

## PART IV

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

#### C. FULL AND FAIR HEARING

##### 3. RIGHT TO COUNSEL; *PRO SE* STATUS; NOTICE TO COUNSEL

Section 6(a) of the Administrative Procedure Act, 5 U.S.C. §555(b) (1976), grants the claimant the right to be represented by counsel at the hearing. See *also* 20 C.F.R. §§725.362-725.364. Any party may waive his or her right to be represented in the adjudication of a claim. 20 C.F.R. §725.362(b). In order to conduct a full and fair hearing, however, the administrative law judge must inform a *pro se* claimant of his right to be represented by an attorney of his choice, without charge to him. ***Shapell v. Director, OWCP***, 7 BLR 1-304 (1984). Section 725.362(b) requires an administrative law judge to make an appropriate and adequate inquiry regarding claimant's *pro se* status. In doing to, he must determine whether claimant's lack of representation is knowing and voluntary. ***Shapell, supra***. Even then, the claimant's *pro se* status may only be accepted where claimant has the capacity to represent himself. ***York v. Director, OWCP***, 5 BLR 1-833 (1983), *overruled on other grounds, Shapell, supra*. After having determined the complexity of the legal and medical problems presented in the case, the adjudication officer must assess the claimant's ability to comprehend those issues and to participate actively in their resolution. Consideration must be given to the claimant's age and formal education, as these factors reflect ability to advocate the position most favorable to the claim. The extent of claimant's experience in legal matters, apparent intelligence and general knowledgeability must be considered. Any physical defects which prevent the claimant's full participation must be considered. If claimant elects to proceed *pro se*, the administrative law judge, as an impartial arbiter, has no special obligation to develop evidence to enhance claimant's case. ***Shapell, supra***.

For a discussion of the procedures applicable to *pro se* appeals see Part IV.C.3. and Part V.B.4. of the Desk Book.

#### CASE LISTINGS

[Sixth Circuit held that even though notice of adjudicator's adverse decision had not been sent to claimant's attorney, attorney had actual notice of decision and, therefore,

defect in notice would not toll 30-day period for filing appeal] **Wellman v. Director, OWCP**, 706 F.2d 191, 193, 5 BLR 2-81, 2-83 (6th Cir. 1983).

[party generally bound by acts of attorney; considered to have "notice of all facts, notice of which can be charged upon the attorney"; **Link v. Wabash**, 370 U.S. 630, 634 (1962); see **Consolidation Coal Co. v. Gooding**, 703 F.2d 230, 233 (6th Cir. 1983)] **Howell v. Director, OWCP**, 7 BLR 1-259 (1984).

[Third Circuit held that failure to notify claimant's lawyer of adjudicator's adverse ruling tolled 30 day period appeal period to Board] **Patton v. Director, OWCP**, 763 F.2d 553, 560, 7 BLR 2-216, 2-227-228 (3d Cir. 1985).

### DIGESTS

The administrative law judge abused his discretion on the facts of the case in denying requests for continuance by claimant to obtain legal counsel where the Director did not oppose the request, claimant had not waived right to counsel, and where the Administrative Procedure Act provides for right to counsel in administrative hearings. **Johnson v. Director, OWCP**, 9 BLR 1-218, 1-220 (1986).

In a case involving representation of a claimant by his son, a DOL-ESA-OWCP employee, the Board affirmed the district director's disallowance of the entire fee requested, holding that the authorization of the counsel/employee's supervisor, which stated that such representation would be allowed but no fee could be awarded, had set the conditions of the representation and barred counsel from receiving a fee. The Board noted that counsel's representation in this case presents an appearance of impropriety. See 29 C.F.R. §0.735.11(B), and demonstrates why arrangements such as this are strongly discouraged. **Hayes v. Director, OWCP**, 11 BLR 1-20, 1-22 (1987).

The Third Circuit held that employer's attorney had actual knowledge of the district director's decision to award benefits and decided not to file a controversy, therefore, the 30 day controversy period was not tolled. **Pothering v. Parkson Coal Co.**, 861 F.2d 1321, 1329, 12 BLR 2-60, 2-72-73 (3d Cir. 1988).

Neither the Act, nor the regulations require any inquiry into an employer's decision to appear at a hearing unrepresented by counsel. Moreover, an administrative law judge is not required to specifically inform an unrepresented employer of its right to counsel. While 20 C.F.R. §725.362(b) and the holding of the Board in **Shapell v. Director, OWCP**, 7 BLR 1-304 (1984), recognize the policy concerns implicit in allowing claimants to proceed without counsel, the Board is unable to conclude that similar policy concerns are recognized by either the Act or the regulations when an employer is unrepresented by counsel. **Mitchell v. Daniels Company**, 99-0982 BLA (June 28, 2000).

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