Jug v. Rochester and Pittsburgh Coal Co.**, 1 BLR 1-628 (1978).

[employer waived right to cross-examine physician, reread x-ray by failing to object at hearing, request subpoena; issue first raised in reconsideration] **Hoffman v. Peabody Coal Co.**, 4 BLR 1-52 (1981).

[hearsay affidavit on length of coal mine employment ruled admissible] **Williams v. Black Diamond Coal Mining Co.**, 6 BLR 1-188 (1983).

[refusal of post-hearing deposition of physician in order to clarify physician's own report upheld, but adjudicator abused discretion in refusing to allow deposition of that physician to comment on recently acquired x-ray readings not reviewed by employer because of claimant's failure to answer interrogatories] **Lee v. Drummond Coal Co.**, 6 BLR 1-544 (1983).

[ventilatory study admissible because was documented on DOL form with adequate tracings and comments by physician and therefore probative evidence] **Huber v. Peabody Coal Co.**, 6 BLR 1-648 (1983).

[claimant's post-hearing medical report properly admitted as "good cause" established under Section 725.456(b); due process requires remand for employer to review report and respond] **Pendleton v. United States Steel Corp.**, 6 BLR 1-815 (1984).

[adjudicator erred refusing to credit medical report where letter relied on for diagnosis, regarding non-coal formica work entailing no harmful exposure, was made part of the deposition of the physician, claimant's failure to include letter in evidence with deposition not significant, and most importantly, Director did not participate at deposition or hearing and the letter was admitted without objection] **Hall v. Director, OWCP**, 6 BLR 1-952 (1984).

[Eighth Circuit held that claimant denied right to fair hearing where adjudicator did not provide a copy of x-ray rereading or permit him opportunity to rebut reader's adverse conclusion] **Coughlan v. Director, OWCP**, 757 F.2d 466, 7 BLR 2-177 (8th Cir. 1985).

[hearsay challenge to *ex parte* medical report rejected] **Parsons v. Black Diamond**

**Coal Co.**, 7 BLR 1-236 (1984).

[Seventh Circuit affirmed Board's holding that adjudicator erred in excluding medical report as hearsay where deposed physician unavailable for cross-examination due to his death; opposing party had fair opportunity to counter physician's findings and was, therefore, afforded full due process rights] **Freeman United Coal Mining Co v. Director, OWCP, [Fowler]**, No. 85-1013 (7th Cir. Jun. 24, 1986)(unpub.), *aff'g Fowler v. Freeman United Coal Co.*, 7 BLR 1-495 (1984).

[employer's argument that "Notice of Review", relevant to application of transfer provisions, inadmissible hearsay was rejected; since "Notice" not served on parties, admitted into evidence or mentioned by adjudicator, it is not evidence] **Krysik v. Harmar Coal Co.**, 7 BLR 1-586 (1984).

[good cause finding to render order protecting claimant, Ohio resident, from undue expense of attending deposition in New York City affirmed; adjudicator's decision to allow deposition by post-hearing conference call sufficient to protect employer's rights] **Arnold v. Consolidation Coal Co.**, 7 BLR 1-648 (1985).

[Fourth Circuit held *ex parte* medical reports admissible despite hearsay nature, noting opposing party's right to cross-examination] **Stefanik v. Consolidation Coal Co.**, No. 84-1764 (4th Cir. Apr. 2, 1985)(unpub.).

[x-ray rereading properly admitted where x-ray lost and objecting party unable to have it reread; opportunity to depose reader satisfies right to cross-examination] **Pulliam v. Drummond Coal Co.**, 7 BLR 1-846 (1985).

### DIGESTS

The Third Circuit held that since hearsay evidence is freely admissible in administrative proceedings, the administrative law judge did not err in admitting the medical report of a non-examining physician. **Evosevich v. Consolidation Coal Co.**, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

The Third Circuit, citing the APA, 5 U.S.C. §556, held that an employer has a due process right to cross-examine a physician or to submit a report to rebut the medical evidence it presented. This principle may not be circumvented by a restrictive application of Section 725.456(b) (the twenty day rule), so as to preclude rebuttal evidence. The administrative law judge may exclude evidence which is "irrelevant, immaterial or unduly repetitious" under 5 U.S.C. §556(d). Thus, the Court held that the exclusion of a physician's report and denial of employer's request for further examinations of claimant unfairly denied employer the opportunity to respond to the doctor's report. **North American Coal Co. v. Miller**, 870 F.2d 948, 12 BLR 2-222 (3d

Cir. 1989); see also **Wallace v. Bowen**, 869 F.2d 187 (3d Cir. 1989)[involving due process requirement in a Social Security disability case when new evidence is introduced by one party after a hearing has been held].

The Sixth Circuit, citing **North American Coal Co. v. Miller**, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), **Marx v. Director, OWCP**, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989), and the APA, §556(d)[“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”], remanded where employer had been effectively deprived of the opportunity to rebut evidence pertinent to issues that did not exist at the time of the administrative law judge hearing. **Harlan Coal Co. v. Lemar**, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

The Board held that although the miner's autopsy slides were destroyed before employer was designated as the responsible operator, and, therefore, employer was not given the opportunity to have the slides reviewed by its own medical experts, employer could have cross-examined the autopsy prosector by means of deposition or hearing testimony. The Board further held that the opportunity for such cross-examination satisfies employer's right to procedural due process in a manner consistent with the standard enunciated in **Richardson v. Perales**, 402 U.S. 389 (1971), see also **Peabody Coal Co. v. Holskey**, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); **North American Coal Co. v. Miller**, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). **Lewis v. Consolidation Coal Co.**, 15 BLR 1-37 (1991).

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).

The Board held that, in reconsidering the case on remand, following the Fourth Circuit court's decision in **Elm Grove Coal Co. v. Director, OWCP [Blake]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), the administrative law judge erred in denying employer's request to re-depose claimant's medical experts on the grounds that employer had already deposed them. The Board noted that in **Blake**, the court premised its determination that employer was entitled to discovery of the communications between claimant's experts and claimant's counsel on the principle that access to these communications was necessary to the proper cross-examination of claimant's experts. **Blake**, 480 F.3d at 301, 23 BLR at 2-467. Therefore, the Board held that the administrative law judge's denial of employer's request to re-depose claimant's experts following the completion of discovery was inconsistent with the court's holding. [**V.B.] v. Elm Grove Coal Co.**, BRB No. 08-0515 BLA, BLR (Feb. 27, 2009).

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